

**How *Great* Judges Think:
Judges Richard Posner,
Henry Friendly, and Roger Traynor on
Judicial Lawmaking**

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INTRODUCTION

How do judges think? Do they think like umpires calling balls and strikes as Chief Justice Roberts famously suggested in his confirmation hearings?¹ Are they formalists, originalists, or textualists? Or do they—or should they, if they are not presently doing so—decide cases based on comprehensive moral or constitutional theories as many of today’s well-known constitutional theorists insist? Judge Richard Posner says they are none of these things.

Judge Posner’s 2008 book, *How Judges Think*, presents “a positive theory of judicial decision making”² in what Judge Posner calls “the open area,” the area where conventional legal materials—the Constitution, statutes, and prior decisions—“fail to generate acceptable answers to . . . legal questions that American judges are required to decide.”³ In the past, Posner’s jurisprudential views have

† Professor of Law, University of San Diego School of Law. Many students provided excellent research assistance on aspects of this Article over a number of years; especially valuable were the contributions of Paul Batcher, Emily Peters, Chandelle Konstanzer, Sierra Damm, and Shana Brown. Virginia Nolan, Neil Levy, Mike Rappaport, Miranda McGowan, and Janet Madden read and made valuable comments on all or parts of drafts of this article. I am also grateful for the generous research support of the University of San Diego School of Law. Amanda Carden of the *Buffalo Law Review* provided insightful editing of the manuscript.

1. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

2. RICHARD A. POSNER, *HOW JUDGES THINK* 369 (2008).

3. *See id.* at 9. Judge Posner uses the term “judicial decision making,” whereas Justice Traynor refers to “judicial lawmaking.” *See, e.g.*, Roger J. Traynor, *Comment on Courts and Lawmaking*, in *LEGAL INSTITUTIONS TODAY AND TOMORROW* (Monrad G. Paulsen ed., 1959). In this Article I have, at most

been controversial. Critics have been inflamed, for example, by what they claim is his “refusal to engage questions of democratic legitimacy” and their fear that his legal pragmatism “will lead inevitably to judicial activism.”⁴ *How Judges Think* will undoubtedly add fuel to the fire.

When the conventional legal materials fall short, Posner argues, “judges perforce have occasional—indeed rather frequent—recourse to other sources of judgment, including their own political opinions or policy judgments, even their idiosyncrasies.”⁵ At these times, “judges in our system are legislators as well as adjudicators.”⁶ Pragmatism, Posner writes, is “an important component of American judicial behavior,” and a “pragmatic judge assesses the consequences of judicial decisions for their bearing on sound policy as he conceives it.”⁷ The “essential datum,” we are told, is “that there is a pronounced political element in the decisions of American judges.”⁸ And this is not necessarily a bad thing. Indeed, according to Posner, it is an unavoidable consequence of the structure of the American legal system, and it is a fact supported by attitudinal studies of political scientists and others.⁹

Is this an accurate account of judicial decision making? Certainly it is not how many academics think judges think. And Posner recognizes this. In a trilogy of books in the 1990s,¹⁰ and now with *How Judges Think*, he has taken

times, used the terminology preferred by the judge about whom I am writing. In writing about Judge Friendly, I use the term “judicial lawmaking.”

4. Jeffrey Rosen, *Overcoming Posner*, 105 YALE L.J. 581, 595 (1995) (reviewing RICHARD A. POSNER, *OVERCOMING LAW* (1995)).

5. POSNER, *supra* note 2, at 9.

6. *Id.* at 118.

7. *Id.* at 13.

8. *Id.* at 369. “Political,” however, “need not . . . denote crass, partisan political commitment.” *Id.* More usefully, it can be seen to refer to “a general political orientation, or in short an ‘ideology’—a body of more or less coherent bedrock beliefs about social, economic, and political questions, a worldview that shape[s] . . . answers to . . . questions when they [arise] in cases in the open area.” *Id.* at 94.

9. *Id.* at 20.

10. RICHARD A. POSNER, *OVERCOMING LAW* (1995); RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999) [hereinafter POSNER, *PROBLEMATICS*]; RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990).

them on. In 1999, in *The Problematics of Moral and Legal Theory*, Posner took aim at the constitutional and jurisprudential theories that today are so popular among academics.¹¹ *How Judges Think* targets legal formalism, or the term Posner prefers, legalism,¹² one version of which is originalism.¹³ Certainly these academics do not agree with Posner's positive description of how judges think. Posner's response is that these academics "have (or express) little understanding of how cases are actually decided, where the judges who decided a case were coming from, and what *really* made them alter existing doctrine as distinct from what they said made them change it."¹⁴

This Article tests Judge Posner's positive theory of judicial decision making by examining a source Posner himself suggests when he writes that we could learn much from reading what judges have written about judging, which he laments is a "neglected literature"¹⁵ despite being written by some of the ablest judges in our history, including Holmes, Cardozo, Roger Traynor, and Henry Friendly.¹⁶ The Article examines the views of Justice Traynor and Judge Friendly to test Posner's account of how

11. See POSNER, *PROBLEMATICS*, *supra* note 10, at x-xi. Scholars who are part of the critical legal studies movement also take aim at these theories. See, e.g., DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE)* (1997). They often part company with Posner, however, in their skepticism over the ability of policy analysis to "bridge the gap between the formal materials of the law and a sensible outcome" in difficult cases. POSNER, *PROBLEMATICS*, *supra* note 10, at 273. Critical approaches to law have been extended to include "outsider" perspectives, such as race and gender perspectives, and applied to specific substantive areas of law. See, e.g., ROY L. BROOKS, *CRITICAL PROCEDURE* (1998).

12. A legalist judge would "not legislate, [or] exercise discretion . . . , [would] have no truck with policy, and [would] not look outside conventional legal texts—mainly statutes, constitutional provisions, and precedents . . . for guidance in deciding new cases." POSNER, *supra* note 2, at 7-8.

13. Although variants exist, originalism can usefully be defined as the "view that, at least where an issue is not irrevocably settled by precedent, cases should be decided on the basis of the original meaning at the time a constitutional provision was adopted." DANIEL A. FARBER & SUZANNA SHERRY, *JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW* xi (2009); see ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3-48 (1997).

14. POSNER, *supra* note 2, at 219.

15. *Id.* at 256.

16. *Id.* at 64, 256.

judges think.¹⁷ Judge Posner writes that his book “emphasizes positive rather than normative analysis—what judges do, not what they should do—[although it does] discuss normative issues.”¹⁸ This Article examines what Traynor and Friendly said about what they were doing but also what they said about what judges should do. Thus it is descriptive of the views of these judges, including their normative views, which I have long shared.¹⁹

I will focus primarily on the extrajudicial writings of Justice Traynor, at times drawing on his judicial opinions,²⁰ and the tort decisions of his court, to illustrate his views. I argue that these extrajudicial writings, which appeared over the span of two decades, from 1956 to 1977, confirm Posner’s positive theory, as does an important 1978 article by Judge Friendly, aptly titled *The Courts and Social Policy: Substance and Procedure*.²¹

Judge Posner has described Friendly as “the greatest federal appellate judge of his time—in analytic power,

17. Others, including Judge Posner, have written about Justice Cardozo, who in his own writings often spoke of the “legislative” role of the judge. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 98, 112-13, 170-74 (1921). In *The Nature of the Judicial Process*, a collection of Cardozo’s Storrs Lectures, Lecture III is entitled *The Method of Sociology. The Judge as a Legislator*. *Id.* at 98; see also RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 28 (1990) (“[*The Nature of the Judicial Process* is] the fullest statement of a jurisprudence of pragmatism that we possess.”).

18. POSNER, *supra* note 2, at 6.

19. Edmund Ursin, *Judicial Creativity and Tort Law*, 49 GEO. WASH. L. REV. 229, 230-32 (1981) [hereinafter Ursin, *Judicial Creativity*] (discussing Traynor’s opposition to legal process jurisprudence and tracing his views to those of Holmes). For a substantive application of this perspective, see Edmund Ursin, *Strict Liability for Defective Business Premises—One Step Beyond Rowland and Greenman*, 22 UCLA L. REV. 820 (1975).

20. Traynor was appointed to the California Supreme Court in 1940, and was elevated to the position of Chief Justice in 1964. He served in that position until his retirement in 1970. In this Article I will refer to Traynor as “Justice Traynor” because much, although certainly not all, of his pioneering work appeared before he assumed the position as Chief Justice and because his influence on the substance of law and the process of judicial lawmaking is attributable to the power of his intellect as well as the qualities referred to by Judge Friendly (see *infra* note 23 and accompanying text), not which title he held while serving on the court.

21. Henry J. Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 21 (1978).

memory, and application perhaps of any time.”²² Similar qualities led Friendly to describe Traynor as the “ablest judge of his generation,” and to write that “no other judge of his generation matched Traynor’s combination of comprehensive scholarship, sense for the ‘right’ result, craftsmanship, and versatility.”²³ The views of these great judges should count for something if one is interested in knowing how judges think.

In *How Judges Think*, Judge Posner writes that “norms govern judicial decisions” just as they “govern the various art genres.” In both art and judging, however, “norms are contestable,”²⁴ and “[r]apid norm shifts are possible . . . because the products of these activities cannot be evaluated objectively.”²⁵ In law, it is the “innovative judges [who] challenge the accepted standards of their art[,] . . . [and these] innovators have the greater influence on the evolution of their field.”²⁶ Posner points to Holmes, Brandeis, Cardozo, and Learned Hand as “examples of judges who succeeded by their example in altering the norms of opinion writing.”²⁷ This Article establishes not only that Traynor’s views on judicial decision making confirm Posner’s positive account, but that Traynor’s name should be added to the list of judges who succeeded in altering the norms of opinion writing.

When Justice Traynor took the bench in 1940, mainstream legal thinkers would have vehemently disputed Posner’s account of judicial decision making. Formalism reigned, and the generally accepted view was that a judge “used principles deduced from the cases and weighed competing interests as had the judges who had gone before him.”²⁸ He did not “allow . . . private opinions of policy to

22. Richard A. Posner, Tribute, *In Memoriam: Henry J. Friendly*, 99 HARV. L. REV. 1709, 1724 (1986).

23. Henry J. Friendly, Tribute, *Ablest Judge of His Generation*, 71 CAL. L. REV. 1039, 1039-40 (1983).

24. POSNER, *supra* note 2, at 63.

25. *Id.* at 64.

