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Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts

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BEHIND THE PARITY DEBATE: THE DECLINE OF THE LEGAL PROCESS TRADITION IN THE LAW OF FEDERAL COURTS

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Whether there is parity between federal and state courts has become a central question in the law of federal courts, dividing judges and commentators into two well-defined camps. Although the issue rarely arose thirty years ago, it now enters into virtually every discussion of the rules concerning access to federal court for constitutional claims. On one side of the debate, advocates of broad federal jurisdiction over constitutional challenges to state action claim that federal courts are better than state courts at adjudicating these controversies.[1] On the other side, advocates of state court jurisdiction insist that state courts are fully adequate to enforce constitutional rights.[2] Both sides agree, however, that the existence of parity between the

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[1] *See, e.g.*, Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (arguing that the Court's forum allocation decisions are "indirect decisions on the merits" that "weaken disfavored federal constitutional rights" by leaving their enforcement to state courts); Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329, 331-42 (1988) (claiming that federal courts possess greater substantive expertise in federal substantive law than state courts); Zeigler, *Federal Court Reform of State Criminal Justice Systems: A Reassessment of the Younger Doctrine from a Modern Perspective*, 19 U.C. DAVIS L. REV. 31, 46-49 (1985) (describing state courts as "unwilling or unable to order systemic reform of state criminal justice systems").

[2] *See, e.g.*, Allen v. McCurry, 449 U.S. 90, 105 (1980) (finding no "universal right" to litigate federal claims in federal courts); Huffman v. Pursue, Ltd., 420 U.S. 592, 611 (1975) (refusing to "base a rule on the assumption that state judges will not be faithful to constitutional responsibilities"); *see also* Aldisert, *State Courts and Federalism in the 1980s: Comment*, 22 WM. & MARY L. REV. 605 (1981) (arguing that "the state judiciary is as qualified as the federal courts"); Solimine & Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213 (1983) (concluding that "state courts are no more 'hostile' to the vindication of federal rights than are their federal counterparts").

two systems is the critical issue on which the proper balance of judicial power between state and federal courts turns.[3]

Not every commentator presents the issue so starkly. Professor Chemerinsky defends federal jurisdiction, not on the ground that federal courts are "better," but because they are "potentially different," so that access to them "maximizes the opportunity for upholding the Constitution."[4] Professor Redish argues that whether or not parity exists between federal and state courts, Congress has decided in favor of federal jurisdiction and that the courts should not circumvent that decision.[5] Yet parity remains a key concern in both of these arguments: Chemerinsky's potential difference seems to be just another name for disparity, and, even if Redish is right about Congress, a major reason for Congress's authorization of federal jurisdiction is its perception of disparity.

Parity, however, is an ambiguous term which can be understood in two very different ways. The assertion of parity between state and federal courts may refer to a claim that a litigant will receive a constitutionally adequate hearing on a federal claim in state court. In contrast with this "weak" sense of parity, the "strong" sense of the term signifies the fungible nature of state and federal courts and the absence of a systematic difference in outcomes whether cases are allotted to state or federal courts.

Notwithstanding all the controversy about parity in the literature and in Supreme Court cases, there seems to be general agreement that weak parity

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[3] *See* Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 233-37 (1988).

[4] *Id.* at 237.

[5] *See* Redish, *Judge-Made Abstention and the Fashionable Art of "Democracy Bashing"*, 40 CASE W. RES. L. REV. 1023 (1989-90) (arguing that Congress has directed civil rights cases to federal courts largely due to mistrust of state courts); Redish, *supra* note 1, at 342-67 (stating that "Congress has established a carefully structured network of statutorily-dictated abstention, which dictates the extent of jurisdiction"); Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984) (criticizing federal courts' use of abstention doctrines to refuse to exercise jurisdiction vested in them by Congress). *But see* Althouse, *The Humble and the Treasonous: Judge-Made Jurisdiction Law*, 40 CASE W. RES. L. REV. 1035, 1036 (1989-90) (criticizing the foundation of Professor Redish's vision of the structure of federal jurisdiction); Beermann, *"Bad" Judicial Activism and Liberal Federal-Courts Doctrine*, 40 CASE W. RES. L. REV. 1053, 1055 (1989-90) (expressing discomfort with Professor Redish's literal interpretation and application of jurisdictional statutes); Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 544 (1985) (stating that Professor Redish's suggestion of an overriding obligation to exercise jurisdiction is "far too grudging" in its reconciliation of judicial discretion); Wells, *Why Professor Redish Is Wrong About Abstention*, 19 GA. L. REV. 1097, 1098 (1985) (commenting that Professor Redish's institutional argument against abstention relies on a faulty premise that "Congress is responsible for the modern federal cause of action under 42 U.S.C. § 1983"). I will forbear from any discussion of Professor Redish's position in this Article.

exists, but that strong parity does not.[6] Doubtless, some defenders of state courts believe that absolutely no systemic differences exist between federal and state courts. Conversely, some champions of the federal courts believe that state courts are constitutionally suspect. This Article proceeds from the premise that these polarized camps are small, and that most participants in the parity debate believe in the weak sense of parity. In any event, the advocates of state courts rarely, if ever, assert parity in the strong sense,[7] and the proponents of federal court access typically do not deny parity in the weak sense.[8]

The real point of contention between the two sides is not parity, but rather the litigating advantage enjoyed by the party who is allowed to try the case in its chosen forum.[9] The parity debate, therefore, should not center on the empirical question of whether parity exists, a matter on which most observers agree. Instead, debate should focus on the substantive question of whether the state or the constitutional challenger should receive the potentially decisive advantage of litigating the case in a forum generally more sympathetic to its interests.

If parity is a non-issue, why do we persist in talking about it? The answer lies in part in the rhetorical demands of legal argument. It is more appealing to argue for federal or state jurisdiction by taking a side of the parity issue, thereby conveniently avoiding the ambiguity of the word, than it is to avow a self-interested desire for a friendly forum. Behind this tactical reason lies a more subtle and more powerful explanation for the parity-laden discourse: the whole idea of a litigating edge is somehow disreputable. The notion that judges should be utterly disinterested is deeply ingrained in our conception of justice.[10] It offends our sense of fair play that the characteristics of the judge should affect the outcome, and we recoil from the notion that a judge's

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[6] *See* Wells, *Is Disparity a Problem?*, 22 GA. L. REV. 283, 296-302 (1988).

[7] *See* sources cited *supra* note 2.

[8] *See, e.g.*, Neuborne, *supra* note 1, at 1119 (stating that most state judges respect the supremacy clause and will enforce the mandates of the federal Constitution when those mandates are "clear"). Professor Redish is an exception to this generalization. *See* Redish, *supra* note 1, at 336 (stating that federal courts, whose judges have article III protections and therefore have more judicial independence, are preferable to state courts from a litigant's perspective).

[9] *See* Wells, *supra* note 6, at 319-24 (arguing that the Court tends to allocate cases to state court when doing so would bestow an advantage upon the state as a party to the litigation).

[10] *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 407 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."); *see also* R. COVER, O. FISS & J. RESNIK, PROCEDURE 1229-32 (1986) (noting that images of Justice typically portray her blindfolded); FELIX FRANKFURTER ON THE SUPREME COURT 78 (P. Kurland ed. 1970) ("Our judicial system is absolutely dependent upon a popular belief that it is as untainted in its workings as the finite limitations of disciplined human minds and feelings make possible."). *See generally* Curtis & Resnik, *Images of Justice*, 96 YALE L.J. 1727 (1987).

background and institutional setting should count as positive reasons for assigning cases to one system of courts or another.

This distaste for basing jurisdictional rules on substantive considerations is rooted in a widely held view of the judicial function, developed principally by Lon Fuller, Henry Hart, Albert Sacks, and Herbert Wechsler in the 1950s. According to this "Legal Process" school, in order for a judge's decisions to be legitimate, the judge must act as a neutral arbiter between the litigants to a dispute, resolving the case by reasoning from the legal materials to an answer. Otherwise, the process is not really "adjudication," and the outcome does not deserve the special respect due the results of the adjudicatory process.[11]

We shrink from substantive grounds for jurisdictional rules because they seem to violate the premises of the Legal Process model of judging, even though we recognize the gap between the factual premises of the Legal Process model and the reality of contemporary federal and state courts.[12] Phrasing arguments and rationales in terms of parity permits both sides of the access debate to maintain their allegiance to Legal Process ideals, even as they fight for a sympathetic forum. As a result, Supreme Court opinions and scholarship about federal courts typically skirt the most important issue in allocation cases: whether the state's interest in sustaining its regulation or the individual's interest in constitutional constraints on state power should receive the litigating edge.

I. WHAT IS AT STAKE IN THE PARITY DEBATE?

When the Supreme Court cuts off access to federal courts for constitutional challenges, it affirms its confidence in the ability of state courts to adjudicate constitutional claims fully and fairly. In *Huffman v. Pursue,*

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[11] *See* Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 354 (1978) (discussing the organization of the adjudication process). This article was published after Fuller's death, but circulated in the late 1950s in draft form. *Id.* at 353 ("special editor's note"); *see also* Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959) (addressing the problems of the volume of the Court's business and the relation of the conditions of the Court's work to the number and quality of its decisions); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (arguing that "courts have the power and duty, to decide all constitutional cases in which the jurisdictional and procedural requirements are met," and that judges must base their decisions on "reasoning and analysis which transcend the immediate result").

[12] It is true that federal courts have become more conservative over the past decade of Republican appointments. *See* Note, *All the President's Men? A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals*, 87 COLUM. L. REV. 766 (1987). These judges, however, have not been "significantly more conservative than their Republican colleagues" on the bench. *Id.* at 767. The institutional differences remain, and most litigants with constitutional claims continue to prefer federal court to state court. *See* Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 655 n.72 (1987).

Ltd., for example, the Court refused "to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities."[13] In *Stone v. Powell*, the Court was "unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights" in the state courts.[14] Later cases recall the Court's "emphatic reaffirmation in [*Stone*] of the constitutional obligation of the state courts to uphold federal law, and its expression of confidence in their ability to do so."[15]

The Court's critics counter that federal and state courts treat constitutional challenges to state action disparately. This gap results from institutional differences between the two systems. For example, the critics claim that the quality and ideology of judges vary between state and federal court. A relatively small number of federal judges, chosen from a large pool of candidates, administer the federal courts. As heirs to a distinguished tradition of enforcing constitutional rights, they are insulated from political influence and reprisals by the tenure and salary provisions of article III.[16] In contrast, most state judges are elected by popular vote or the state legislature, and are sometimes turned out of office because of their decisions on civil liberties issues.[17] Because of these institutional differences, the argument runs, federal courts are more likely to be true to constitutional dictates, and hence, federal courts should be the principal arbiters of constitutional claims.[18]

The terms of this debate invite commentators to boil it down to a single question: are state courts as sympathetic and competent to decide constitutional claims as federal courts?[19] This formulation implies that parity is an

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[13] 420 U.S. 592, 611 (1975).

[14] 428 U.S. 465, 494 n.35 (1976).

[15] Allen v. McCurry, 449 U.S. 90, 105 (1980); *see also* Deakins v. Monaghan, 108 S. Ct. 523, 530 (1988); California v. Grace Brethren Church, 457 U.S. 393, 417 n.37 (1982); Moore v. Sims, 442 U.S. 415, 430 (1979).