26. *Id.* at 12-13.

27. *Id.* at 63.

28. Warren A. Seavey, Tribute, *Mr. Justice Cardozo and the Law of Torts*, 52 HARV. L. REV. 372, 373 (1939); 39 COLUM. L. REV. 20, 21 (1939); 48 YALE L.J. 390, 391 (1939) [hereinafter cited to *Harvard Law Review*].

sway him from the lines into which the law had been moulded.”²⁹ In particular, consideration of the “ability to spread the loss” was beyond the pale, thought of as “sentimental justice,” as opposed to “legal justice”;³⁰ and the existence of liability insurance was said to have no role in decision making. In tort law, the general principle from which subsidiary rules were to be deduced was that “one is not liable . . . without legal fault.”³¹

Justice Traynor’s 1944 concurring opinion in *Escola v. Coca Cola Bottling Co.* defied these formalist norms, proposing the doctrine of strict products liability based in part on the fact that “the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.”³² Traynor’s *Escola* proposal also ran afoul of the teachings of the legal process school that came to dominate mainstream academic thought in the 1950s and 1960s.³³ In contrast to Posner, who finds a “pronounced political element in the decisions of American judges,”³⁴ legal process scholars called on courts to avoid lawmaking that could be characterized as political or non-neutral.³⁵ In tort law the avowed purpose was to “offer[] some reassurance against the specter of runaway social engineering with ill-considered emphasis on risk-spreading capacity.”³⁶

The opposition of legal process scholars to the judicial adoption of what became known as the theory of enterprise liability³⁷ should cast suspicion on the widely held view that

29. Seavey, *supra* note 28, at 373.

30. *Id.*

31. Warren A. Seavey, *Principles of Torts*, 56 HARV. L. REV. 72, 85-86 (1942).

32. 150 P.2d 436, 440-41 (Cal. 1944) (Traynor, J., concurring).

33. See Ursin, *Judicial Creativity*, *supra* note 19, at 289-304.

34. POSNER, *supra* note 2, at 369.

35. See, e.g., ROBERT E. KEETON, VENTURING TO DO JUSTICE: REFORMING PRIVATE LAW 43 (1969); Ursin, *Judicial Creativity*, *supra* note 19, at 234-43; Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

36. Robert E. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401, 444 (1959).

37. The doctrine of strict products liability was one aspect of the enterprise liability theory which also included no-fault compensation plans, expansive negligence doctrines, and damages reform. See VIRGINIA E. NOLAN & EDMUND

Justice Traynor was a “firm advocate of the [legal] process theory” of judicial lawmaking.³⁸ In fact, this Article’s examination of Traynor’s extrajudicial writings reveals that he wrote in opposition to the restrictive view of judicial lawmaking of the legal process scholars.

In a series of articles beginning in 1956, two years after *Brown v. Board of Education*,³⁹ and spanning two decades, Justice Traynor laid out a jurisprudential perspective that foreshadowed Posner’s pragmatic jurisprudence and that would guide his court. In contrast to formalists who denied that judges are lawmakers and legal process scholars who offered formulas or “magic words” such as “neutral

URSIN, UNDERSTANDING ENTERPRISE LIABILITY: RETHINKING TORT REFORM FOR THE TWENTY-FIRST CENTURY (1995).

38. G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 245 (3d ed. 2007) [hereinafter WHITE, JUDICIAL TRADITION]; see also BEN FIELD, ACTIVISM IN PURSUIT OF THE PUBLIC INTEREST: THE JURISPRUDENCE OF CHIEF JUSTICE ROGER J. TRAYNOR xiv, 11, 15 (2003) (“White . . . has written the most thorough analysis of Traynor’s judicial thought to date”); James R. McCall, *Thoughts About Roger Traynor and Learned Hand—A Qualifying Response to Professor Konefsky*, 65 U. CIN. L. REV. 1243, 1246 (1997) (“Traynor . . . played [a] very significant role[] in establishing the propriety of process theory—serving . . . as [an] exemplar[] of the component ideas of process theory.”); John W. Poulos, *The Judicial Philosophy of Roger Traynor*, 46 HASTINGS L.J. 1643, 1675 n.145 (1995). Each of these scholars, however, acknowledges tension between Traynor’s view that a basic aspect of judicial decision making involved making choices between conflicting social values or policies and legal process scholars’ emphasis on durable generalized rules. See FIELD, *supra*, at 122; WHITE, JUDICIAL TRADITION, *supra*, at 296; Poulos, *supra*, at 1692. For example, despite characterizing Traynor as “a firm advocate of process theory,” White writes that Traynor “nonetheless saw its limitations as a vehicle for promoting the values of fairness and justice.” WHITE, JUDICIAL TRADITION, *supra*, at 245. In White’s view, Traynor responded to these limitations by emphasizing “rationality [as] the essence of judging.” *Id.*; see also G. EDWARD WHITE, TORT LAW IN AMERICA 188, 208 (expanded ed. 2003) (writing of Traynor’s “activist theory of judging” and the policymaking role he assigned to judges in tort cases, and characterizing Traynor “as in some respects, the state court equivalent of a ‘Warren Court’ judge”). James McCall has written that Judge Posner’s call “for a renewal of appreciation and study of the pragmatic perspective in judging . . . is tantamount to a request for . . . renewal of [legal] process theory.” McCall, *supra*, at 1246 (footnote omitted). This Article, however, demonstrates that Posner, like Traynor, rejects the legal process perspective on judicial decision making. Likewise, it is a mistake to link Judge Friendly to legal process thinking.

39. 347 U.S. 483 (1954).

principles” to *limit* judicial lawmaking,⁴⁰ Traynor wrote that “[t]he real concern [was] not the remote possibility of too many creative opinions but their continuing scarcity.”⁴¹ In his view, “[t]he growth of the law, far from being unduly accelerated by judicial boldness, is unduly hampered by judicial lethargy that masks itself as judicial dignity with the tacit approval of an equally lethargic bar.”⁴² From this perspective, Traynor concluded that “judicial responsibility connotes . . . the recurring formulation of new rules to supplement or displace the old [and the] choice of one policy over another.”⁴³

Beginning in the late 1950s, the Traynor view prevailed, and Traynor led his court as it became the leading state supreme court in the nation.⁴⁴ In 1974 Grant Gilmore wrote that “during the past quarter of a century the California Supreme Court ha[d] unquestionably been the most innovative court in the country.”⁴⁵ The consequence of that innovation, the editors of the *Harvard Law Review* wrote in 1970, was a “dramatic renaissance of the common law.”⁴⁶ That renaissance was made possible by the rejection by Traynor and his court of both formalism

40. Roger J. Traynor, *No Magic Words Could Do It Justice*, 49 CAL. L. REV. 615, 616, 623-24 (1961).

41. Traynor, *supra* note 3, at 52.

42. *Id.*

43. R. J. Traynor, *The Courts: Interweavers in the Reformation of Law*, 32 SASK. L. REV. 201, 213 (1967).

44. Measured by decisions that have been “followed,” as that term is employed by Shepard’s Citations Service, “over the course of several decades, the California Supreme Court has been the most followed state high court, and that trend continues.” Jake Dear & Edward W. Jessen, “*Followed Rates*” and the *Leading State Cases, 1940-2005*, 41 U.C. DAVIS L. REV. 683, 683, 710 (2007). Five of the six *most* followed of the “most followed” decisions are tort decisions rendered since 1960. *See id.* at 708-09.

45. GRANT GILMORE, *THE DEATH OF CONTRACT* 91 (1974). In holding California’s anti-miscegenation legislation unconstitutional, Traynor, writing for his court, innovated where even the Warren Court hesitated. *Compare* *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948) (holding California’s anti-miscegenation legislation unconstitutional), *with* *Loving v. Virginia*, 388 U.S. 1 (1967) (holding Virginia’s anti-miscegenation legislations unconstitutional), *and* *Naim v. Naim*, 350 U.S. 891 (1955) (dismissing appeal from Virginia’s nullification of marriage on anti-miscegenation grounds).

46. 83 HARV. L. REV. 1769, 1769 (1970).

and the teachings of the legal process school—and an embrace of a competing view of the lawmaking role of courts.⁴⁷

Traynor's position in *Escola* was written into law in 1963 with an opinion by Traynor for a unanimous California Supreme Court,⁴⁸ and that doctrine is now firmly established in American tort law.⁴⁹ Similarly, for four decades under both a liberal and later a conservative California Supreme Court, the “availability, cost, and prevalence of insurance”⁵⁰—as well as a variety of other policy considerations—have been fixtures in California tort law.⁵¹ Under Justice Traynor's guidance, the California Supreme Court, whatever its ideological orientation, became an occasional—and in some fields frequent—legislator, with policy at the heart of its legislating, demonstrating a dramatic shift in the norms of opinion writing in California and across the nation—and confirming Judge Posner's positive theoretic account of judicial behavior.

Confirmation can also be found in the jurisprudence of Judge Friendly. In his previously mentioned 1978 *Courts and Social Policy: Substance and Procedure*⁵² article, which was published just three years before Posner took the bench, Friendly surveyed the jurisprudential controversies of the previous quarter century including the judicial adoption of strict products liability, the legal process school, *Brown v. Board of Education*,⁵³ and *Roe v. Wade*,⁵⁴ while also commenting on Ronald Dworkin, who at that date was

47. Ursin, *Judicial Creativity*, *supra* note 19, at 287-308 (comparing Traynor with the legal process school); *see also* Neil M. Levy & Edmund Ursin, *Tort Law in California: At the Crossroads*, 67 CAL. L. REV. 497 (1979) (analyzing Traynor-era tort law).

48. *Greenman v. Yuba Power Prod., Inc.*, 377 P.2d 897 (Cal. 1963).

49. WILLIAM O. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 653-54 (4th ed. 1971).

50. *Rowland v. Christian*, 443 P.2d 561, 564 (Cal. 1968).

51. *See* Edmund Ursin & John N. Carter, *Clarifying Duty: California's No-Duty-for-Sports Regime*, 45 SAN DIEGO L. REV. 383, 395-96 (2008); *see also* Levy & Ursin, *supra* note 47, at 500.

52. Friendly, *supra* note 21.

53. 347 U.S. 483 (1954).

54. 410 U.S. 113 (1973).

in the vanguard of the next generation of theorists of whom Posner would write critically. In answer to the question whether courts should decide issues of social policy, Friendly wrote, "The courts must address themselves in some instances to issues of social policy, not because this is particularly desirable, but because often there is no feasible alternative."⁵⁵

This Article proceeds as follows. In the next part, Part I, the Article examines in some detail Judge Posner's positive account of judicial decision making and his critique of contemporary versions of legal formalist, including originalist, accounts of judicial decision making. In Part II, I place Justice Traynor in historical perspective. I explain that Traynor's view of the lawmaking role of courts follows the path laid out by Oliver Wendell Holmes and thus is also aligned with the jurisprudence of Lemuel Shaw, who served as Chief Judge of the Supreme Judicial Court of Massachusetts from 1830 to 1860. This Part situates Traynor in the context of formalist, Legal Realist, and legal process scholars who were his contemporaries, as well as the competing tort theories of his era. Following Holmes's lead, Traynor and the Legal Realists saw a general need for courts to defer to legislative judgments in constitutional adjudication. Legal process scholars also shared this view; but, unlike Justice Traynor and the Legal Realists, legal process writers strayed from the Holmesian jurisprudential path by proposing formulas to limit judicial lawmaking—and applying these formulas not only to constitutional decisions but also to common law subjects. These were the formulas that would have blocked courts from adopting Justice Traynor's *Escola* proposal, which reflected the earlier scholarship of Legal Realists such as Leon Green and Karl Llewellyn.

Part III then examines what Justice Traynor had to say about judicial decision making, contrasting his jurisprudential views with the views of formalist and legal process writers. I explain how Traynor's jurisprudential views combined with his tort theoretic perspective to guide his court as it left both formalist and legal process thinking behind on its way to creating the common law renaissance of which the *Harvard* editors wrote. This Part also draws attention to a striking parallel between Traynor and

55. Friendly, *supra* note 21, at 21.

Posner: Traynor wrote, and Posner writes, in opposition to the dominant jurisprudential movements of their respective eras—the legal process school in Traynor’s case, and the moral, constitutional, jurisprudential, and formalist (including originalist) theorists in Posner’s. This parallel is not coincidental: each is writing about judging from the vantage point of the real world of judging, not the academic ivory tower. Also writing from this perspective was Judge Friendly, whose 1978 article is the focus of Part IV. Friendly confirms a theme of this Article—that the leading academic theorists of the past half century have been out of touch with the reality of judicial lawmaking as it has been understood, and expressly articulated, by the great judges who have shaped our law.

Part V returns to Judge Posner, who was appointed to the bench three years after Friendly’s article appeared. It examines his early forays into jurisprudence and their relationship to *How Judges Think*. The Conclusion then summarizes the various themes of this Article and the jurisprudential perspective that Traynor, Friendly, and Posner have in common. The jurisprudential framework that these judges share, and that this Article examines, is not liberal or conservative—as can be seen in the vastly different ideologies of Traynor and Posner. And it is not original. It is the framework articulated by our greatest judge, Oliver Wendell Holmes. Judge Posner has expressly linked his views to Holmes, describing his 1999 book, *The Problematics of Moral and Legal Theory*, as “an extended homage to Holmes’s ideas.” The goal of that book, he wrote, was “to push the engine a little farther along.”⁵⁶ This Article demonstrates that Justice Traynor and Judge Friendly pushed the train along from Holmes to Posner.

I. JUDGE POSNER ON HOW JUDGES THINK

A. *The Judge as “Occasional Legislator”*

Judge Posner writes that American judges operate in a “dauntingly complex, uncertainty-riven legal system—featuring an antique constitution, an overlay of federal on state law, weak political parties, cumbersome and undisciplined legislatures, and executive-legislative tugs-of-

56. POSNER, *PROBLEMATICS*, *supra* note 10, at vii.

war.” As a consequence, “[m]any of the cases that arise . . . cannot be decided by the straight-forward application of a preexisting rule.”⁵⁷ A statute, the Constitution, or a judicial decision “is usually just a first cut at regulating the activities that fall within . . . the initial statement of a rule.”⁵⁸ The “subsequent refinement of the rule by judges, whether through interpretation of a legislative enactment or distinguishing of precedents, is aimed at fitting the rule to a particular situation.” This “is not an operation based on logic or the straightforward application of a rule to facts anticipated in the drafting of the rule.”⁵⁹

The consequence, Posner writes, is that American “judges have and exercise discretion. Especially if they are appellate judges, even intermediate ones, they are ‘occasional legislators.’”⁶⁰ They are not formalists—or “legalists,” the term Posner prefers “as it carries less baggage”—who “decide cases by applying preexisting rules, or in some versions of legalism, by employing allegedly distinctive modes of legal reasoning, such as legal reasoning by analogy.”⁶¹ At least that is true in important cases, for Posner notes that “[l]egalism drives most judicial decisions, though generally they are the less important ones for the development of legal doctrine or the impact on society.”⁶²

In previous work, in particular his 1999 book *The Problematics of Moral and Legal Theory*, Judge Posner has argued that when the materials of legalist decision making fall short, judges should engage in “pragmatic adjudication.”⁶³ Echoing Holmes’s famous “the life of the law is not logic but experience,”⁶⁴ Posner wrote in his 1999 book that judges thrust into “the area where the conventional sources of guidance run out . . . can do no better than to rely

57. POSNER, *supra* note 2, at 371.

58. *Id.*

59. *Id.*

60. *Id.* at 5.

61. *Id.* at 7.

62. *Id.* at 8.

63. POSNER, *PROBLEMATICS*, *supra* note 10, at 240-42.

64. OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (Mark DeWolfe Howe ed., 1963).

on notions of policy, common sense, personal and professional values, and intuition and opinion, including informed or crystallized public opinion.”⁶⁵ Such a judge is not “centrally concerned with securing consistency with past enactments.”⁶⁶ Rather, he would “always try to do the best [he] can do for the present and future . . . [;]” the chief concern is “producing the best results for the future.”⁶⁷

How Judges Think “emphasizes positive rather than normative analysis—what judges do, not what they should do,” although at times it “do[es] discuss normative issues.”⁶⁸ Posner writes that “[t]he word that best describes the average American judge at all levels of our judicial hierarchies and yields the greatest insight into his behavior is ‘pragmatist[,]’ [or] more precisely . . . ‘constrained pragmatist.’”⁶⁹ And the “core of legal pragmatism is pragmatic adjudication, and its core is heightened judicial concern for consequences and thus a disposition to base policy judgments on them rather than on conceptualisms and generalities.”⁷⁰

The “essential datum” at the root of Posner’s positive theory is “that there is a pronounced political element in the decisions of American judges, including federal trial and intermediate appellate judges and U.S. Supreme Court Justices.”⁷¹ This datum derives in part from attitudinal studies of political scientists and others that seek to explain judicial decisions by the political preferences judges bring to cases. “Most of the studies that try to test [this] theory infer judges’ political preferences from the political party of the President who appointed them, while recognizing that it is a crude proxy.”⁷² To say that political opinions influence judicial decision making is not to say, however, that partisan—Republican, Democratic—opinions are decisive. Political, in the sense Posner uses the word, refers to

65. POSNER, *PROBLEMATICS*, *supra* note 10, at viii.

66. *Id.* at 241.

67. *Id.*

68. *Id.* at 6.

69. *Id.* at 230.

70. *Id.* at 238.

71. *Id.* at 369.

72. *Id.* at 20.

“‘ideology’—a body of more or less coherent bedrock beliefs about social, economic, and political questions, a worldview that shape[s] . . . answers to . . . questions when they [arise] in the open area.”⁷³

“[E]ven a ‘politicized’ judiciary,” Posner writes, “is not usurpative in a society that is politically homogeneous. Law is shot through with political values, which when endorsed by the public at large provide a neutral background of assumptions and presuppositions rather than being a cockpit of contention.” He points out that “[t]hat which is unchallenged seems natural rather than political.” Today, “[t]his is the situation in large stretches of the common law. . . . Contract law, for example, is [shot through] with the values of capitalism, a political theory and practice.”⁷⁴

Ideology, however, “is not the only recourse of judges in the open area.”⁷⁵ Other factors in judicial decision making include “personality traits, or temperament . . . , which are more or less innate personal characteristics.” These characteristics include “personal background characteristics, such as race and sex, and also personal and professional experience.” Also “strategic considerations” and “[i]nstitutional factors—such as how clear or unclear the law is . . . and the structure of judicial promotion— . . . influence judicial behavior.”⁷⁶

Emotion also plays a role in judicial decision making. And it is not “always an illegitimate or even bad ground for judicial decision.” A “judge has to decide the case even if unable, because he is facing irreducible uncertainty, to reach a decision by algorithmic means.”⁷⁷ Similarly “[i]ntuition plays a major role in judicial as in most decision making.”⁷⁸ It “is best understood as a capability for reaching down into a subconscious repository of knowledge acquired from one’s education and particularly one’s experiences.”⁷⁹

73. *Id.* at 94.

74. *Id.* at 235.

75. *Id.* at 94.

76. *Id.* at 10 (italics omitted).

77. *Id.* at 105.

78. *Id.* at 107.

79. *Id.*

These “political and personal factors create preconceptions, often unconscious, that a judge brings to a case. This can explain how judges can think their decisions uninflected by political considerations but neutral observers find otherwise.”⁸⁰ It is “impossible as a psychological matter to purge ourselves of [preconceptions],” and it “would be irrational to do so, since preconceptions impound information, though it is not always accurate.”⁸¹

B. *Constraints on Judicial Decision Making*

1. *Legalism’s (Including Originalism’s) Failure as Constraint.* Legalism might be thought to provide a constraint on judges’ decision making, or at least that is what its advocates claim. Posner thinks not, and one goal of *How Judges Think* is to drive a stake through the heart of legalism—one version of which is originalism. The legalist’s judges “do not legislate, do not exercise discretion other than in ministerial matters (such as scheduling), have no truck with policy, and do not look outside conventional legal texts—mainly statutes, constitutional provisions, and precedents (authoritative judicial decisions)—for guidance in deciding new cases.”⁸² To legalists “the law is an autonomous domain of knowledge and technique.”⁸³ Legalists respond to the fact that many cases cannot be decided by the straight-forward application of a preexisting rule by offering “tools for managing uncertainty and producing what legalists regard as objective decisions.”⁸⁴ These tools include “reasoning by analogy and strictly interpreting statutes and constitutions.”⁸⁵ These, however, “come up short: the first is empty and the second has, despite appearances, a large discretionary element.”⁸⁶ Moreover, “[l]egalism fails at a deeper level to refute the hypothesis that personal and political leanings influence

80. *Id.* at 11 (italics omitted).