[16] U.S. CONST. art. III, § 1.

[17] *See, e.g.*, Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007, 2036-42 (1988).

[18] *See* Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1050-52 (1977) (arguing that pragmatic concerns of state courts lead them to construe constitutional rights narrowly); Marvell, *The Rationales for Federal Question Jurisdiction: An Empirical Examination of Student Rights Litigation*, 1984 WIS. L. REV. 1315, 1338, 1354-64 (arguing, based on an empirical survey of lawyers' reasons for forum selection, that parity does not exist); Neuborne, *supra* note 1, at 1115-28 (comparing the competence, psychological and attitudinal characteristics, and degree of insulation from majoritarian pressures between state and federal court judges); Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581, 611-17 (1985) (discussing how federal judges are "empowered" by their life tenure and salary protection, and "ennobled" by their constitutional status).

[19] *See, e.g.*, Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 629-35 (1981) (suggesting that "we should devote serious attention

empirical issue. In a recent article, Professor Chemerinsky demonstrates that such proof is probably impossible to find. Because no agreement can be reached on parity, he argues, one must look elsewhere to achieve consensus on the appropriate rules for granting access to federal court.[20]

Professor Chemerinsky reaches the right conclusion, but for the wrong reason. The true problem with focusing attention on parity is that doing so obscures the real stakes in the debate. The two sides are actually fighting for a substantive advantage on the jurisdictional battlefield.

A. *Strong and Weak Parity*

Framing the debate in terms of parity falsely suggests disagreement because parity is an ambiguous term. Thus, it is useful to distinguish between a strong and a weak sense of parity. In its strong sense, an affirmation of parity is a claim that state and federal courts are, as a group, virtually identical in their attitude toward and ability to adjudicate constitutional challenges. Granting that a given state or federal judge may respond more or less sympathetically to constitutional challenges, strong parity proponents maintain that no systematic difference in the outcomes of cases exists whether federal or state courts adjudicate them.

In its weak sense, parity between federal and state courts signifies that state courts are constitutionally adequate forums for the resolution of constitutional issues. Even if outcomes systematically differ—with federal courts favoring federal claims and state courts tending to uphold state law against constitutional challenges[21]—state court procedures meet the demands of the due process clause. Moreover, state court judges are neither incompetent nor biased against federal claims in any constitutionally significant way. There is, after all, a difference between approaching a case with a set of attitudes that favor state regulatory interests and exhibiting constitutionally

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to protecting and improving the conditions which determine whether constitutional claims are hospitably adjudicated in the state courts"); Chemerinsky & Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. REV. 67, 78-79; Neuborne, *supra* note 1, at 1105.

[20] Chemerinsky, *supra* note 3. Professor Chemerinsky thinks we should focus on "maximiz[ing] the opportunity for upholding the Constitution," and argues that the way to do this is to give litigants a choice between federal and state court. *Id.* at 236-37.

[21] I ignore the many differences among state courts and treat them as a group in order to contrast them with the federal courts. Undoubtedly, some state courts are more amenable to federal constitutional claims than are the federal courts. Still, as a group, state courts seem less sympathetic to such claims. In any event, the issue as it is framed in the jurisdictional cases discussed in this Article is not whether a case should be assigned to federal or state court. It is whether a litigant with a constitutional claim should have a *choice* to go to federal court. If a litigant believes that state court is preferable, that alternative is always available. *Cf.* Howlett v. Rose, 110 S. Ct. 2430 (1990) (stating that state courts cannot refuse to entertain § 1983 cases); McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 110 S. Ct. 2238, 2252 (1990) (holding that a state must provide a "meaningful opportunity" to recover unconstitutionally collected taxes).

impermissible prejudice against federal rights.[22] The weak version of parity denies only the latter characteristic of state judges.

A close examination of both positions suggests agreement that strong parity does not exist. Most observers, however, admit the existence of weak parity. Accordingly, behind the parity controversy lurks the broad consensus that state judges and state procedures are constitutionally adequate. At the same time, most participants in the debate also agree that outcomes in some cases may differ depending on whether litigants have access to federal court. The disagreement between friends and foes of federal jurisdiction lies elsewhere, in their mutual quest for the litigating edge.

Neither the Supreme Court majority nor its academic allies assert the strong version of parity. Recall that the Court's affirmations of parity in *Stone*, *Huffman*, and other cases stress the constitutional adequacy of state courts. The Court has "repeatedly and emphatically" rejected the postulate that state courts are "not competent to adjudicate federal constitutional claims,"[23] but it has never asserted the absence of differences between state and federal courts.

Academics who defend state court jurisdiction are no more ambitious than the Court. The late Professor Paul Bator would assert only that "the case for channelling cases to the federal courts on the ground that sufficiently competent and expert consideration of constitutional issues cannot be expected from the state appellate courts simply has not been made."[24] Justice O'Connor, writing before her appointment to the Supreme Court, and Professors Solimine and Walker have expressed a similar view.[25]

By the same token, the Court's critics seem to admit the existence of weak parity. Martin Redish has argued that the due process clause requires access to a federal trial court for constitutional challenges, but he acknowledges that few others share his view.[26] Not even the liberal Warren Court went so far as to articulate such a right. Indeed, the Court has explicitly rejected

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[22] *See* Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 631-34 (1981) (suggesting that it is beneficial to have "a variety of institutional 'sets' within which issues of federal constitutional law are addressed").

[23] Moore v. Sims, 442 U.S. 415, 430 (1979).

[24] Bator, *supra* note 22, at 630-31.

[25] *See* O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 813-14 (1981) ("There is no reason to assume that state court judges cannot and will not provide a 'hospitable forum' in litigating federal constitutional questions."); Solimine & Walker, *State Court Protection of Federal Constitutional Rights*, 12 HARV. J.L. & PUB. POL'Y 127, 128 & n.8 (1989) (arguing that federal courts are not so superior to state courts as to "vitiate parity," and that state courts are continually improving in overall quality). Solimine and Walker undertook an empirical study, concluding that federal courts found in favor of constitutional claims 41% of the time, while state courts so ruled 32% of the time. *See* Solimine & Walker, *supra* note 2, at 240. For a critical analysis of this and other empirical arguments on parity, see Chemerinsky, *supra* note 3, at 255-73.

[26] *See* Redish, *supra* note 1, at 335; *see also* Redish, *Constitutional Limitations on*

that proposition time and again.[27] Dissenters from the majority's restrictive approach to federal jurisdiction do not challenge it on constitutional grounds, preferring to rest their criticism on their view of the historic role of federal courts as the primary enforcers of federal rights.[28] Burt Neuborne, in his seminal article on the parity problem, urges that civil liberties plaintiffs should have access to federal court. He takes pains, however, not to question parity in the weak sense, arguing only that federal court is the more sympathetic forum, not that state courts are constitutionally infirm.[29] Moreover, Akhil Amar interprets article III as establishing "the structural superiority of federal courts in federal question cases,"[30] but he admits that, even in his ambitious view of the role of federal courts, the availability of appellate review in a federal court is sufficient to satisfy the demands of article III.[31]

B. *The Litigating Edge*

If there is not universal agreement on the parity issue, the consensus nevertheless seems broad enough to justify the conclusion that parity, or its absence, is not the major bone of contention between the two sides of the access controversy. The camps are divided only by the question of who shall obtain the advantage in cases where the asserted gap between federal and state courts may influence outcomes. Indeed, even though state courts are

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Congressional Power To Control Federal Jurisdiction: A Reaction to Professor Sager, 77 NW. U.L. REV. 143, 161-66 (1982).

[27] *See, e.g.*, Allen v. McCurry, 449 U.S. 90, 102-05 (1979) (finding no authority in either the federal Constitution or in section 1983 supporting an "unencumbered right" to litigate a federal claim in federal court); Palmore v. United States, 411 U.S. 389, 400-02 (1973) (explaining that neither the legislature nor the judiciary has taken the view that trial and decision of all federal questions are reserved for article III judges); Lockerty v. Phillips, 319 U.S. 182, 187-89 (1943) (stating that under article III, Congress was free to decide whether to establish lower federal courts, and could have left federal remedies to state courts, subject to Supreme Court review); *see also* Bator, *Congressional Control over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1032 (1982) (asserting that no Supreme Court case has questioned the notion that it is for Congress to determine which cases may be filed and litigated in federal district courts).

[28] *See, e.g.*, Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 119-25 (1981) (Brennan, J., concurring); Trainor v. Hernandez, 431 U.S. 434, 456 (1977) (Brennan, J., dissenting); Huffman v. Pursue, Ltd., 420 U.S. 592, 617 (1975) (Brennan, J., dissenting).

[29] *See* Neuborne, *supra* note 1, at 1119-20. Professor Neuborne stated, "We are not faced today with widespread state judicial refusal to enforce clear federal rights. . . . Our comparison need only suggest that given the institutional differences between the two benches, state trial judges are less likely to resolve arguable issues in favor of protecting federal constitutional rights." *Id.*

[30] Amar, *Law Story*, 102 HARV. L. REV. 688, 697 (1989).

[31] *See* Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205, 206 (1985).

constitutionally adequate, there will be a category of "close cases," in which most state judges would uphold state laws against constitutional challenges, while most federal judges would strike them down. Moreover, the parity question will not matter in cases where the law and the facts are so clear that nearly everyone would agree on the proper outcome. It will emerge as important only in hard cases calling for the exercise of judgment, such as controversies featuring open issues and sharp clashes between conflicting values. In these cases, subtle differences between the attitudes of federal and state judges may prove decisive, and the choice of forum will be worth contesting.[32]

For these reasons, it seems that the rhetoric of the access debate has deceived Professor Chemerinsky, who wrongly characterizes the controversy as an empirical disagreement over the extent of similarity between federal and state courts. Empirical proof of disparity, however, would not convince advocates of state courts to change their opinions. Witness Solimine and Walker. Their own statistics reveal differences between federal and state courts, yet they deny the existence of significant disparity.[33]

What is really at stake is the host of potential advantages that come with litigating before a sympathetic arbiter. The constitutional claimant seeks a forum that not only is constitutionally adequate but also accords her the benefit of the doubt on close questions. The state acknowledges the plaintiff's right to a constitutionally valid hearing, notes the general agreement that state courts provide such a hearing, and seeks the benefits that accompany trying the case in the state system.

The two sides are fighting over substance, though not in the ordinary sense of clashing over the content of substantive rules. Rather, each pursues the litigating edge it can obtain by having the issues heard in a forum sympathetic to its ends. The preference extends to rulings on matters of legal principle, findings of fact, evidentiary rulings, and any of the myriad of small decisions that may affect the outcome. Because the state, for whatever reason, wins more often in state court, rules assigning cases to that forum will likely further the state's general interest in freedom from constitutional restraints. Because constitutional challengers win more often in federal court, rules allowing broad access to federal courts serve the individual's interest in limiting state power.[34]

II. COURTS AND THE LEGAL PROCESS: THE INSTITUTIONAL MODEL OF FEDERAL COURTS LAW

If the conflict in the allocation cases is really the gaining of a substantive

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[32] Of course, some litigants will always prefer federal or state court for non-substantive reasons, such as a preference for a lighter docket or the convenience of the court.

[33] *See* Solimine & Walker, *supra* note 2.

[34] *See* Wells, *supra* note 6, at 319-24.

advantage, then why do both sides focus on parity—either affirming or denying it—rather than argue straightforwardly for what they want? The reason is that the participants in the parity debate, including judges, scholars, and lawyers, think that courts may not legitimately rely on substantive arguments in making jurisdictional rules. Forbidden by scruple from pursuing their ends directly, they resort to arguments about parity, institutional costs, or legislative intent.

The source of their unease with substantive arguments is a model of the adjudicatory process that generations of lawyers have either explicitly studied or unconsciously absorbed in law school and in practice. Although the origins of this model can be traced to the first efforts to distinguish law from raw governmental power, the version of those efforts of concern here emerged from the rise of the "Legal Process" theory of law in the 1950s, in response to the challenge posed by Realist thought to the legitimacy of judicial authority.

In the early twentieth century, scholars such as Roscoe Pound, Karl Llewellyn, and Jerome Frank buried the notion that judges mechanically deduced holdings from precedents and statutes.[35] The Realists further demonstrated that judges exercised broad discretion to decide cases according to their best judgment.[36] The Realists' account of the judicial function, however, cast doubt on the propriety of judicial creativity. If legal texts do not constrain judges, then judicial action resembles legislative decree, even though judges lack the legitimacy conferred by popular election to a legislative post. If judges are not bound by precedents and statutes, then the fear arises that they may decide cases according to their personal preferences without the constraint imposed by accountability to the electorate.[37] Anyone who accepted the Realist critique of nineteenth century formalism either had to agree that judicial lawmaking was a form of legislation, or else had to develop a new justification for judicial invention.[38]

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[35] *See* White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972). The origins of Legal Realism in the broader intellectual currents of the early twentieth century are traced in E. PURCELL, THE CRISIS OF DEMOCRATIC THEORY (1972). Purcell describes the rise of scientific naturalism in the wake of Darwin, invention of non-Euclidean geometries, and other intellectual developments that called into question the adequacy of both inductive and deductive reasoning to justify or explain social arrangements. *Id.* at 3-73. He then shows how these ideas drew progressive lawyers, scholars, and judges toward the tenets of Legal Realism. *Id.* at 74-94.

[36] *See, e.g.*, J. FRANK, LAW AND THE MODERN MIND (1930); Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929); Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930). *See generally* White, *supra* note 35.

[37] The problem is most acute in the constitutional context, where legislatures cannot override judicial decisions. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH 16-17 (1962).

[38] *See* Amar, *supra* note 30, at 693-94; Hazard, *Rising Above Principle*, 135 U. PA. L.

A. *The Legal Process and the Legitimacy of Adjudication*

After the Second World War, Lon Fuller, Henry Hart, Albert Sacks, and Herbert Wechsler produced a number of books and articles aimed at developing a new justification for judicial invention. Their students, among them Paul Bator, Alexander Bickel, Ronald Dworkin, John Hart Ely, Henry Monaghan, and Philip Kurland, continued the tradition into the 1960s and beyond, elaborating on the work of their predecessors and diverging among themselves on its implications. The "Legal Process" theorists, as they came to be called, addressed a broad range of issues related to "the making and application of law,"[39] including statutory interpretation,[40] the relation between law and morality,[41] and the allocation of decisionmaking between courts, agencies, and legislatures.[42] One of these efforts resulted in a casebook that defined the terms of discussion of modern federal courts law: Hart and Wechsler's *The Federal Courts and the Federal System*, published in 1953.

For purposes of this Article, the most important aspect of their work is a theory of adjudication that defends judicial invention against the charge that judges who act creatively are unelected legislators. Henry Hart and his colleagues argued that adjudication differed significantly from legislation. Although the Realists correctly concluded that judges may refer to materials other than precedents and statutory texts, the exercise of judgment does not automatically convert a judge into a legislator. According to the tenets of Legal Process theory, the *process* by which judges reach decisions distinguishes adjudication from other decisionmaking and is the source of its legitimacy. If judges abide by a distinctively adjudicatory process, they may act creatively to establish new common law rules, to interpret statutes sensibly, and even, on occasion, to strike down legislation on constitutional grounds, and still withstand the charge that they are usurping the legislative function.[43]

What are the features of the adjudicatory process? The account that follows does not describe comprehensively the Legal Process theory of the judi-

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REV. 153, 182-83 (1986); Vetter, *Postwar Legal Scholarship on Judicial Decisionmaking*, 33 J. LEGAL. EDUC. 412, 412-13 (1983); White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 282-86 (1973); *see also* E. PURCELL, *supra* note 35, at 159-78.

[39] *See* H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tentative ed. 1958).

[40] *See id.* at 1144-1417.

[41] *See* Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

[42] *See* Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978). *See generally* H. HART & A. SACKS, *supra* note 39.

[43] *See* White, *supra* note 38, at 280-91; *cf.* E. PURCELL, *supra* note 35, at 197-217 (describing the "relativist theory of democracy" that provided the intellectual underpinnings for much of Legal Process thought).

cial function. For example, it omits entirely the effort of Legal Process writers to legitimate a creative role for judges in statutory interpretation.[44] Instead, it focuses on the attributes of adjudication that justify the claim that judging differs from legislating, and that judicial creativity may be an appropriate part of judges' work. These aspects of the Legal Process approach to adjudication are central to understanding Henry Hart and Herbert Wechsler's treatment of federal courts law and the persistence of the parity issue.

1. Legal Materials

Judges do not rely on intuitive judgments in resolving hard cases.[45] Judges properly rule after reflection upon all relevant legal materials. These materials are not limited to the precedents and the texts of relevant statutes and constitutional provisions. In keeping with the Realist tradition, the Legal Process theorists permit, indeed require, that judges take account of general ethical principles and widely shared social goals. They maintain that "the law rests upon a body of hard-won and deeply-embedded principles and policies."[46]

According to this theory, a policy is an objective that society *may* pursue, while a principle is both an objective whose "result *ought* to be achieved" and "*the reasons why*" the objective should be achieved.[47] Some examples of principles are the precepts that "agreements should be observed" and that "no person should be unjustly enriched."[48] The identification and refinement of principles and policies are "the basic devices for controlling as well as may be the most important and the more intractable of the decisions which the circumstances of man in society require to be postponed to the future."[49]

Hart and Sacks's distinctive contribution was to stress that the judge who adverts to general principles and policies is not merely enacting personal predilections into law. Although Professor Hart and his colleagues never specified fully the sources of these general directives, they insisted that the "deeply embedded" principles and policies are not mere facades for the judge's subjective preferences. Those principles comprise "a precious inheritance and possession of the whole society."[50] The judge's task is not to enact

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[44] *See, e.g.*, Eskridge & Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 694-701 (1987); *see also* Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1012-14 (1989).

[45] *See* Hart, *supra* note 11, at 124-25.

[46] H. HART & A. SACKS, *supra* note 39, at 158-60; *see also* Wellman, *Dworkin and the Legal Process Tradition: The Legacy of Hart & Sacks*, 29 ARIZ. L. REV. 413 (1987).

[47] H. HART & A. SACKS, *supra* note 39, at 159 (emphasis in original).

[48] *Id.* Another example is that "official power can properly be thought of as limited by a general prohibition against arbitrariness in its exercise." *Id.* at 175.

[49] *Id.* at 160.

[50] *Id.* at 101.

opinions into law, but to decide cases "in terms of the best account of the body of norms as a whole."[51]

2. Reasoned Elaboration

Judges do not reach decisions by mechanically applying precedents and statutes, nor do they merely enforce their own views. Although judges sometimes act by fiat,[52] they and their critics should always strive to expand the realm of reason in the law.[53] Beginning the decisionmaking process with the whole range of legal materials, judges arrive at decisions by reasoning from the materials to a resolution of the issue.[54]

Hart and Sacks identify two factors which "necessarily introduce a rational element . . . into legal arrangements, and which compel some semblance of rational method into their development and application."[55] First, in applying a standard to a set of facts, judges "strive for consistency with other established applications of it,"[56] for "human life and social life could not be thought about or managed in any way if this effort were not made."[57] Second, judges resolve uncertainties in a rule's application by ascertaining the purpose behind the rule. A purpose can nearly always be identified, because "[s]ane people do not make provisions for the future which are purposeless." [58]

3. Neutral Principles

The reasoning process of judges should produce not only a resolution of the particular case, but also a decision based upon "grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply."[59] This criterion represents an effort to implement the basic principle of fairness that cases similar to each other in relevant respects should be treated alike.[60] Beyond the demands of fairness

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[51] Wellman, *supra* note 46, at 433.

[52] *See generally* Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376 (1946).

[53] *See* H. WECHSLER, PRINCIPLES, POLITICS & FUNDAMENTAL LAW 15-17 (1961).

[54] *See, e.g.*, H. HART & A. SACKS, *supra* note 39, at 161-68; *see also* Hazard, *supra* note 38, at 182-83; White, *supra* note 38, at 280-91.

[55] H. HART & A. SACKS, *supra* note 39, at 165; *see also* Fuller, *supra* note 11, at 366.

[56] H. HART & A. SACKS, *supra* note 39, at 165.

[57] *Id.* at 166.

[58] *Id.*; *see also* Fuller, *supra* note 11, at 381.

[59] H. WECHSLER, *supra* note 53, at 21.

[60] *See* K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 100-17 (1960) (discussing the choice, use and frequency of precedent and techniques of application of precedent); Golding, *Principled Decision-Making and the Supreme Court*, 63 COLUM. L. REV. 35, 38-40 (1963) (addressing neutrality and principled decisionmaking by the Supreme Court); *see also* ARISTOTLE, ETHICA NICHOMACHEA V. 3. 1131a-1131b (W. Ross trans. 1925) (stating that what is "just" is a "species of the proportionate," hence the ratio between any two like pairs must be equal in order to be fair).

to litigants, the criterion also reflects a judgment that the integrity of the judicial process may be compromised if one settles for arguments that extend no further than the case at hand. For if it were otherwise, judges would be able to pursue a personal agenda, concealing their true motivations behind a screen of false reasons. It is "the very essence of judicial method to insist upon attending to such other cases, preferably those involving an opposing interest, in evaluating any principle avowed."[61] Only by insisting on a level of generality, some distance between the reasons and the facts of the case at hand, can one be certain that judges are actually reasoning from legal materials rather than indulging their own preferences.

4. Bipolar Disputes

Adjudication is not an appropriate means for resolving every kind of issue. Lon Fuller introduced the notion that judges are fit only to resolve "bipolar" disputes in which each of two contending parties introduces arguments making a claim of right or an accusation of guilt, and in which the judge's task is to choose between them on a reasoned basis.[62] In contrast, some problems are "polycentric,"[63] in that their elements "are interrelated in such a way that sensible consideration of any issue . . . requires the simultaneous consideration of most, or all, of the others."[64] Examples of such problems include determining the makeup of a football team, deciding where to go for vacation, and designing complex products.[65] In these cases, the answer cannot be based on the evaluation by a neutral arbiter of arguments presented by the opposing sides,[66] and the decisionmaker will possess too much discretion to warrant calling the decisionmaking process "adjudication." Such decisions are best left to other branches of government.[67]

5. Impartiality

In the Legal Process conception of adjudication, the judge acts as an impartial[68] and "neutral arbiter,"[69] bringing "an uncommitted mind"[70] to

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[61] H. WECHSLER, *supra* note 53, at 21.