81. *Id.* at 67.

82. *Id.* at 7-8.

83. *Id.* at 8.

84. *Id.* at 13.

85. *Id.* at 12.

86. *Id.*

judicial decisions.”⁸⁷ Legalist techniques, such as statutory and constitutional literalism, the preference for rules over standards, and reasoning by analogy, all “require legislative judgments and thus the exercise of discretion.” The choice of a rule over a standard, for example, “depends on a policy judgment rather than an exercise of logic.”⁸⁸

In fact, “the currently most influential incantations of legalism [have been] guided by a political judgment: that there are too many legally enforceable rights.”⁸⁹ The contemporary “exaltation of legalism is to a significant extent a reaction by politically conservative legal thinkers, including a number of prominent judges, to the expansions of rights and liability.”⁹⁰ These expansions include “the rights of tort (including civil rights) plaintiffs, . . . prisoners, consumers, workers, and criminal defendants.” These expansions were brought about “by the judicial activists of the Warren Court of the 1960s and their successors who, continuing into the 1970s, issued further activist decisions, notably *Roe v. Wade*, and by their counterparts in the state courts.”⁹¹

The claim that courts “shifted the balance too far in favor of rights—also that they are continuing to do so in cases involving capital punishment and homosexual rights—is a perfectly reasonable claim, but it is political.” Conservatives, however, “have discovered that it is rhetorically more effective to call activist liberal decisions ‘lawless’ than to call them ‘too liberal.’”⁹²

Legalists “give controlling weight to an arbitrary subset of institutional consequences of judicial decisions.”⁹³ “They are hypersensitive to the uncertainty that can result from loose construction of statutes and contracts, from seeking the purpose of a rule to determine the rule’s scope and application, from salting doctrine with policy, from

87. *Id.* at 371.

88. *Id.* at 179.

89. *Id.* at 372.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 239.

aggressive distinguishing and overruling of precedents.”⁹⁴ Pragmatists, however, “do not see how so one-sided an emphasis on possible negative consequences of pragmatic judging can be sensible.”⁹⁵

Moreover, Posner notes that “[s]o pervasive is pragmatic thinking in American political culture that legalists are driven to defend the blinkered results to which their methodology of strict rules and literal interpretations tends as yielding better consequences” than a pragmatic approach to judicial decision making.⁹⁶ According to legalists, “adjudication should be backward-looking, [and] judges should not try to keep law up to date but should leave to legislatures in the case of statutory law, and to the amendment process in the case of constitutional law, any needed updating of statutes or the Constitution.”⁹⁷ Legalists, however, “do not back up their argument with facts concerning the ability of legislatures to update legislation in the face of inertial forces built into the legislative process, or the feasibility of a program of continuously amending the Constitution to keep it up to date.” Similarly, they make no attempt “to show what the state of the law, and of the society, would be today had American judges, beginning with the great loose constructionist John Marshall, consistently adhered to the legalist creed.”⁹⁸

In Posner’s view pragmatic adjudication is unavoidable; “there is no alternative . . . in twenty-first century [America].”⁹⁹ Numerous features of the structure of the American legal system “create an immense irreducible domain of discretionary lawmaking.” These features include “America’s judicially enforceable constitution [and] its common law heritage.” Also, American legislatures are “undisciplined[,] a product in part of the weakness of political parties in the United States and in part of bicameralism and the presidential veto, which together make it extremely difficult to enact legislation unless it is

94. *Id.*

95. *Id.*

96. *Id.* at 239-40.

97. *Id.* at 240.

98. *Id.*

99. *Id.* at 255.

left vague." In addition, there is "the sheer complexity of the American legal system (the federal constitution layered over federal statutes and the whole layered over the legal systems of the 50 different states)." Compounded with all of these things is "heterogeneity of the judges, and the related fact that judging in the United States is not a career but a position to which middle-aged lawyers are appointed after a career as a practicing lawyer, professor, or prosecutor." Also, "many judges owe their appointments to political connections, to being on the outskirts of politics. Legalism is not a straitjacket that can be put on these worldly judges." Moreover, legalism "has no resources to guide the making of new law as distinct from the ascertainment of the old, for it denies that lawmaking is a legitimate task of judges."¹⁰⁰

2. *Limited Constraints.* Legislative enactments reflect preferences of legislators, and "those preferences are formed (even setting aside pressure from constituents) . . . by each legislator's values, temperament, life experiences, and conception of the scope and limits of the legislative function."¹⁰¹ The same is true "in the case of the judge as legislator." One should not ignore, however, "the possibility of weighing consequences in a dispassionate and even predictable manner in areas of consensus." Similarly, one should not ignore "the material, psychological, and institutional constraints on pragmatic . . . judges." Judges, for example, "are subject to removal from office for dereliction of duty." Also, their decisions "can be nullified by legislative or constitutional amendment[,] [and] the process of selecting judges tends to exclude those who are most power hungry, the most 'political,' the farthest out of the mainstream." In addition, "the system of compensation and the rules concerning conflicts of interest [assure that] . . . [i]f the judge is a legislator, at least he is a disinterested one." "The good pragmatist judge . . . is a constrained pragmatist[,] . . . operat[ing] under both internal and external constraints[,] . . . [as do] legalist judges."¹⁰² He, like other judges, "must play by the rules of the judicial game,

100. *Id.*; see also Elizabeth N. Carter, *Radicals in Robes, Professors in Tweed: A Law Student's Critique* (on file with author) (contrasting legalism with pragmatism and Cass Sunstein's "minimalism").

101. POSNER, *supra* note 2, at 253.

102. *Id.*

. . . [which do not] permit the consideration of certain types of consequence[s].”¹⁰³

The adversary system also serves as a check on judicial decision making. It “forces a judge to give a hearing to someone who will challenge the judge’s intuition.”¹⁰⁴ Judges explain their decisions in opinions, and this convention obscures the “role of the unconscious in judicial decision making.”¹⁰⁵ “The judicial opinion itself can best be understood as an attempt to explain how the decision, even if (as is most likely) arrived at on the basis of intuition, could have been arrived at on the basis of logical step-by-step reasoning.” The opinion thus serves as “a check on the errors to which intuitive reasoning is prone because of its compressed, inarticulate character.”¹⁰⁶ Also serving as a check on judicial decision making are “such institutional concerns of a sort especially prized by legalists as the feasibility of a particular judicial intervention given the limited knowledge and powers of courts, or the effect on the law’s stability and a court’s standing of too cavalier a view of precedent and statutory text.”¹⁰⁷

All but twelve states use some form of election to choose judges, who must also stand for reelection.¹⁰⁸ Posner writes that this is a form of performance review and is likely to make these judges “more sensitive to public opinion than a judge whose tenure does not depend on the electorate’s whim.”¹⁰⁹ A judge or judge aspirant “also [must] be able to raise money to conduct his electoral campaign . . . mainly [from] lawyers who litigate in the court to which the candidate aspires.”¹¹⁰ This has a potential “distorting effect of lawyers’ campaign contributions on the evolution of law.”¹¹¹ It also “curtails the field of judicial selection [since] [m]ost people are temperamentally unsuited for electoral

103. *Id.* at 253-54.

104. *Id.* at 107.

105. *Id.* at 110.

106. *Id.*

107. *Id.* at 80.

108. *Id.* at 134-35.

109. *Id.* at 135.

110. *Id.*

111. *Id.* at 137.

politics and in any event not good at it, though they may have just the suite of abilities required in an excellent judge.”¹¹²

3. *The Norms of Judging as a (Contestable) Constraint.* Posner writes that “the biggest internal constraints on judging,” for most judges, “are, first, the desire for self respect and respect from other judges and legal professionals generally, which a judge earns by being a good judge, and, second (and closely related), the intrinsic satisfactions of judging, which usually are greater for a good judge than a bad one.”¹¹³ Posner reports that “[m]any [judges] work very hard indeed” and this supports the “hypothesis that judges are motivated by a desire to be good workers.”¹¹⁴

Posner draws “a parallel between the utility functions of judges and that of serious artists.” Serious artists, he writes, “are not income or leisure maximizers.”¹¹⁵ The intrinsic satisfaction of their work is a major component of their utility function. “But bound up with that in most cases is a desire to be able to regard themselves and be regarded by others as good artists.” Most judges likewise “derive considerable intrinsic satisfaction from their work and want to be able to regard themselves and be regarded by others as good judges.”¹¹⁶ And to be regarded “as a good judge requires conformity to the accepted norms of judging.”¹¹⁷

In both art and judging, however, “norms are contestable[,]”¹¹⁸ and, as previously noted, “[r]apid norm shifts are possible . . . , because the products of these activities cannot be evaluated objectively.”¹¹⁹ In law it is the innovative judges who “challenge the accepted standards of their art, . . . [and these] innovators have the greater influence on the evolution of their field.”¹²⁰ Posner cites

112. *Id.*

113. *Id.* at 371.

114. *Id.* at 61.

115. *Id.* at 62.

116. *Id.*

117. *Id.* at 61.

118. *Id.* at 63.

119. *Id.* at 64.

120. *Id.* at 12-13.

Holmes, Brandeis, Cardozo, and Hand as “examples of judges who succeeded by their example in altering the norms of opinion writing.”¹²¹

As will be seen, Justice Traynor also altered the norms of opinion writing by his example and by his extrajudicial writings. Posner, in fact, calls attention to these writings. In noting the importance of the “neglected literature” consisting of judges writing on judging,¹²² Posner mentions Traynor along with Holmes, Cardozo, Hand, Friendly, and others.¹²³ He writes that the “distinction of [these] judges . . . is notable, but more notable still is that they should confess pragmatism.” Traynor’s writings did more than *confess* pragmatism—they urged courts to engage in what Posner would call pragmatic adjudication. Posner correctly notes that it may also be that the “distinguished judge is more likely to be an occasional legislator than his less distinguished colleagues and so more likely to realize that judging at its most demanding is a pragmatic activity.”¹²⁴ This was certainly true of Traynor, and, at his urging, eventually the California Supreme Court. And nowhere was this more true than in the common law and especially tort law.