[62] *See* Fuller, *supra* note 11, at 370-71.

[63] *Id.* at 394 (citing M. POLANYI, THE LOGIC OF LIBERTY 171 (1951)).

[64] Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467, 471 (1976).

[65] *See* Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973) (arguing that courts are not well-suited for the task of establishing specific product safety standards in the course of applying general reasonableness tests to determine the adequacy of allegedly defective products).

[66] *See* Fuller, *supra* note 11, at 394-95.

[67] *Id.* at 398-401.

[68] *Id.* at 365.

[69] Hazard, *supra* note 38, at 184.

[70] Fuller, *supra* note 11, at 386.

the case. The judge undertakes a "thoughtful and dispassionate"[71] examination of the problems at hand, remembering that "reason is the life of the law, not just votes for your side."[72] If a member of a collegial court, the judge engages with his or her colleagues in a "joint and impersonal effort to explore and illuminate the issues."[73] The judge will be disqualified for having "a strong emotional attachment . . . to one of the interests involved in the dispute" and in "the situation where the arbiter's experience of life has not embraced the area of the dispute, or, worse still, where he has always viewed that area from some single vantage point."[74] This is because "a blind spot of which he is quite unconscious may prevent him from getting the point of testimony or argument."[75]

Ignoring these precepts compromises the integrity of the adjudicatory process and undermines the value of adjudication as a means of social ordering.[76] Worse, it "invite[s] votes which are influenced more strongly by general predilections in the area of law involved than they are by lawyerlike examination of the precise issues presented for decision."[77] From these premises about the nature of adjudication, Professor Hart argued that the test of a Supreme Court opinion is its craftsmanship,[78] and decried the lack of a tradition of "sustained, disinterested, and competent criticism of the professional quality of the Court's opinions."[79]

B. *The Institutional Model of Federal Courts Law*

In 1953 Henry Hart and Herbert Wechsler published a casebook on federal courts.[80] Departing from earlier efforts, it emphasized issues of federalism and separation of powers rather than procedure.[81] The casebook, currently in its third edition, received high praise,[82] and has influenced fed-

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[71] Hart, *supra* note 11, at 124.

[72] *Id.* at 125.

[73] *Id.* at 124.

[74] Fuller, *supra* note 11, at 391.

[75] *Id.*

[76] *Id.* at 356-57; *see also* Summers, *Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law*, 92 HARV. L. REV. 433, 445 (1978) (concluding that our dominant philosophy of law, "pragmatic instrumentalism," should accommodate the jurisprudence of Professor Fuller).

[77] Hart, *supra* note 11, at 124.

[78] *See id.* at 123 (criticizing Supreme Court opinions which indicate that "the merits and respective implications of the differing interpretations were never open-mindedly and thoroughly examined by the whole Court prior to the decisive vote on the outcome").

[79] *Id.* at 125.

[80] H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953).

[81] *Id.* at xii (stating that their text concentrates on the issue of "the appropriate relationship between the federal courts and other organs of federal and state government").

[82] *See, e.g.*, Barrett, Book Review, 42 CALIF. L. REV. 202 (1954) (stating that Hart

eral courts teaching and scholarship since its initial publication.[83] The Legal Process theory of adjudication serves as an essential premise for the text's conception of federal courts law, a framework accepted for nearly forty years by scholars and judges as a starting point of analysis of federal courts issues.[84]

The issues presented by this body of law concern the proper distribution of power among the national government and the federal and state courts. When is a matter "justiciable," so that courts can take cognizance of it as a "case"? Should federal courts apply federal or state law in cases not governed by federal statutes? What is the proper scope of the federal question jurisdiction? Under what circumstances should federal courts hear constitutional challenges to state action?

Hart and Wechsler, as well as other Legal Process theorists, believed that the proper resolution of these issues turned largely on institutional considerations.[85] They organized their thought in terms of the "structure"[86] of the federal system, and the need for "coordination"[87] of the efforts of state and federal courts. Their book emphasizes the relations between state and federal law, the question of "what courts are good for," and problems of judicial administration.[88] Some examples will help to delineate their approach.

Consider the problem of determining whether a dispute is a "case" within the meaning of article III. Resolving this issue begins with a premise about institutional competence: courts are best suited to decide concrete, live controversies between adverse parties. Accordingly, justiciability issues—mootness, ripeness, and standing—turn on the fitness of the dispute for resolution

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and Wechsler's book is a "new and stimulating contribution"); Kurland, Book Review, 67 HARV. L. REV. 906, 907 (1954) (stating that Hart and Wechsler's book is "the definitive text on the subject of federal jurisdiction"); Mishkin, Book Review, 21 U. CHI. L. REV. 776, 778 (1954) (stating that "the analysis [in Hart and Wechsler's book] is of an order difficult to match anywhere").

[83] *See* Amar, *supra* note 30 (reviewing Hart and Wechsler's third edition).

[84] A notable exception is the treatment of judicial federalism in H. FINK & M. TUSHNET, FEDERAL JURISDICTION: POLICY AND PRACTICE (2d ed. 1987).

[85] *See* Amar, *supra* note 30, at 691 ("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.").

[86] Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 491-98 (discussing the institutional structures of both the state and federal governments, especially the roles played by the legislative and judicial branches in formulating law).

[87] *Id.* at 539-42 (discussing the problems that must be addressed in order to achieve a more unified system of law).

[88] In their preface, Hart and Wechsler summarize the purpose of their text: "In varying contexts 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." H. HART & H. WECHSLER, *supra* note 80, at xiii.

and the stake of the parties in the outcome.[89] Disputes which are no longer alive, are insufficiently concrete, or are pursued by parties with minimal personal interest in resolution should be dismissed.

Another institutional concern is the division of decisionmaking responsibility between state and federal courts. Professor Hart applauded *Erie Railroad v. Tompkins*[90] for holding that federal courts generally must follow state common law decisions rather than rules of their own choice. In doing so, the decision acknowledged that state governments bear the institutional responsibility for making state law[91] and that state courts are "organs of coordinate authority with other branches of the state government."[92]

When federal courts administer state law in diversity cases, a further issue arises: if a state's highest court has not spoken definitively on an issue, how should a federal court ascertain state law? The federal court could act like a common law court or it could follow a rule or dictum announced by any rank of state court. In keeping with his vision of adjudication as an exercise in reasoned elaboration, Professor Hart opted for the former approach, declaring that federal courts, "in the exposition of state law, [must] have the freedom at least of the state courts immediately inferior to the state's highest court." Otherwise, "federal justice . . . is doomed to be second rate justice, and the state systems will lose the benefit of valuable contributions to their growth."[93]

A similar issue of institutional competence arises in connection with the scope of federal jurisdiction. From an institutional perspective, defining the scope of federal question jurisdiction for the district courts and for the Supreme Court when it hears appeals from state courts is a thorny problem. Jurisdiction should extend to disputes in which federal law is an important element, but not to every case containing a federal question. Because federal law is generally interstitial in nature,[94] many cases contain both federal and state issues. Therefore, the challenge lies in finding a principled means of identifying those cases that belong in federal court.[95]

Because the Supreme Court's role is that of "an agency only for vindicating federal authority,"[96] review is appropriate when the state court decision depends on a federal element in the case. Defining the scope of federal district court jurisdiction is more difficult. At the outset of litigation, it is often impossible to determine whether federal or state issues will predominate, and

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[89] *Id.* at 121-23, 148-49, 174-75.

[90] 304 U.S. 64 (1938).

[91] *Id.* at 78.

[92] Hart, *supra* note 86, at 512.

[93] *Id.* at 510.

[94] H. HART & H. WECHSLER, *supra* note 80, at 435 (acknowledging that federal law "rarely occupies a legal field completely, totally excluding all participation by the legal systems of the states").

[95] *Id.* at 763-69.

[96] Hart, *supra* note 86, at 503.

it is considered unwise to devote significant resources to deciding jurisdictional issues. Characteristically, the Legal Process theorists attempted to locate a thread of principle running through the disparate case law on federal question jurisdiction in the district courts.[97]

For present purposes, the treatment of constitutional litigation is the most important aspect of the Legal Process approach to federal courts law. Doctrines requiring federal courts to abstain from exercising their statutory jurisdiction to grant injunctive relief for constitutional violations have been justified formally in terms of the traditional discretion of a court of equity.[98] The manner in which a federal court exercises its discretion, in suits presenting constitutional challenges to state action, depends primarily on the institutional costs such adjudication would impose upon federal and state courts.[99]

Abstention doctrine provides two prominent examples of this institutional costs approach. *Younger v. Harris*[100] and its progeny[101] dictated avoidance of pending state proceedings, because to do otherwise would have been disruptive and duplicative[102] and would have offended the spirit of federal-state

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[97] For a classic article articulating the principle that the case must arise "directly" under federal law, see Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 159 (1953). *But see* Cohen, *The Broken Compass: The Requirement That a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890 (1967) (arguing that the Court actually devises pragmatic solutions on a case by case basis); Doernberg, *There's No Reason for It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597 (1987) (suggesting that the Court should abandon the well-pleaded complaint rule because it sabotages the purposes of federal question jurisdiction).

[98] *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 980 (2d ed. 1973); H. HART & H. WECHSLER, *supra* note 80, at 862-66. The problem with this position is that many of the Court's abstention rules cannot be justified in terms of equity practice. *See, e.g.*, Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 SUP. CT. REV. 193 (arguing that, in many cases, state courts cannot provide adequate remedies for violations of defendants' federal rights because they cannot grant interlocutory, prospective, or class relief); Soifer & MacGill, *The Younger Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141 (1977) (arguing that the Court limited "federal judicial power to the advantage of the states, [but] at the expense of civil liberties"). The editors of the casebook have now abandoned this explanation, preferring instead the view that judges have inherent discretion over jurisdiction. *See* P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1346-47 (3d ed. 1988).

[99] *See* Bator, *supra* note 22, at 608-22.

[100] 401 U.S. 37 (1971).

[101] *E.g.*, Pennzoil Co. v. Texaco Inc., 481 U.S. 1 (1987); Moore v. Sims, 442 U.S. 415 (1979); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).

[102] *See* Steffel v. Thompson, 415 U.S. 452 (1974) (allowing federal court intervention when a state prosecution has been threatened, but is not pending); Stefanelli v. Minard, 342 U.S. 117, 121-22 (1951) ("[F]ederal courts should refuse to intervene in State

comity.[103] *Railroad Commission v. Pullman Co.*,[104] held that a federal court, faced with a constitutional issue that may be avoided by a decision on an unsettled matter of state law, should refrain from deciding the state issue.[105] The Court occasionally has extended its concern with disruption of the federal-state balance beyond deference to state courts, holding that federal courts should refrain from granting disruptive and intrusive injunctive relief against state law enforcement practices.[106]

In addition, respect for finality justifies barring relitigation in federal section 1983 cases of issues decided by prior state cases.[107] In habeas corpus proceedings, the finality interest alone will not preclude review of all prisoner petitions, yet that interest is not without force. If the prisoner's claim does not relate to the "basic justice" of the confinement,[108] or if the inmate has violated state procedural rules for presenting and preserving any federal issue,[109] or if he seeks to obtain relief from a "new rule,"[110] the institutional interests in putting litigation to rest will prevail over the prisoner's interest in access to a federal forum. Apart from the value of finality, respect for state corrective processes requires exhaustion of state remedies before inmates may raise their claims in federal court.[111]

The foregoing sketch illustrates the central point that substantive implications of jurisdictional rules are unimportant in the Hart and Wechsler framework because ideally there are none. Courts are described in highly abstract terms, either as meeting or falling short of the goals of impartiality and reasoned elaboration. Judges are neutral arbiters, listening to arguments and taking evidence in concrete disputes, and then reasoning through the legal materials to resolutions based on principles that transcend the cases at hand. Within this model, judges do not contribute particular qualities or attitudes

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criminal proceedings to suppress the use of evidence even when [it is] claimed to have been secured by unlawful search and seizure.").

[103] Younger v. Harris, 401 U.S. 37, 44 (1971).

[104] 312 U.S. 496 (1941).

[105] *Id.* at 499-500.

[106] *See* City of Los Angeles v. Lyons, 461 U.S. 95, 101-13 (1983) (holding that the plaintiff lacked standing to sue for injunctive relief).

[107] *See* Allen v. McCurry, 449 U.S. 90 (1980) (holding that federal courts in section 1983 cases must give preclusive effect to prior state court judgments).

[108] *See* Stone v. Powell, 428 U.S. 65, 91 n.31 (1976) (denying federal habeas relief based on a claim of unlawful search and seizure).

[109] *See* Wainwright v. Sykes, 433 U.S. 72 (1977) (holding that the respondent's failure to comply with a state contemporaneous objection rule precluded him from federal habeas relief based on the evidence admitted).

[110] *See* Butler v. McKellar, 110 S. Ct. 1212, 1216-17 (1990) (holding that the "new rule" would not be applied to this case on collateral review because the state court's decision, though contrary to the "new rule," was a reasonable and good faith interpretation of prior precedent) (quoting Teague v. Lane, 489 U.S. 288, 306 (1989) (plurality opinion)).

[111] *See* H. HART & H. WECHSLER, *supra* note 80, at 1298.

to the decision process. Therefore, federal and state courts should be interchangeable.

Henry Hart's analysis of congressional power over federal court jurisdiction illustrates this theme. Hart maintained that Congress has broad power to curtail federal judicial power, but that it cannot completely deprive a litigant of access to any court to challenge the exercise of governmental power against him. In the event of such a congressional effort, the question arises whether federal or state courts should remain open. Hart opted for state courts as "the primary guarantors of constitutional rights,"[112] not because state courts were different from federal courts, but rather, because "the scheme of the Constitution" dictates that "state courts [unlike federal courts] always have a general jurisdiction to fall back on [a]nd the Supremacy Clause binds them to exercise that jurisdiction in accordance with the Constitution."[113]

In practice, a judge or a system of judges may fail to meet the rigorous standards of the neutral arbiter model. The Legal Process theorists characterized such divergences as departures from the adjudicatory ideal of neutrality. The differences amount to a problem that must be remedied by ensuring that the litigant is given access to an impartial forum. For example, one justification for diversity jurisdiction was that state judges tended to be prejudiced against out-of-state litigants. In order to combat potential bias, the Framers authorized Congress to grant jurisdiction over suits between parties from different states to the federal courts.[114] Another example is the Legal Process approach to habeas corpus and equitable restraint of state proceedings. Paul Bator argued that the institutional costs of federal court interference with state criminal justice processes are generally too great to warrant such intrusions. He thought federal action was appropriate, however, for litigants denied a full and fair opportunity to litigate in state court.[115] In such a case, state judges would not be entitled to the normal presumption of neutrality.

The classic Legal Process conception of adjudication does not accept the

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[112] Hart, *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

[113] *Id.* at 1401.

[114] *See* United Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145 (1965) (holding that the Constitution extends federal jurisdiction to suits between citizens of different states); Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809) (stating that "rational tribunals" exist to decide controversies between citizens of different states). *See generally* P. LOW & J. JEFFRIES, FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 464-65 (2d ed. 1989) (discussing *R.H. Bouligny, Inc.* and diversity jurisdiction).

[115] *See* Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 626 (1981) (noting that the state court will be allowed to adjudicate only if there was, or will be, a "full and fair opportunity" to litigate the constitutional question in the state court); *see also* H. HART & H. WECHSLER, supra note 80, at 1654-55 (discussing Bator's article and problems in judicial federalism).

notion that disparity may exist between federal and state courts when judges adhere to the traditional standard of impartiality. Judges are either fungible, or some of them are inadequate. Although the model allows litigants to gain access to a more impartial forum in order to limit bias, it does not permit them to choose between a federal or state forum for the purpose of gaining a litigating edge in close cases. Such exploitation of the potential disparity between state and federal courts would undermine the premises of Legal Process theory, for it would indicate that judges do not objectively examine legal materials to formulate answers, but rather operate under the Realist model,[116] deciding cases in accordance with their political attitudes, or with the institutional attitudes characteristic of the court system of which they are a part. Acceptance of such a view would erode the premise that judicial creativity is the product of a distinctive adjudicatory process. Judges would lose their defense against charges that they usurp the legislative function.

III. THE BREAKDOWN OF THE INSTITUTIONAL MODEL

The Institutional Model is the framework for posing and resolving federal courts issues that generations of federal courts teachers have learned and passed on to their students. But it is no longer an adequate vehicle for understanding federal courts doctrine. Over the past thirty years, the transformation of constitutional law, the rise of public law litigation, and the intellectual revolution in legal scholarship have steadily eroded its descriptive and normative power. Today it is difficult, if not impossible, to conceive of judges in the fashion of the Legal Process model, as entirely disinterested and impersonal arbiters, devoid of personal histories and of attitudes instilled by the court system to which they belong. Although the Supreme Court claims allegiance to the Institutional Model, its rulings belie the pretense.

A. *Factors Undermining the Institutional Model*

Legal Process theory developed in the 1940s and 1950s.[117] During the period between the constitutional crisis of the mid-1930s and the constitutional transformation that began with *Brown v. Board of Education*,[118] the salient features of the American legal landscape neatly fit the premises of the Legal Process doctrine and the Institutional Model of federal courts law.[119] During World War II and the Cold War that followed, Americans rarely

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[116] *See* Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 972 (1977) (arguing that the "nightmare" is judges making new law rather than applying existing law).

[117] *See* White, *supra* note 38 (discussing realism and reasoned elaboration as legal theories).

[118] 347 U.S. 483 (1954).

[119] *See* Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 227 (1948).

engaged in sharp clashes between competing values. Those who held disparate views about routine political issues were united in their faith in the superiority of individual liberty and of democratic rule over the Nazi and Stalinist regimes.[120] "Secular, humanistic, patriotic, and centrist, the American intellectual scene in the late 1950s and early 1960s was remarkably free from ideological strife."[121]

A primary task for legal scholars was to chase away the Realist nightmare of the judge as an unelected legislator and to demonstrate that American modes of governmental decisionmaking rested on morally acceptable underpinnings. Under a quiescent Supreme Court, the value-laden problem of reconciling individual rights with democratic rule did not preoccupy the attention of the legal profession. It was quite reasonable to believe that judges, who remained neutral and who employed reason to reach results, could rebut the charge that judicial creativity resembled mere legislation. Federal courts issues had little, if any, political dimension. They turned largely on considerations of institutional competence and efficient judicial administration.[122]

In the 1960s, the Institutional Model of federal courts began to collapse under the weight of three interrelated developments. First, the Supreme Court resumed the activist stance it had abandoned in the late 1930s, albeit in the service of a new set of values. Process became less important than results. Second, armed with new legal theories based on the Court's constitutional rulings and the egalitarian statutes enacted in the mid-1960s, litigants seeking social change turned to the federal courts for help. Inevitably, litigation at all levels, not just in the Supreme Court, became more concerned with identifying and enforcing political choices. Third, at the same time, the legal academy turned its interest away from the problem of justifying judicial creativity, which had preoccupied the Legal Process theorists, and toward substantive reform of law and society.

1. Modern Supreme Court Activism

In 1954, one year after the publication of Hart and Wechsler's *The Federal Courts and the Federal System*, the Supreme Court decided *Brown*, and set in motion a dynamic that would eventually challenge the fundamental premises of the Institutional Model. Led by Chief Justice Warren, the Court struck down laws that maintained racial distinctions[123] and transformed the

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[120] *See* White, *supra* note 38, at 282-86 (discussing legal theories of the late 1930s and 1940s).

[121] Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 765 (1987); *see also* D. BELL, THE END OF IDEOLOGY: ON THE EXHAUSTION OF POLITICAL IDEAS IN THE FIFTIES (1962); E. PURCELL, *supra* note 35, at 235-66.

[122] *See, e.g.*, Currie, *The Federal Courts and the American Law Institute* (pts. 1-2), 36 U. CHI. L. REV. 1, 3-4, 268, 337 (1968-1969).

[123] *See, e.g.*, Lee v. Washington, 390 U.S. 333 (1968) (finding unconstitutional

law of state criminal procedure by incorporating almost all of the guarantees of the Bill of Rights into the fourteenth amendment[124] and by creating prophylactic rules, such as the *Miranda* warning, to ensure their enforcement.[125] Furthermore, the Court breathed life into the equal protection clause, making it a powerful weapon for combatting inequality across a wide range of issues.[126] It tightened first amendment restrictions on governmental regulation of speech,[127] imposed new procedural requirements on the denial of government benefits,[128] and commanded the wholesale reapportionment of legislative districts across the country.[129] In sum, the Warren Court made

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Alabama statutes requiring racial segregration in prisons); Loving v. Virginia, 388 U.S. 1 (1967) (finding Virginia's statutes prohibiting racial intermarriage unconstitutional); Anderson v. Martin, 375 U.S. 399 (1964) (finding that the state's designation of race on a ballot to be unconstitutional); New Orleans City Park Improvement Assoc. v. Detiege, 358 U.S. 54 (1958) (holding that the city's refusal to desegregate publicly supported facilities was unconstitutional).

[124] *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968) (stating that trial by jury in criminal cases is fundamental to American justice); Malloy v. Hogan, 378 U.S. 1 (1964) (prohibiting state infringement of the privilege against self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that the right of an indigent defendant in criminal trial to have assistance of counsel is a "fundamental right" under the Constitution).

[125] Miranda v. Arizona, 384 U.S. 436 (1966); *see also* Mapp v. Ohio, 367 U.S. 643 (1961) (establishing fourth amendment exclusionary rule).