C. *Judicial Decision Making in Common Law Subjects*

Judge Posner’s view of judicial decision making is most controversial in decisions involving statutory interpretation or constitutional law. But much American law still involves the common law. Since Justice Traynor’s most noted decisions are in the common law, Posner’s observations regarding the common law provide an entryway into Traynor’s jurisprudential views. Posner writes that “[c]ommon law systems give judges the power to make law [and thus] [o]ur judges . . . have a legislative role.”¹²⁵ Indeed, “[j]udges’ legislative power is usually thought to reach its zenith in common law fields.”¹²⁶ In these fields the law is

121. *Id.* at 63.

122. *Id.* at 256.

123. *Id.* at 256-63.

124. *Id.* at 263.

125. *Id.* at 153.

126. *Id.* at 82.

“something that judges make up as they go along [, making] . . . judges in the Anglo-American tradition . . . occasional legislators.”¹²⁷ Posner sees this legislative role as a given in our legal system. He writes that “the common law should make a legalist uncomfortable,”¹²⁸ but even “[m]ost legalists are . . . willing to allow common law judges . . . to overrule and distinguish precedents and create new common law rules and standards.”¹²⁹ So it seems that with the exception of a few legalists,¹³⁰ the consensus today is that in the common law judges are “occasional legislators.” Maybe.

But it was not always so. And it was certainly not so when Roger Traynor took the bench in 1940.

II. JUSTICE TRAYNOR IN HISTORICAL PERSPECTIVE: THE PATH FROM HOLMES TO TRAYNOR

A. *The Escola Proposal in an Era of Formalism and Traditional (Fault-Based) Tort Theory*

When Justice Traynor was appointed to the California Supreme Court in 1940, only three years after the United States Supreme Court had turned its back on *Lochner*-style constitutional decisions that had struck down social and economic legislation,¹³¹ the lawmaking role of courts was very much in dispute. Nevertheless, despite the relentless assault by the relatively small band of Legal Realists, formalism—the view that judges apply but do not make law, and that policy has no role in judicial decision making—was still the norm in judicial decisions and mainstream legal thought. In 1939, the year before Traynor was appointed to the bench, for example, Warren Seavey, the leading torts scholar at Harvard Law School and Reporter for the *Restatement of Torts*, wrote approvingly of judges who recognized that their task was to articulate “principles deduced from the cases[,] . . . to see the plan and

127. *Id.* at 234.

128. *Id.* at 83.

129. *Id.* at 48; see SCALIA, *supra* note 13.

130. *E.g.*, LLOYD WEINRIB, *LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT* (2005).

131. *Lochner v. New York*, 198 U.S. 45 (1905) (striking down maximum hour law for bakers).

pattern underlying the law and to make clear the paths which had been obscured by the undergrowth of illogical reasoning.”¹³² In Seavey’s view a judge’s “private opinions of policy” had no place in this process, and to consider the “ability to spread the loss” would be to employ “sentimental,” as opposed to “legal,” justice.¹³³

In the field of torts, formalism was linked to what might be called traditional tort theory. Scholars who were traditional theorists saw tort law “as a study in corrective justice, as an effort to develop a coherent set of principles to decide whether *this* plaintiff was entitled to compensation from *this* defendant as a matter of fairness between the parties.”¹³⁴ These scholars wrote of “the fundamental proposition of the common law which link[ed] liability to fault.”¹³⁵ Only five years after Seavey wrote, however, Justice Traynor challenged these views. In his famous concurring opinion in *Escola v. Coca Cola Bottling Co.*,¹³⁶ Traynor called on his court not only to make new law, but to do so by adopting a strict liability rule in products liability cases—and to do this based on a policy that Seavey had disdainfully dismissed as “sentimental justice” unfit for a court of law. Traynor wrote in *Escola* that a strict liability rule was justified in products cases in part because “the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.”¹³⁷

B. *The Holmesian Pedigree of Justice Traynor’s Jurisprudence*

Seavey no doubt saw the *Escola* proposal as heretical both for its substance and for its bold “activist” view of judicial lawmaking. The image of decades of *Lochner*-style activist rulings of the Supreme Court striking down social

132. See Seavey, *supra* note 28, at 372-73 (praising Justice Cardozo for his view of judicial decision making).

133. See *id.* at 373.

134. RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* xxxi (6th ed. 1995).

135. Ezra Ripley Thayer, *Liability Without Fault*, 29 HARV. L. REV. 801, 815 (1916); see also Seavey, *supra* note 28, at 375 (noting the policy of not imposing liability for non-negligent conduct).

136. 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring).

137. *Id.* at 441.

and economic legislation, which had ceased only in 1937, might even have been called up to strike terror in the hearts of judges, along with Justice Holmes's famous *Lochner* dissent,¹³⁸ often quoted for its disapproval of courts' deciding cases based on their view of social and economic policy.

But this would have been to misunderstand the lessons of *Lochner*. Unlike Traynor's *Escola* proposal, *Lochner* and its progeny were constitutional decisions in which the court limited the power of the legislature.¹³⁹ For Holmes—and Traynor—there was no inconsistency in calling for deference to the legislature in constitutional decision making while insisting on a creative role for courts when it came to the common law.¹⁴⁰ Indeed, Holmes had addressed both themes in his famous essay, *The Path of the Law*.¹⁴¹ Anticipating the coming of *Lochner*, Holmes wrote that he “suspect[ed] that [the] fear [of socialism] ha[d] influenced judicial action.”¹⁴² Holmes took aim at “people who no longer hope[d] to control the legislatures [and] look[ed] to the courts as expounders of the Constitutions,” warning that “new principles have been discovered outside the bodies of those [Constitutions], which may be generalized into acceptance of economic doctrines which prevailed about fifty years ago, and wholesale prohibition of what a tribunal of lawyers does not think about right.”¹⁴³ Holmes, however, urged judges to “hesitate” before “taking sides upon debatable and often burning questions.”¹⁴⁴

No such hesitancy was called for in the realm of judge-made common law, which, as Holmes had written in *The Common Law*, is a product of “[t]he felt necessities of the time, the prevalent moral and political theories, intuitions

138. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (“[A] constitution is not intended to embody a particular economic theory.”).

139. *E.g.*, *id.* at 53; *see also, e.g.*, *Atkins v. Children’s Hosp.*, 261 U.S. 525 (1923) (holding statute fixing minimum wage for women and children unconstitutional).

140. *See* Ursin, *Judicial Creativity*, *supra* note 19, at 231-32.

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

142. *Id.* at 467.

143. *Id.* at 467-68.

144. *Id.* at 468.

of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men.”¹⁴⁵ Continuing this theme in *The Path of the Law*, Holmes wrote that the common law reflects judicial accommodation of “competing legislative grounds.”¹⁴⁶ Accordingly, “the means do not exist for determinations that shall be good for all time, and [a judicial] decision can do no more than embody the preference of a given body in a given time and place.”¹⁴⁷

To illustrate “how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind,” Holmes took the example of the law governing compensation for workers injured in the course of their employment¹⁴⁸—by far the largest and most important source of tort litigation in America at the turn of the twentieth century. Writing in 1897, the same year that England enacted its workers compensation legislation, Holmes suggested that *courts* might reconsider the requirement that employees prove negligence in cases involving injuries received in the course of their employment.¹⁴⁹ In such cases, Holmes wrote, “[t]he liability . . . is estimated, and sooner or later goes into the price paid by the public. The public really pays the damages, and the question of liability, if pressed far enough, is really the question how far it is desirable that the public should insure the safety of those whose work it uses.”¹⁵⁰ Holmes concluded, “Indeed, I think that even now our theory upon this matter [i.e., the imposition of accident costs on employers] is open to reconsideration, although I am not prepared to say how I should decide if a reconsideration were proposed.”¹⁵¹ What would have been heretical to Seavey was just common sense to Holmes.

Traynor, as we shall see, was very much in the tradition of Holmes, just as Holmes was very much in the tradition of Chief Judge Lemuel Shaw of Massachusetts, the author of

145. HOLMES, *supra* note 64, at 1.

146. Holmes, *supra* note 141, at 466.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 467.

151. *Id.*

Brown v. Kendall, the cornerstone of the negligence system,¹⁵² and *Farwell v. Boston & Worcester Railroad*, which adopted the fellow servant rule and the defense of assumption of the risk.¹⁵³ Shaw's creative lawmaking shaped the tort law—and all of the common law—of his era. It was because of this judicial lawmaking that Holmes praised Shaw as “the greatest *magistrate* which this country has produced.”¹⁵⁴ Holmes wrote that “few [had] lived who were [Shaw's] equals in their understanding of the grounds of public policy to which all laws must ultimately be referred.”¹⁵⁵ But this lawmaking did not usurp the legislature's role. Indeed, Shaw played a vital role in the development and legitimization of the police power—and the deference to legislative judgments that came with it—in the realm of constitutional law.¹⁵⁶ The jurisprudential view that Traynor shares with Posner thus is in the tradition of Shaw and Holmes, two of the great judges who shaped our nation's laws.

C. *The Holmesian Path Not Followed*

But the views of both Holmes and Traynor were in a minority in an era in which judges “[did] not like to discuss questions of policy.”¹⁵⁷ These judges treated the judicial process as one of “logical deduction” and sought to make “legal reasoning seem like mathematics.”¹⁵⁸ This was the era during which the United States Supreme Court struck down social legislation as exemplified by the maximum hour legislation struck down in *Lochner v. New York*. Even scholars who rejected the “mechanical jurisprudence”¹⁵⁹ of the *Lochner* era nevertheless also rejected Holmes's view

152. 60 Mass. (6 Cush.) 292, 295-98 (1850).

153. 45 Mass. (4 Met.) 49, 57-62 (1842).

154. HOLMES, *supra* note 64, at 106.

155. *Id.*

156. LEONARD W. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 229 (1957).

157. Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 7 (1894).