[126] *See, e.g.*, Reed v. Reed, 404 U.S. 71 (1971) (striking down a statute giving preference to men over women in appointment as estate administrators); Graham v. Richardson, 403 U.S. 365 (1971) (holding that state statutes which deny welfare benefits to aliens violate the equal protection clause); Shapiro v. Thompson, 394 U.S. 618 (1969) (finding equal protection violation in state statute that denied benefits to new state residents); Levy v. Louisiana, 391 U.S. 68 (1968) (finding a state statute which denied right of recovery by illegitimate children violative of equal protection); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (striking down a poll tax); Douglas v. California, 372 U.S. 353 (1963) (holding that denial of indigent defendant's right to counsel violates equal protection); *see also* G. GUNTHER, CONSTITUTIONAL LAW 588 (11th ed. 1985) (discussing Warren Court's aggressive use of the equal protection clause).

[127] *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (striking down state statute prohibiting mere advocacy of lawless activity); Street v. New York, 394 U.S. 576 (1969) (finding a state statute prohibiting speech against the American flag to be unconstitutional); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (holding that the first amendment protects the right of students to wear armbands in school); Keyishian v. Board of Regents, 385 U.S. 589 (1967) (holding that statutes prohibiting teachers from making "seditious" utterances are unconstitutionally vague); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (holding that the Constitution does not permit a state to award damages for libel in actions brought by public officials against critics of their official conduct).

[128] Goldberg v. Kelly, 397 U.S. 254 (1970) (finding that a pretermination hearing is necessary to provide welfare recipients with procedural due process).

[129] *See* Reynolds v. Sims, 377 U.S. 533 (1964) (holding that the equal protection clause requires substantially equal legislative representation for all citizens in a state); *see*

the Constitution a far more serious restraint on government than it had been before 1954.[130]

If the Court had accomplished this expansion of constitutional rights by carefully reasoning from the legal materials and by meticulously crafting explanations of its holdings, the Legal Process theorists might have accepted it as a proper exercise of the judicial function. In fact, the Warren Court was notorious for its lack of craftsmanship, and Legal Process scholars railed against its work. For example, Herbert Wechsler criticized the Court for its failure to articulate a principled basis for the *Brown* decision.[131] Alexander Bickel and Harry Wellington noted "an increasing incidence of the sweeping dogmatic statement, [and] of the formulation of results accompanied by little or no effort to support them in reason."[132] Writing seven years later, Philip Kurland quoted Bickel and Wellington with approval, and discerned "a recent tendency to add disingenuousness and misrepresentation to this list"of the Warren Court's faults.[133] In short, the Legal Process critics charged that the Court acted more like a legislature than a court. They accused the Court of implementing the egalitarian and libertarian values of a majority of the Justices rather than resolving cases according to the criteria essential to the integrity of the adjudicatory process.[134]

Nor did the appointment of more conservative justices by Presidents Nixon and Reagan put a stop the Court's activism.[135] Under Chief Justices Burger and Rehnquist, the Court typically has shown little respect for prece-

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also Kirkpatrick v. Preisler, 394 U.S. 526 (1969) (holding that the Constitution requires that states create congressional districts that provide equal representation for equal numbers of people); Avery v. Midland Co., 390 U.S. 474 (1968) (agreeing with *Reynolds v. Sims*).

[130] For diverse appraisals of the Warren Court's work, compare A. COX, THE WARREN COURT (1968) with A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970).

[131] *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959).

[132] Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 3 (1957).

[133] Kurland, *The Supreme Court, 1963 Term—Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 HARV. L. REV. 143, 145 (1964).

[134] *See* A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1st ed. 1970); P. KURLAND, POLITICS, THE CONSTITUTION AND THE WARREN COURT (1970).

[135] *See* Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436 (1987) ("[T]he Court's erratic acitivism neither conceded nor compensated for its essential lack of vision and commitment."); Blasi, *The Rootless Activism of the Burger Court*, in THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 216 (V. Blasi ed. 1983).

dent,[136] has made specious distinctions,[137] and has rendered ad hoc, unprincipled decisions.[138] Some commentators claim that the Burger Court's craftsmanship was even worse than that of the Warren Court.[139] The contemporary Court differs from the Warren Court primarily in the substantive values underlying most of its holdings. The present Court is more likely to favor the interests of the state over the interests of individuals claiming constitutional rights.[140] Legal Process values are no more important today to Supreme Court Justices than they were in the 1960s.

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[136] *See, e.g.*, United States v. Scott, 437 U.S. 82, 101 (1978) (quoting Justice Brandeis's dissent in Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-08 (1932), which stated, "where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions"); *see also* Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467; Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 742-43 (1988) (citing Garcia v. San Antonio Metropolitan Transport Authority, 469 U.S. 528 (1985), as proof that the Rehnquist Court has little respect for its own precedent).

[137] *See* Alschuler, *supra* note 135, at 1441; Dershowitz & Ely, Harris v. New York: *Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1199 (1971).

[138] *See* Nichol, *An Activism of Ambivalence* (Book Review), 98 HARV. L. REV. 315, 326-27 (1984) (stating that although the "Burger Court has reminded us that it is emphatically the province of the judiciary to say what the law is," the Court has failed to carry out its own mandate).

[139] *See* Kurland, *supra* note 133, at 144-45; Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 943 (1973).

[140] *See, e.g.*, United States v. Salerno, 481 U.S. 739 (1987) (upholding Bank Reform Act of 1984 in light of the Act's legitimate and compelling regulatory purpose and the procedural protections that it offers); Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding a state statute criminalizing sodomy); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (holding that recovery of presumed and punitive damages in defamation cases absent a showing of "actual malice," does not violate first amendment principles); Young v. American Mini Theatres, 427 U.S. 50 (1976) (sustaining a town's "anti-skid row" ordinance against a first amendment challenge); Washington v. Davis, 426 U.S. 229 (1976) (finding no violation of the fifth amendment in the use of a police examination that had a racially disproportionate impact); Paul v. Davis, 424 U.S. 693 (1976) (holding that the erroneous distribution of respondent's picture on a flyer listing "known shoplifters" did not deprive him of a liberty interest under the fourteenth amendment); *see also* Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989); Stone, *October Term 1983 and the Era of Aggressive Majoritarianism: A Court in Transition*, 19 GA. L. REV. 15 (1984); Tribe, *Seven Deadly Sins of Straining the Constitution Through a Psuedo-Scientific Sieve*, 36 HASTINGS L.J. 155 (1984).

Litigants asserting property rights have elicited more sympathy from the contemporary Court. *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (striking down a conditional zoning permit scheme which failed to substantially further governmental purposes); First Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) (providing for compensation of temporary takings under the fourteenth amendment).

2. Public Law Litigation

The proliferation of constitutional rights in the 1960s represented only one aspect of a broader movement toward a greater concern about public law. The federal government made greater efforts to solve social problems through legislation and administrative regulation, enacting statutes and establishing agencies to address such matters as race discrimination and environmental protection. The growth of the administrative state produced demands for judicial intervention to counter abuses of agency power. Litigants denied relief by other branches of the government turned to the courts, and used new statutes and the Supreme Court's innovative interpretations of the fourteenth amendment as support for judicial reform of prisons, mental hospitals, and employment practices. These developments have given rise to a new model of judicial action in cases where constitutional guarantees or other broad questions of social policy are at issue.[141]

Public law litigation differs markedly from the traditional model of adjudication celebrated in the classical Legal Process literature. Rather than a bipolar lawsuit focusing on the rights and obligations of the parties, with the judge acting as a neutral umpire, the typical public law suit "is about whether or how a government policy or program shall be carried out."[142] The "party structure and the matter in controversy are both amorphous . . . [and] the temporal orientation of the lawsuit is prospective rather than historical."[143]

In fashioning prospective relief, the public law judge does not act like an adjudicator, but like a legislator drafting a mini-statute aimed at controlling the conduct of officials and others in the future.[144] At times, the trial judge, who becomes actively involved in shaping the relief and monitoring its implementation, passes "beyond even the role of legislator and [becomes] a policy planner and manager."[145] Taken together, these aspects of public law litigation mean that "[l]itigation inevitably becomes an explicitly political forum and the court a visible arm of the political process."[146] In these lawsuits, judges cannot avoid, nor even conceal, substantive choices over the definition and implementation of public values.

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[141] *See* P. LOW & J. JEFFRIES, *supra* note 114, at 14.

[142] Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1295 (1976).

[143] Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 5 (1982); *see also* Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 320-21 (1988).

[144] Chayes, *supra* note 142, at 1297 ("In public law litigation . . . factfinding is principally concerned with 'legislative' rather than 'adjudicative' fact.").

[145] *Id.* at 1302; *see also* Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949, 956 (1978).

[146] Chayes, *supra* note 142, at 1304; *see also* Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 635-37 (1982).

3. The Rise of Ideology in the Law Schools

In the 1960s, the Legal Process notion that a conscientious judge could reason her way from legal materials to the just result lost its persuasive force. Advocates of social change could not accept craftsmanship and institutional competence as necessary foundations of reform.[147] If the legal materials provided no neutral principle striking down segregation,[148] then neutrality would have to be sacrificed. If the legal materials said the war and the draft were valid exercises of government power, then protest rather than submission was the appropriate response. Whatever its merits, the Legal Process model lost the allegiance of many who felt that the substantive ends they sought were too important to be sacrificed to the demands of process values. This shift in perspective soon manifested itself in the intellectual life of American law schools.[149]

While the political component of Supreme Court decisionmaking grew larger, it was subjected to less of the "sustained, disinterested, and competent criticism of the professional quality of [its] opinions"[150] for which Henry Hart had called.[151] Law professors began to lose faith in the first premise of Legal Process thought—the autonomy of adjudication. The attack upon that premise came from both the left and the right of the political spectrum. Veterans of the civil rights and anti-war protests enrolled in law schools and later became professors, some of whom ultimately formed the core of the Critical Legal Studies ("CLS") movement.[152] CLS scholars asserted that the legal materials which Hart and Sacks had told judges to use did not exist.[153] Furthermore, they denied that judges reason their way to results,[154] rejected the distinction between process and substance,[155] and questioned the separa-

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[147] *See* Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 804 (1971).

[148] For scholars offering principled rationales for *Brown*, see Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959).

[149] *See* Eskridge, *Metaprocedure*, 98 YALE L.J. 945, 964-65 (1989) (discussing the effects of *Brown v. Board of Education*, and the Legal Process school's insistence on judicial neutrality).

[150] Hart, *supra* note 11, at 125.

[151] *See* Alschuler, *supra* note 135, at 1451 (noting an increasing emphasis on deconstruction among legal scholars).

[152] *See* White, *The Inevitability of Critical Legal Studies*, 36 STAN. L. REV. 649, 658-59 (1984).

[153] *See* Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 564-76 (1983).

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

[155] *See* Peller, *Neutral Principles in the 1950s*, 21 U. MICH. J.L. REF. 561 (1988); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 804-24 (1983) (stating that there is no way to provide the constraints on judges that liberalism requires).

tion between interpretation and the interest of the interpreter.[156] On the right, the descriptive wing of the Law and Economics movement maintained that many common law rules are economically efficient,[157] that a study of the outcomes of decided cases proves this,[158] and that the reasoning in the opinions (in which efficiency figures only fitfully) is irrelevant to understanding many areas of the law.[159]

The upshot of these developments has been the decline of law as an autonomous discipline.[160] Now all sides agree that "in some ultimate sense law . . . is unavoidably political."[161] Whether the topic is free speech, promissory estoppel, the defense of assumption of risk, or corporate governance, many of the hard issues apparently boil down to stark choices between conflicting interests and values. There is no way to get around the fact that people disagree fundamentally about the role of government and the organization of society. Today, most accept the view of Thurman Arnold, the unreconstructed Realist, who derided Henry Hart's faith in "logic and debate" as the solution to disagreements between "judges who hold differing views with absolute convictions."[162] For many, the legitimacy of judicial action depends more on the substantive content of judges' decisions than on the process by which the decisions are reached.[163]

B. *The Impact of the Constitutional and Intellectual Revolutions on the Rules Regulating Access to Federal Court*

These developments have had important consequences for the law of federal courts. As part of its drive to impose constitutional restraints on the states, the Warren Court provided new federal remedies for the new rights it

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[156] Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765 (1982).

[157] *See, e.g.*, W. LANDES & R. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 312 (1987).

[158] *Id.* at 313.

[159] *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 16-17, 21 (3d ed. 1986).

[160] *See* Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987); *see also* Kissam, *The Decline of Law School Professionalism*, 134 U. PA. L. REV. 251 (1986) (exploring the consequences of the changing social structure in American law schools).

[161] *Id.* at 766; *see also* R. DWORKIN, A MATTER OF PRINCIPLE 146, 162 (1985) (liberal perspective); R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 203 (1985) (conservative perspective); Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1152-53 (1985) (CLS perspective).

[162] Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298, 1313 (1960); *see also* R. POSNER, *supra* note 161, at 203 (explicitly endorsing Arnold's view); Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 858-61 (1988) (discussing the limits of reason in adjudication).

[163] *See, e.g.*, Chayes, *supra* note 142, at 1313-16. This view, however, is not unanimous. For an account of adjudication that gives a prominent role to reason as a constraint on judges, see Wilkinson, *The Role of Reason in the Rule of Law*, 56 U. CHI. L. REV. 779 (1989).

recognized. *Monroe v. Pape*[164] authorized a federal cause of action for damages to redress constitutional violations. In cases like *Fay v. Noia*[165] and *Jones v. Cunningham*,[166] it removed restrictions on access to federal habeas corpus for state prisoners. *Dombrowski v. Pfister*[167] eased access to federal court for free speech challenges to state criminal laws. The Warren Court rarely found the criteria for *Pullman* abstention satisfied.[168]

In 1971, the Court began to cut back on the availability of federal remedies. *Younger v. Harris*[169] and its progeny established a principle that anyone who could raise a federal issue in some state proceeding pending against him, whether criminal,[170] civil,[171] or even administrative,[172] could not take the claim to federal court instead. Overturning seventy-five years of practice, *Pennhurst State School & Hospital v. Halderman*[173] denied access to federal court for persons seeking to link their federal challenge to official action with a state law claim. The Court barred habeas corpus for fourth amendment issues,[174] for questions not raised or preserved in state court on account of attorney error,[175] and for any issue on which the state court could have rationally, though wrongly, read the existing Supreme Court precedents as it did.[176] Other lines of cases revived *Pullman* abstention and employed it as a weapon to hinder access to federal court,[177] erected new barriers to federal court under the rubric of standing to sue,[178] and narrowly construed the reach of the due process clause in cases where the plaintiff had

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[164] 365 U.S. 167 (1961).

[165] 372 U.S. 391 (1963).

[166] 371 U.S. 236 (1963).

[167] 380 U.S. 479 (1965).

[168] *See* Note, *Federal Question Abstention: Justice Frankfurter's Doctrine in an Activist Era*, 80 HARV. L. REV. 604 (1967).

[169] 401 U.S. 37 (1971).

[170] *Id.* at 42.

[171] *E.g.*, Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987); Trainor v. Hernandez, 431 U.S. 434 (1977); Juidice v. Vail, 430 U.S. 327 (1977).

[172] *E.g.*, Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982).

[173] 465 U.S. 89 (1984).

[174] Stone v. Powell, 428 U.S. 465, 465, 494 (1976).

[175] Murray v. Carrier, 477 U.S. 478 (1986).

[176] *See, e.g.*, Butler v. McKellar, 110 S. Ct. 1212, 1216-17 (1990).

[177] *See* Field, *The Abstention Doctrine Today*, 125 U. PA. L. REV. 590, 602 (1977).

[178] *See, e.g.*, Allen v. Wright, 468 U.S. 737 (1984) (denying standing to parents of black children attending public schools in districts undergoing desegregation who sought to challenge the government's tax exemption practices); Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982) (holding that organization dedicated to separation of church and state failed to identify any personal injury suffered as a consequence of alleged constitutional violation in uncompensated transfer of federally owned property to religious association).

suffered physical injury, thereby requiring him to pursue state tort remedies instead.[179]

These contrasting lines of cases represent an effort by the majority in each era to give a litigating edge to parties whose substantive interests it favors. The break with the Legal Process tradition was not sudden or sharp, because in the early 1960s, the broader availability of federal courts could be justified within the Institutional Model. Many state judges, especially in the South, were hostile to the new federal rights, making it doubtful that litigants with constitutional claims against state governments could obtain impartial justice in the state courts.[180] By the mid-1970s, however, state courts had improved enough so that Professor Neuborne acknowledged the absence of "widespread state judicial refusal to enforce clear federal rights."[181] As state courts have grown more accommodating to constitutional claims, the Legal Process foundation for access to federal court in order to assure an impartial forum has grown weaker. Absent state court bias, Legal Process theory often favors state court adjudication, based on such institutional concerns as the minimization of federal-state friction and the efficient allocation of scarce judicial resources.[182] Today the case for easy access to federal court rests mainly on the likelihood that federal courts will resolve close issues in favor of the constitutional challenger.[183]

Similarly, the restrictive decisions of the past twenty years reflect the institutional costs of federal interference with state judicial systems, such as duplication of effort, disruption of state processes, and demoralization of state judges. Many of these decisions, however, go far beyond the explanatory range of such concerns. Although the Court does not say so, the holdings seem calculated to give the litigating edge to state governments. The argument in support of this account of the cases rests on three premises.

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[179] *See, e.g.*, DeShaney v. Winnebago County, 489 U.S. 189 (1989) (holding that state had no constitutional duty to protect child from his father); Daniels v. Williams, 474 U.S. 327 (1986) (holding that negligence is not sufficient to make out a due process claim); Ingraham v. Wright, 430 U.S. 651 (1977) (holding that the due process clause did not require notice and hearing prior to the imposition of corporal punishment in the public schools); Paul v. Davis, 424 U.S. 693 (1976) (holding that reputation alone does not implicate any "liberty" or "property" interest sufficient to invoke the procedural protection of the due process clause).

[180] *See* Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction To Abort State Court Trial*, 113 U. PA. L. REV. 793 (1965).

[181] Neuborne, *supra* note 1, at 1119.

[182] *See, e.g.*, Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 110-16 (1981) (holding that the principle of comity barred suit by state taxpayers brought under the Civil Rights Act against various county officials); Allen v. McCurry, 449 U.S. 90, 94, 103-05 (1980) (holding that rules of collateral estoppel apply to actions brought under Civil Rights Act and encompass state court judgments); Stone v. Powell, 428 U.S. 465, 491 &. n.31, 493-94 n.34 (1976); *see also* Currie, *supra* note 122, at 2-4, 337.

[183] *See* Neuborne, *supra* note 1, at 1119-20; *see also* Wells, *supra* note 6, at 322-24.

First, in adjudicating the merits of constitutional cases, the contemporary Court exhibits undisputed preference for the states' interests in pursuing majoritarian ends over pleas for libertarian and egalitarian constraints on state government.[184] Second, because of the disparity between federal and state courts, assigning constitutional cases to state courts will further these state interests, because the government will tend to win more often in state court than in federal court. Third, the Court's institutional cost rationale for restrictive rules does not withstand scrutiny. While it may be mere chance that the subtantive impact of the Court's jurisdictional rules dovetails with its substantive agenda, the absence of a close relationship between the Court's proferred reasons and the rules it announces makes it highly unlikely that the jurisdictional rules are motivated solely, or even principally, by considerations of institutional cost. The doctrines limiting access seem to be aimed at achieving substantive ends by jurisdictional means.

Consider, for example, the *Younger* doctrine. Certainly there are costs associated with federal injunctions against pending state criminal proceedings. The injunction will disrupt the state's normal mechanisms for enforcing the criminal law, nullify the time and effort put into the case by state officials, and may even demoralize state judges by casting aspersions on their competence and fairness.[185] The Court, however, applies this rule to civil cases,[186] administrative proceedings,[187] permissive counterclaims,[188] and state cases filed after the institution of the federal case.[189] Access to federal court is denied even when the state agency itself has no authority to hear the constitutional issue. Therefore, a litigant must appeal agency action to the state courts in order to assert his rights,[190] even when relief in the state

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[184] *See* sources cited *supra* note 140.

[185] *See* Steffel v. Thompson, 415 U.S. 452, 462 (1974) (discussing the role of state courts in the evaluation of federal constitutional law and the enforcement of constitutional principles); *see also* Bator, *supra* note 19.

[186] *See, e.g.*, Juidice v. Vail, 430 U.S. 327 (1977) (holding that principles of comity and federalism in Supreme Court decisions directing non-intervention by court of equity in state judicial proceedings are not confined solely to criminal cases).

[187] *See, e.g.*, Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982) (holding that importance of state interest in pending state disciplinary proceeding and in federal constitutional challenge to disciplinary rules called for *Younger* abstention).

[188] *See, e.g.*, Moore v. Sims, 442 U.S. 415 (1979) (finding no "extraordinary circumstances" which would prevent application of the *Younger* doctrine in the absence of a showing of bad faith in the state courts).

[189] *See, e.g.*, Hicks v. Miranda, 422 U.S. 332, 349-50 (1975) ("[W]here state criminal proceedings are begun against federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, the principles of *Younger v. Harris* should apply in full force.").

[190] *See* Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) (holding that the district court should have abstained from adjudicating an action, considering that elimination of prohibited sex discrimination was a sufficiently important

courts is practically impossible because of a burdensome appeal bond requirement.[191] Federal judicial intervention in these circumstances does not threaten to disrupt state judicial processes or to insult state judges, and therefore such intervention would do little or nothing to diminish comity between federal and state courts. For this reason, the "institutional costs" rationale for these holdings is unpersuasive.[192]

The Court's recent dramatic curtailment of federal habeas corpus jurisdiction provides another example of the same theme. The ostensible issue in *Teague v. Lane*,[193] *Butler v. McKellar*,[194] and several other recent cases[195] is the retroactive effect of constitutional decisions in habeas proceedings. May a prisoner whose confinement is entirely proper under the constitutional standards prevailing at the time of his trial and appeal invoke constitutional rules announced after his conviction in a later habeas corpus petition? The Court now has crafted a general rule that he may not, except in a narrow range of cases where the later ruling enunciates a new rule of fundamental procedural fairness or invalidates the substantive criminal law on which the conviction is based.[196] The Court's rationale is the strong state interest in repose and finality. Indeed, finality of judgment promotes the efficient allocation of judicial resources, increased judicial morale, and public confidence in the legal system. Moreover, it recognizes the prisoner's psychological need to acknowledge guilt and proceed with rehabilitation, to let matters rest rather than to permit unending questioning of the conviction.[197] The fundamental value choice behind habeas corpus involves deciding whether remedying an unjust confinement is worth the cost to these finality concerns. In particular circumstances, finality may be an especially strong value. According to the *Teague* Court, the interest in repose is especially strong when the prisoner has been tried properly under prevailing standards and seeks to rely on a "new rule" established after his conviction.[198]

The problem with this reasoning lies in the Court's definition of "new rule." The term not only embraces radical breaks with the past but also

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state interest to bring case within the ambit of *Younger*, and that school would receive an adequate opportunity to raise its constitutional claims).