158. *Id.*

159. See generally Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908) (criticizing “mechanical jurisprudence”).

that courts should play an active role in bringing the common law into conformity with twentieth century social reality and values. Roscoe Pound, for example, saw courts as “less and less competent to formulate rules for new relations.”¹⁶⁰ Citing the fact that “legislation is the more truly democratic form of lawmaking,”¹⁶¹ scholars such as Pound saw the “function of the judge [as] confined within ever narrowing limits.”¹⁶²

Pound’s view was an understandable reaction to a revulsion over *Lochner*-style judicial activism. Louis Jaffe has written that as a Harvard law student between 1928 and 1931, he “came to believe that the judiciary by its very nature was at the worst reactionary and at the least undependable.”¹⁶³ “Led by Frankfurter,” Harvard students and scholars of that era “were all passionate believers in the dogma of judicial restraint[,] . . . sympathetic to the argument that John Marshall’s assertion in *Marbury v. Madison* of the power to declare legislation unconstitutional was ‘usurpation.’”¹⁶⁴ An understandable reaction to this distrust of judicial lawmaking, which in the 1950s would form the basis of legal process scholarship, was to give up on courts as agents of reform. But an understandable reaction is not necessarily an institutional truth, and a minority of legal scholars rejected this view. These were the

160. Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 403-04 (1908).

161. *Id.* at 406.

162. *Id.* at 403 n.2 (quoting HENRY SIDGWICK, *THE ELEMENTS OF POLITICS* 203 (2d ed. 1897)). These themes of institutional competence and electoral accountability were developed over the next decades by theorists such as Justice Louis Brandeis, Dean James Landis of Harvard, and Justice Felix Frankfurter. These writers laid the groundwork for the legal process school and marked a departure from the role of courts envisioned by Holmes in *The Path of the Law*. Compare *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 246 (1918) (Holmes, J., concurring), with *id.* at 250 (Brandeis, J., dissenting), discussed in William N. Eskridge, Jr. & Phillip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, in HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* lix-lx (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). Although Hart and Sacks never published their working legal process materials, the 1958 “Tentative Edition” became the standard version for more than thirty years, and was preserved intact by the 1994 Eskridge & Frickey edition.

163. LOUIS L. JAFFE, *ENGLISH AND AMERICAN JUDGES AS LAWMAKERS* 85 (1969).

164. *Id.* at 86 (footnote omitted).

Legal Realists who called for deference to legislative judgments in the realm of constitutional law, but aligned with Holmes in the view that it was the *job* of courts to bring the common law in line with the “felt necessities of the time.”¹⁶⁵

D. *Justice Traynor’s Legal Realist/Enterprise Liability Tort Agenda*

Justice Traynor’s *Escola* proposal and the policies underlying it were part of a broader theoretical perspective which had been developed by Legal Realists such as Leon Green, Karl Llewellyn, and others beginning in the 1920s and 1930s. Under the umbrella of what is now known as the theory of enterprise liability, these scholars urged that legislatures adopt no-fault compensation plans modeled after workers’ compensation plans and that courts rewrite tort law to reflect the values of twentieth century America by adopting expansive liability rules and limiting or eliminating restrictive defenses and no-duty rules that protected even negligent defendants from liability (while also limiting damages awards).¹⁶⁶ For these scholars, the choice between the legislative and common law routes was “a pragmatic one, contingent on broader political and jurisprudential forces.”¹⁶⁷ It was this scholarship that spawned the two most striking developments in the tort law of the past half century: the strict products liability “revolution” and the movement for no-fault auto compensation plans.¹⁶⁸

Green proposed replacing traditional analysis with his own scheme for determining both common law duty and liability rules and whether compensation plans should displace tort law in particular categories of accidents.¹⁶⁹ He

165. HOLMES, *supra* note 64, at 1.

166. NOLAN & URSIN, *supra* note 37, at 7-11.

167. *Id.* at 11.

168. *Id.* at 7-8. Llewellyn’s major work was his drafting of Article 2 of the Uniform Commercial Code, “the sales article of the most successful codification in American law.” Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 466 (1987).

169. See Leon Green, *The Duty Problem in Negligence Cases: II*, 29 COLUM. L. REV. 255, 255 (1929). See generally NOLAN & URSIN, *supra* note 37.

urged a focus on five factors:¹⁷⁰ (1) the administrative factor—the practical workability of a rule; (2) the moral factor—or consideration of fault; (3) the economic factor—including the impact on economic activity; (4) the prophylactic factor—concerned with the prevention of future harm; and (5) the justice factor—seen as “synonymous [with] the capacity to bear the loss.”¹⁷¹

Traditional tort theorists recognized this last factor, which envisioned an inquiry into loss spreading capacity, as truly revolutionary. Francis Bohlen, for example, wrote that “[t]he so-called ‘Justice’ factor . . . has no place in a restatement of the existing law of the United States and not that of Utopia. This factor has never consciously or . . . unconsciously influenced the decision of any court.”¹⁷²

Four decades later the California Supreme Court would write these factors into law in its landmark decision in *Rowland v. Christian* which used similar policy factors in abolishing the traditional landowner rules.¹⁷³ Justice Traynor’s 1944 *Escola* proposal for strict products liability, in turn, can be traced to Llewellyn’s 1930 casebook on the law of sales which had proposed that the line of sales warranty cases that gave consumers injured by food products a strict liability cause of action be extended to create a broad strict products liability.¹⁷⁴ Llewellyn wrote that the “needed protection is twofold: to shift the immediate incidence of the hazard of life in an industrial society away from the individual over to a group which can distribute the loss; and to place the loss where the most pressure will be exerted to keep down future losses.”¹⁷⁵

170. Green, *supra* note 169, at 255-57.

171. Calvert Magruder, Book Review, 45 HARV. L. REV. 412, 415 (1931) (reviewing LEON GREEN, JUDGE AND JURY (1930)).

172. Francis H. Bohlen, Book Review, 80 U. PA. L. REV. 781, 794 (1932) (reviewing GREEN, *supra* note 171).

173. 443 P.2d 561, 564 (Cal. 1968); *see also* Biakanja v. Irving, 320 P.2d 16, 19 (Cal. 1958) (articulating the factors in part).

174. KARL N. LLEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES 341-42 (1930) [hereinafter LLEWELLYN, CASES AND MATERIALS]; *see also* Karl N. Llewellyn, *The Effect of Legal Institutions upon Economics*, 15 AM. ECON. REV. 665, 666-67 (1925) (giving an early presentation of related views).

175. LLEWELLYN, CASES AND MATERIALS, *supra* note 174, at 341.

By the 1950s Green and Llewellyn had been followed by a second generation of scholars who elaborated on themes they had initiated. Foremost among this second generation of enterprise liability scholars was Fleming James, whose tort treatise, coauthored with Fowler Harper, was published in 1956.¹⁷⁶ In addition to approving of the movement toward strict liability in products cases, the Harper and James treatise provided a blueprint for expansive developments in negligence law. As noted at the time by a critic, the treatise examined “[e]very legal principle and the result of every case . . . through one lens.”¹⁷⁷ That lens, of course, was the enterprise liability perspective. The critic objected that the treatise was an invitation for courts “to remake the law themselves,”¹⁷⁸ which of course it was.

These Legal Realist/enterprise liability scholars saw no problem in asking courts to enact their agenda. Following Holmes’s example, they were staunch critics of the *Lochner* court,¹⁷⁹ but when it came to the common law, the position of these scholars was simple and clear. In the common law realm courts (1) do make law and (2) such lawmaking is so obviously desirable, necessary, and in our common law tradition that it needs no fancy jurisprudential justification—beyond, that is, arguments as to the *substantive* desirability of particular proposals. Recognizing that this view ran up against the dominant formalism of that era, Realists called for courts to return to the “Grand Style”¹⁸⁰ of judges like Shaw, whom they held up as an

176. FOWLER V. HARPER & FLEMING JAMES, JR., *THE LAW OF TORTS* (1956).

177. Luke K. Cooperrider, *A Comment on the Law of Torts*, 56 MICH. L. REV. 1291, 1295 (1958).

178. *Id.* at 1299.

179. See Leon Green, *Unpacking the Court*, NEW REPUBLIC, Feb. 24, 1937, at 67; Karl Llewellyn, *A United Front on the Court*, THE NATION, Mar. 13, 1937, at 288.

180. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS*, 64-72 (1960). The lawmaking role of courts that I attribute to Green and Llewellyn appears broader than that which Brian Leiter attributes to the Legal Realists. And it is certainly different from the depiction of Legal Realism by contemporary critics of the Realists.

Legal Realism has long been an object of scorn among legal philosophers such as Ronald Dworkin. These scholars claim that Realists believed that “judges actually decide cases according to their own political and moral tastes, and then choose an appropriate legal rule as a rationalization.” RONALD

example of judicial “statesmanship,” or, in Fowler Harper’s words, “juristic pragmatism.”¹⁸¹

DWORKIN, *TAKING RIGHTS SERIOUSLY* 3 (1977); *see also* H.L.A. HART, *THE CONCEPT OF LAW* 133 (1961); RICHARD A. WASSERSTROM, *THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION* 7 (1961). In this view judges exercise unfettered discretion, and predicting how courts will decide cases is impossible.

Leiter has risen to the defense of the Legal Realists, offering a “philosophical reconstruction.” Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 *TEX. L. REV.* 267, 275 (1997). According to Leiter, most Realists believed that judicial decisions fall into predictable patterns, although not necessarily what one predicts from legal rules. Leiter writes that these Realists advanced “(1) a descriptive theory about the nature of judicial decision, according to which, (2) judicial decisions fall into (sociologically) determined patterns, in which (3) judges reach results based on a (generally shared) response to the underlying facts of the case, which (4) they then rationalize after-the-fact with appropriate legal rules and reasons.” *Id.* at 285. In private law especially, what courts do is enforce prevailing uncodified norms such as those of the commercial culture, as they would apply to the underlying factual situation. *See id.* at 281.