[191] Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987) (holding that *Younger* abstention required district court to abstain from hearing constitutional claims where judgment debtor did not present those claims to state courts, and where it was impossible to be certain that governing state statutes and procedural rules actually allowed those claims).

[192] *See* Wells, *supra* note 6, at 315-22.

[193] 489 U.S. 288 (1989).

[194] 494 U.S. 407 (1990).

[195] Sawyer v. Smith, 110 S. Ct. 2822 (1990); Saffle v. Parks, 494 U.S. 484 (1990); Penry v. Lynaugh, 492 U.S. 302 (1989).

[196] *See* Butler v. McKellar, 110 S. Ct. 1212, 1217-18 (1990); Penry v. Lynaugh, 492 U.S. 302, 314, 330 (1989); Teague v. Lane, 489 U.S. 288, 307-10 (1989).

[197] *See* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 451-53 (1963).

[198] 489 U.S. at 306-10.

extends to any decision that is not "dictated" by Supreme Court precedent.[199] Rules that are implicit in the reasoning of earlier cases nevertheless qualify as "new rules" (and hence are unavailable on habeas) so long as there are colorable grounds for distinguishing the later case from the earlier one.[200] *Teague* and *Butler* hold that federal courts may not consider a habeas petition if the petitioner relies on inferences based on the reasoning in the opinions rather than on holdings within the four corners of Supreme Court precedents. The effect of this approach to retroactivity is to reduce drastically the scope of habeas corpus review. As long as state judges have a rational basis for reading the precedents as they do, federal habeas corpus will not be available to many prisoners, for federal judges may not even inquire into the correctness of such state rulings.[201]

The Court's justification for this limit on the availability of habeas falls short because finality is not a major concern in the vast majority of cases that fall within the "new rule" category. Granting that finality is an important consideration, its weight depends on the extent to which the later decision is a break with the past. State courts can reasonably foresee rulings that fairly fall within the reasoning of earlier cases, and they should take potential decisions of this sort into account when adjudicating constitutional issues at the criminal trial and on appeal. Habeas *always* carries some cost to the value of finality, but it is no special affront to reexamine a state conviction under standards the state court could have anticipated.

How then are the "new rule" cases to be understood? As with the *Younger* rules, the effect of *Teague* and *Butler* is to restrict access to a federal forum and to leave many constitutional decisions in the hands of state courts. Given the inadequacy of the finality rationale for this new limit on habeas, the Court's avowed preference for state interests, and the disparity between federal and state courts, the "new rule" cases are best explained as an expression of the Court's desire to give a litigating edge to state governments in close constitutional cases.[202]

C. *The Persistence of the Parity Debate*

Notice how far we have come from the Legal Process model of adjudication and the reasons it countenances for assigning cases to federal or state courts. Allocation decisions now are based largely on substance. The notion

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[199] *Butler*, 110 S. Ct. at 1216; *Teague*, 489 U.S. at 301.

[200] *See Butler*, 110 S. Ct. at 1217.

[201] *Id.* at 1219, 1222 (1990) (Brennan, J., dissenting); *see also The Supreme Court, 1989 Term—Leading Cases*, 104 HARV. L. REV. 129, 308-19 (1990) (discussing recent Supreme Court decisions in habeas corpus cases).

[202] For more examples of the powerful and hidden role of substantive considerations in explaining recent Supreme Court cases on jurisdictional issues, see Wells, *The Impact of Substantive Interests on the Law of Federal Courts*, 30 WM. & MARY L. REV. 499, 519-34 (1989) (discussing eleventh amendment, Supreme Court review, standing, and *Younger* issues).

of the court as a neutral arbiter using reason to resolve the issues no longer corresponds to the reality of federal and state courts, if it ever did. The modern Supreme Court and the litigants who square off before it on jurisdictional issues take a strongly ideological approach to federal courts law, in which the characteristics of the judge may be central to the decision on the merits. That is why it is so important to both sides to win the forum fight.

Why is it that neither side discusses allocation cases in these terms? The answer has two parts. Tactically, rhetoric is more effective when one argues that its side should win for reasons related to the structure and proper operation of the federal system than when one admits to seeking a substantive advantage. Thus, litigants prefer to speak as though the court were a neutral arbiter and the issue were merely whether the state courts are as competent as the federal courts. The two sides of the access debate share an interest in maintaining the discussion on the high plane of principle. If either were to expose the other, it would reveal the vulnerability of its own position to the same criticism.

The more fundamental reason for the persistence of the parity debate is related to the jurisprudential premises shared by many participants on both sides and by the judges to whom they address their arguments. If one's starting point for the analysis of allocation issues is the Legal Process model of adjudication, then the judge is supposed to be strictly neutral. From this premise, one easily infers that any judge who allows personal characteristics to influence the outcome departs from the model, because he or she fails to rely solely on reasoned elaboration of the legal materials.

Occasionally, personal or institutional characteristics affect the judge's decision in a given case. If so, the court has failed to meet the Legal Process ideal and deserves the sort of criticism Henry Hart leveled at the Supreme Court for its reliance on intuition over reason in deciding cases.[203] In this view, it would be wrong to turn the model upside down and to treat systematic differences between state and federal judges as a proper basis for the allocation decision, rather than as a blot on the adjudicatory ideal. Basing jurisdictional rules on the desire of one side or the other to exploit such characteristics contradicts the Legal Process criteria for adjudication. No matter how powerful the explanatory force of the substantive thesis, we cannot bring ourselves to embrace openly an approach to allocation issues that seems to contradict one of our deeply held beliefs about the essential requisites of the legal order.[204]

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[203] Hart, *supra* note 11.

[204] Are we left with a choice between clinging to an unrealistic ideal of adjudication, to which courts and litigants pay only lip service, and affirming that adjudication of close cases is nothing more than the judge's imposition of personal opinion? I do not think so. It is not necessary to embrace the whole Legal Process theory of law in order to maintain that judges are bound by legal materials, such as the principles and policies to which Hart and Sacks advert. One may find a significant political component in the resolution of controversial questions without suggesting that adjudication is nothing but politics.

CONCLUSION

Driven by the need to rebut the Realist threat to the legitimacy of judicial creativity, the Legal Process theorists constructed an unrealistic model of the judge. The ideal Legal Process judge brings nothing to the task of adjudication except an ability to reason. The judge suppresses background, emotions, opinions, and any habits of mind absorbed from the milieu in which he or she works. The problem with the Legal Process model of adjudication lies in its recognition of only two possible characterizations of the judges' work: either judges must derive their judgments solely by reasoned deliberation from the legal materials, or else they fail to fulfill their judicial duty. This account of adjudication leaves no room for the judge who fairly considers all the legal materials and scrupulously avoids bias, but who brings to the job personal qualities acquired in part from the institutional features of the court. This should not suggest that Legal Process theorists were unaware of

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Judges may act within the constraints of law when they draw on their own experiences, attitudes, and values to decide such cases.

Consider, for example, Ronald Dworkin's theory of law. Dworkin, a successor of the Legal Process school, maintains that judges differ from legislators in that they are constrained by principle, R. DWORKIN, TAKING RIGHTS SERIOUSLY 82-84 (1977), or "integrity," R. DWORKIN, LAW'S EMPIRE 164-66, 225-75 (1986). *See* Brussack, *The Second Labor of Hercules: A Review of Ronald Dworkin's Law's Empire*, 23 GA. L. REV. 1129, 1131-32 (1989). Unlike the Legal Process school, however, he does not view reason as the sole source of judicial creativity. Dworkin gives the judge's convictions about substantive ends a central role in the adjudication of hard cases. R. DWORKIN, LAW'S EMPIRE *supra*, at 99, 247-49, 256, 258, 260, 366-69, 374, 378, 411; R. DWORKIN, A MATTER OF PRINCIPLE 329 (1985); Dworkin, *"Natural Law" Revisited*, 34 FLA. L. REV. 165, 169-73 (1982); *see* Brussack, *supra*, at 1129-30; *see also* Note, *Dworkin and Subjectivity in Legal Interpretation*, 40 STAN. L. REV. 1517, 1530-39 (1988). So, for example, he defends *Brown v. Board of Education* against process-oriented attacks like Wechsler's by invoking a substantive value: "America's growing sense that racial segregation was wrong in principle, because it was incompatible with decency to treat one race as inherently inferior to another." R. DWORKIN, LAW'S EMPIRE, *supra*, at 388.

Dworkin rarely addresses the problem of different judges bringing different sets of substantive values to the resolution of concrete cases, because he constructs a mythical, all-knowing judge, a famous "Hercules", to illustrate the operation of his theory. It seems entirely in keeping with the theory, however, for real-world choices on allocating cases between federal and state courts to take into account the attributes of the decisionmaker, after ascertaining that either choice would be constitutionally acceptable. Certainly, Dworkin recognizes that judges will diverge in the values they bring to adjudication. For example, he states that "a constitutional theory requires . . . judgments about political and moral philosophy, and Hercules' judgments will inevitably differ from those other judges would make." R. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra*, at 117; *see also* R. DWORKIN, LAW'S EMPIRE, *supra*, at 239, 250, 256, 334; R. DWORKIN, A MATTER OF PRINCIPLE, *supra*, at 329 ("[J]udges must decide which of . . . two competing justifications [of a statute] is superior as a matter of political morality, and apply the statute so as to further tht justification. Different judges, who disagree about morality, will therefore disagree about the statute.").

the artificiality of the standard they set. Rather, they seem to have viewed the intrusion of a judges' personal attitudes into their judicial work as departures, however inevitable, from the ideal of a disinterested judiciary.[205]

Starting from this model of adjudication, and writing in an era of minimal conflict between federal courts and state governments, Henry Hart and Herbert Wechsler constructed a theory of federal courts law based on such goals as respect for institutional competence, avoidance of friction, and efficient administration of justice. Their framework served us well for decades, even as its premises began to collapse. But their approach to the area is inadequate today, and the increasingly sterile debate over parity is a symptom of its failure. One cannot fully and accurately explain the contemporary law of federal courts, or argue persuasively about what the rules should be and why, without acknowledging the systemic disparity between federal and state judges and the importance of substantive considerations in the resolution of jurisdictional issues.

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[205] *See, e.g.*, FELIX FRANKFURTER ON THE SUPREME COURT, *supra* note 10. Frankfurter acknowledges that "judges, in lively controversies, are 'more or less prejudiced.' " *Id.* at 78 (quoting an unnamed source). But he goes on to state that "the differences between the 'more or less' are the triumphs of disinterestedness, they are the aspirations we call justice." *Id.* Moreover, the duty of a judge who is conscious of "potential prejudice" is to suppress its influence. *Id.*