Under this version of Legal Realism, (1) “[the] choice of decision . . . [is] sufficiently fettered that prediction is possible,” and (2), “these fetters upon choice [do] not consist in idiosyncratic facts about individual judges, but rather [are] of sufficient generality or commonality to be both accessible and to permit formulating general scientific laws of the kind that make prediction possible.” *Id.* at 280-81. Because this is “an irremediable fact about judging, most Legal Realists believed it makes no sense to give normative advice, other than to tell judges to do what they will do anyway, that is, enforce the norms of the commercial culture, of the prevailing mercantile practice.” *Id.* at 281-83. Nevertheless, Leiter writes, “to the extent, *however small*, that judges are not fact responsive (to the extent, for example, that they are sometimes formalistic or Langdellian in their mode of decision), then to that extent they *ought* to decide as the core claim says most of them ordinarily do.” *Id.* at 277-79.

Leiter’s descriptive and normative claims may well be true of Legal Realists who addressed contract and sales law. However, when Legal Realists like Green and Llewellyn turned to tort law, they were not enforcing the uncodified norms of commercial culture, and they were not telling judges what they would do anyway. In fact, they were telling judges to do what they were not doing—to rewrite tort law to reflect the policies of enterprise liability. *See* NOLAN & URSIN, *supra* note 37, at 71-81, 91.

181. Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 *VA. L. REV.* 359, 396 (1951) (judicial “statesmanship”). As early as 1929 Fowler Harper, who later would become James’s torts treatise coauthor, linked Holmes’s constitutional jurisprudence with Green’s Legal Realist/enterprise liability scholarship and gave a name to their shared jurisprudential perspective. Each, Harper wrote, was an example of “juristic pragmatism,” which meant viewing judicial decision making “not in terms of a logically

E. The Legal Process School

Justice Traynor's court would eventually write much of the enterprise liability scholars' agenda into California tort law. But before that could happen a jurisprudential hurdle had to be overcome. And it was not just formalism that had to be overcome. By the 1950s the legal process school, named after the famous materials by Henry Hart and Albert Sacks, had eclipsed both formalism and Legal Realism in mainstream legal thought.¹⁸²

Legal process scholars rejected the formalist contention that courts do not make law. Traumatized by the constitutional lawmaking of the *Lochner* era, however, these scholars sought to avoid future "*Lochners*" by developing formulas or guidelines that would restrict, even as they recognized, judicial lawmaking.¹⁸³ Pointing to the lack of electoral accountability and lawmaking competence of courts, legal process scholars called on courts to avoid lawmaking that could be characterized as "political"¹⁸⁴ or "nonneutral."¹⁸⁵

The limitations on judicial lawmaking that legal process scholars had crafted in response to the perceived abuses of the *Lochner* era soon ran headlong into the constitutional decisions of the Warren Court, most famously when Herbert Wechsler called the Court to task for failing to meet his test of neutral principles in its decision in *Brown v. Board of Education*.¹⁸⁶ William Eskridge and Philip Frickey have noted that "Wechsler criticized *Brown* for resting upon 'policy' considerations rather than upon constitutional 'principle,'"¹⁸⁷ and that Wechsler's "worry that *Brown* was unprincipled or perhaps even unlawful was shared by a

determined system . . . , but in terms of 'judgment,' 'good taste,' and 'interpretation of the community's desires.'" Fowler Vincent Harper, *Some Implications of Juristic Pragmatism*, 3 INT'L J. ETHICS 269, 286-87. Although Harper's terminology did not catch on, it anticipated Judge Posner's use of the term "pragmatic adjudication" decades later.

182. See Ursin, *Judicial Creativity*, *supra* note 19.

183. See *id.*

184. KEETON, *supra* note 35, at 43.

185. See, e.g., Wechsler, *supra* note 35.

186. 347 U.S. 483 (1954).

187. Eskridge, Jr. & Frickey, *supra* note 162, at cviii.

number of law professors.”¹⁸⁸ *Brown* and subsequent decisions of the Warren Court drew fire from legal process scholars as both unprincipled and “result oriented.”

Less well known, however, is the application of legal process limitations in the common law realm. Departing from the tradition of Shaw and Holmes, legal process scholars sought to restrict the lawmaking role of courts even in the common law. In fact, Hart and Sacks used a Shaw opinion, *Norway Plains v. Boston & Maine R.R.*,¹⁸⁹ to illustrate the application of their viewpoint to the common law and their distinction between “a power of reasoned elaboration from existing arrangements”¹⁹⁰ (appropriate for courts) and the exercise of “discretionary power”¹⁹¹ (inappropriate). So Shaw, held up by legal Realists as a model judge, became, for Hart and Sacks, the poster child for courts exercising impermissible discretionary power.

Building on the fact that Shaw limited railroad liability in that case, Hart and Sacks suggested that if a nineteenth-century court had limited railroad tort liability on the ground that more extensive liability would stifle the growth of the infant railroad industry, it would have been exercising impermissible discretionary power. And the court’s action would have been improper even if the protection of railroads from excessive liability had in fact been necessary to promote economic growth and to advance the best interests of the nation. From Hart and Sacks’s perspective, courts lack the capacity to assemble and evaluate the economic and social data necessary for this type of lawmaking. In addition, political decisions such as whether to subsidize economic growth should be subject to the sorts of electoral and political checks that are placed on legislative bodies.¹⁹² In contrast, according to another Hart and Sacks example, courts engage in reasoned elaboration from existing arrangements when they determine common expectations in commercial transactions.¹⁹³

188. *Id.*

189. *Norway Plains v. Boston & Me. R.R.*, 67 Mass. (1 Gray) 263 (1854).

190. HART & SACKS, *supra* note 162, at 398.

191. *Id.* at 123, 161-63, 172-73, 386-406.

192. *Id.* at 374-75.

193. *Id.* at 375-76. The format that Hart and Sacks adopted to present this view was one of “leading questions” rather than clear, declarative statements.

Robert Keeton¹⁹⁴ and Harry Wellington¹⁹⁵ shared Hart and Sacks's desire to place limitations on judicial lawmaking power in the common law, and their discussions help clarify the restrictions on judicial lawmaking imposed by the legal process approach. Keeton suggested the relevance of considerations such as the magnitude of a proposed change, the controversiality of the change, and, similar to Hart and Sacks, whether the change would be characterized as "political."¹⁹⁶ Keeton recognized the difficulty of formulating a precise distinction between "political" and "nonpolitical" lawmaking.¹⁹⁷ He would, however, assess the degree to which proposed reforms "affect or become involved in current political controversy," and he asserted that "courts quite appropriately abstain from initiating reforms that, in the context, would be generally regarded as essentially political in nature."¹⁹⁸ In a similar vein, Wellington argued that policies that courts use to justify common law rules not only should be widely regarded as socially desirable but also should be "relatively neutral" or nonpartisan.¹⁹⁹ He defined neutrality to mean that a court should not use a policy if it imposes disproportionate burdens on a particular group (as contrasted with the population generally), unless there are special reasons that can be adduced for imposing those burdens.²⁰⁰ Wellington wrote—in what one might use as a guide for interpretation—that "[s]ince many policies which might serve as justification for rules fail of neutrality, in that they are too partisan, common law courts, if they are to

Hart and Sacks, however, did not regard their "questions" as *merely* questions. A leading question later becomes "the point earlier made." See *id.* at 376; Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 226 (1973) (stating that policy of subsidizing infant industry inappropriate for judicial lawmaking).

194. KEETON, *supra* note 35, at 15-17.

195. Wellington, *supra* note 193, at 240.

196. KEETON, *supra* note 35, at 43.

197. *Id.* at 93.

198. *Id.* at 92.

199. Wellington, *supra* note 193, at 236. Wellington distinguishes judicial use of "policies" from judicial use of "principles." *Id.*

200. *Id.* at 238.

exercise power legitimately, are drastically limited in their capacity to implement policies.”²⁰¹

F. *Legal Process Opposition to the Enterprise Liability Agenda*

As Legal Realist/enterprise liability scholars focused on courts and the common law in the 1950s, their approach ran into the jurisprudential roadblock of the legal process school. The substantive premise of the Harper and James treatise was that “the best and most efficient way to deal with accident loss . . . is to assure accident victims of substantial compensation, and to distribute the losses involved over society as a whole Such a basis for administering losses is what we have called social insurance.”²⁰²

It is difficult to imagine a policy (except, perhaps, the fostering of infant industry) more at odds with the constraints that legal process scholars would impose on judicial lawmaking. It is instructive to recall that for scholars such as Seavey, the loss spreading policy would be nonlegal, inappropriate even for judicial consideration. Pound expressed still stronger sentiments in 1954. Regarding *Escola* specifically, he wrote: “If I am not to be my brother’s keeper but am to be his insurer, should not so radical a change in the social order come through legislation rather than through judicial decision.”²⁰³ Pound suggested that the “practical result [of thinking like Traynor’s] is likely to be that the burden is shifted to the most convenient victim.”²⁰⁴ Pound wrote that “[such] was the solution provided by . . . the Soviet Civil Code.”

Lest Pound and Seavey be dismissed as (by then) cranky old men, the views of William Prosser, “Mr. Torts” and Reporter for the *Restatement (Second) of Torts*, should be considered. Prosser’s famous 1960 article, *The Assault Upon the Citadel (Strict Liability to the Consumer)*,²⁰⁵ can

201. *Id.* at 241.

202. HARPER & JAMES, *supra* note 176, at 762-63.

203. ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 102 (1954).

204. *Id.* at 103.

205. William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

be seen as Prosser's response to the enterprise liability views that had recently been expressed by Traynor and James. Prosser wrote in substantive opposition to fundamental aspects of the enterprise liability theory, but his article highlights the conflict between the enterprise liability theory and legal process demands that courts refrain from lawmaking that could be considered "political," "controversial," or lacking in "neutrality."

Prosser linked Traynor's "risk spreading" policy to Traynor's view that strict liability should be imposed "all at once upon all producers."²⁰⁶ In Prosser's view, Traynor's position would be "likely to be regarded as too radical and disruptive,"²⁰⁷ and Prosser thought that "our courts, our legislators, and public sentiment in general"²⁰⁸ were not yet ready to accept a view that might "very possibly be the law of fifty years ahead."²⁰⁹ Prosser concluded that "[u]ltimately . . . we may arrive at a 'general rule' of strict liability for all products, with certain specified exceptions; but these things are still of the uncertain and indefinite future."²¹⁰

Prosser was not formally a member of the legal process school, but Robert Keeton, as previously discussed, was. And his writings illustrate the unambiguous antagonism between the enterprise liability agenda and that school. Keeton's view is particularly illuminating because it demonstrates that the legal process objections were focused on *judicial* lawmaking—as opposed to the legislative process. Thus in the sphere of *legislative* reform of tort law, Keeton refined previous enterprise liability proposals for no-fault automobile compensation plans premised on the desirability of loss spreading. In his seminal 1965 book (written with Jeffrey O'Connell), Keeton proposed "that the burden of a minimum level of protection against measurable economic loss . . . be treated as a cost of motoring. The cost . . . would be distributed generally . . . without regard to fault."²¹¹

206. *Id.* at 1120.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 1140.

211. ROBERT E. KEETON & JEFFREY O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 268 (1965).

In contrast, in 1959 and 1962 Keeton published a pair of articles in the *Harvard Law Review* whose focus was on judicial lawmaking and whose avowed purpose was to offer “some reassurance against the specter of runaway social engineering with ill-considered emphasis on risk-spreading capacity.”²¹² His goal was to rebut those who, like Harper and James, had “urged with increasing vigor that a loss should be shifted from plaintiff to defendant if defendant is a more efficient loss distributor.”²¹³ Keeton cautioned that “a sharp change in our system of compensation of accidental injuries, shifting from the present system with its premise of liability based on fault to a system based on a premise of loss distribution or insurance, is beyond the sphere of desirable judicial creativity.”²¹⁴

Keeton was also critical of courts employing loss spreading concepts to further the goal of victim compensation *within* the fault system.²¹⁵ He recognized that enterprise liability/Legal Realist scholars, such as Harper and James, had urged “*gradual* movement by judicial decisions away from the principle of liability based on fault and toward a principle of loss distribution.” He rejected this approach, which “often [had] impl[ied] that it is appropriate for a decision reached under the influence of the latter principle to be explained in the judicial opinion solely on another ground, unrelated to that principle save in the coincidence that both lead to the same result in the particular case.”²¹⁶

In 1957 James had vigorously argued that food products were not unique and that victims, including bystanders, should have a strict liability action against manufacturers,

212. Keeton, *supra* note 36, at 444.

213. *Id.* at 405; *see id.* at 407-08. Keeton recognized that risk spreading had had an influence on tort law. *Id.* at 407. He argued, however, that notions of “individual blameworthiness” are the basis of tort law developments. *Id.* at 403-05, 433-44.

214. Robert E. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 508 (1962).

215. Keeton, however, did advocate judicial adoption of comparative negligence. Unlike strict liability rules based on loss distribution, adoption of comparative negligence can be seen merely bringing tort doctrine in line with the “neutral” fault premise. *See id.* at 508.

216. *Id.* at 465 (emphasis added).

retailers, and distributors of all products.²¹⁷ In contrast, two years later Keeton wrote that the basis of strict liability in food cases was “difficult to grasp because of the difficulty of finding material distinctions between selling food and selling some other product which, if defective, is likely to cause harm to persons.”²¹⁸ Keeton insisted that it was “erroneous to conclude that the grocer’s capacity for risk spreading is the basis of his liability [because] such liability is not imposed on retailers of other products though a similar and often superior capacity for risk spreading exists.”²¹⁹ He concluded that “sound prediction and sound development of the scope of liability . . . rests less on comparison of the relative capacities . . . to insure or otherwise spread the risk, than upon identifying other grounds for liability in . . . the sale of food.”²²⁰

Richard Speidel’s 1965 analysis of strict products liability accurately reflected the implications of legal process scholarship. He wrote that a “legitimate basis for criticism” exists “when courts take the bold step toward imposing and justifying strict products liability without legislative authorization and assistance.”²²¹ The basis for this criticism reflects the concerns over competence and accountability: “In making the value choice to intervene on behalf of the consumer [in his relationship with a more powerful business enterprise] without negligence or contract, the court has weighed the interest of the enterprise *as a legislature* would, and found it wanting.”²²² Speidel suggested that courts should leave this lawmaking “to other legal institutions,”²²³ and he concluded that “one

217. Fleming James, Jr., *General Products—Should Manufacturers Be Liable Without Negligence?*, 24 TENN. L. REV. 923 (1957).

218. Keeton, *supra* note 36, at 442.

219. *Id.* at 442-43.

220. *Id.* at 443. Keeton recognized “that risk spreading had an influence on tort law.” *Id.* at 407. He argued, however, that notions of “individual blameworthiness,” *id.* at 435, are the basis of tort law developments. *See id.* at 403-05, 433-44. *But see* Ursin, *Judicial Creativity*, *supra* note 19, at 301.

221. Richard E. Speidel, *The Virginia “Anti-Privity” Statute: Strict Products Liability Under the Uniform Commercial Code*, 51 VA. L. REV. 804, 845 n.103 (1965).

222. *Id.* (emphasis added).

223. *Id.*

can doubt the long-range feasibility of having the large premises involved in a public law approach to products liability created by common law judges.”²²⁴ Indicative of the influence of the legal process perspective is that Charles Gregory and Harry Kalven in their 1969 torts casebook wrote that only in the late 1950s and early 1960s did loss distribution and insurance emerge as “respectable” topics in tort law.²²⁵

G. *The Need for a Response to Legal Process Jurisprudence*

By the late 1950s and early 1960s the legal process perspective had assumed a position of prominence among leading legal academics. Moreover, legal process concerns had made their way from academic journals to the mind set of judges. Courts would articulate concerns over competence and accountability in refusing to adopt a rule which they considered to be substantively desirable, as illustrated by the refusal of the Illinois Supreme Court to replace the rule of contributory negligence with comparative negligence.²²⁶

Although the influence of legal process scholarship had grown over the decades, enterprise liability scholars had offered no arguments to counter the process scholars’ arguments that courts lacked the competence and political accountability necessary for the type of lawmaking enterprise liability scholars sought. Enterprise liability scholars had hinted at the ingredients for an answer to the legal process scholars, including the role courts historically played in America and a recognition of the power that special interests exercised in the legislative process. But they had not combined them into an argument that directly confronted the legal process view. That task was left to a “Shaw-like” judge who, as they wrote, was about to lead his court, and the judges of his generation, to adopt enterprise liability doctrines. That judge, of course, was Roger

224. *Id.* at 846 n.103.

225. See CHARLES O. GREGORY & HARRY KALVEN, JR., *CASES AND MATERIALS ON TORTS* 694 (2d ed. 1969).

226. See *Maki v. Frelk*, 239 N.E.2d 445, 447 (Ill. 1968).

Traynor, who as early as his law student days had been influenced by Holmes.²²⁷

III. JUSTICE TRAYNOR ON JUDICIAL LAWMAKING

A. *The Need for Judicial Creativity*

Beginning in 1956, two years after *Brown v. Board of Education*, Justice Traynor published a series of articles that stood in opposition both to formalism and legal process jurisprudence. These articles spelled out the jurisprudential view that would prevail among the judges of his generation and that was a necessary condition for the judicial acceptance of enterprise liability theories. This view emphasized not democratic theory but the practical necessity of judicial innovation to meet constantly changing conditions and values. The real danger, in Traynor's view, was not that judicial creativity would be excessive, but rather that the law would not be responsive enough to changing social conditions and values. In his series of articles, Justice Traynor made the case for a creative role for courts—for a return of courts to the tradition of Shaw and Holmes and a rejection of the restraints that legal process scholars would impose on common law courts.²²⁸

Traynor recognized that judicial lawmaking was necessary precisely because of the political content of the law. During "the nineteenth century . . . *laissez-faire* commanded easy acceptance," Traynor wrote, but by the depression years those values had "ceased to be acceptable."²²⁹ In the aftermath of World War II the nation was "compelled . . . to realize that each of us has a direct responsibility for the general welfare. Inevitably some part of that obligation had to be made legally enforceable by a society given the opprobrious term of 'welfare state' by those who would have it remain static."²³⁰

227. See, e.g., Comment, *Inheritance Taxation: Tax Payable at Domicile of Testator on Intangible Personality in Another Jurisdiction*, 14 CAL. L. REV. 225, 228-29 (1926).

228. See Ursin, *Judicial Creativity*, *supra* note 19.

229. Roger J. Traynor, *Law and Social Change in a Democratic Society*, 1956 U. ILL. L.F. 230, 231.

230. *Id.*

Roosevelt's New Deal legislation, of course, stood out as the major manifestation of the adaptation of the American legal system to twentieth century values, and Traynor recognized that "[m]ore than ever social problems [had found] their solution in legislation."²³¹ Nevertheless, "[e]ndless problems remain . . . which the courts must resolve without the benefit of legislation."²³² In fact, courts have "the major responsibility for lawmaking in the basic common law subjects."²³³ "Courts have a creative job to do when they find that a rule has lost its touch with reality and should be abandoned or reformulated to meet new conditions and new moral values."²³⁴ Their role is to engage in a "pragmatic search for solutions" and then to "hammer out new rules that will respect whatever values of the past have survived the tests of reason and experience and anticipate what contemporary values will meet those tests."²³⁵ In short, courts "can and should participate creatively in the development of the common law."²³⁶

The task Traynor envisioned for courts paralleled that which Posner has assigned to judges. Judges, Posner writes, "are rulemakers as well as rule appliers." In a particular case, "[a]n appellate judge has to decide . . . whether to apply an old rule unmodified, modify and apply the old rule, or create and apply a new one."²³⁷ In this process the goal is "making the choice that will produce the best results."²³⁸ In this regard, he sees past decisions "as sources of potentially valuable information about the likely best result in the present case and as signposts that [the judge] must be careful not to obliterate or obscure gratuitously, because people may be relying on them."²³⁹

231. *Id.* at 232.

232. *Id.*

233. Traynor, *supra* note 40, at 618.

234. Traynor, *supra* note 229, at 232.

235. *Id.*

236. Traynor, *supra* note 3, at 52.

237. POSNER, PROBLEMATICS, *supra* note 10, at 248-49.

238. *Id.* at 249.

239. *Id.* at 242.

B. *Statutory Interpretation and Constitutional Law*

Beyond their role in keeping the common law in tune with contemporary values, Traynor also saw a creative role for courts in the realm of statutory law. Traynor recognized that there were significant differences between hard cases involving statutory law and hard cases involving common law. He was “concerned[,] [however,] with a major likeness. In both groups of cases competing considerations are of such closely matched strength as to create a dilemma. How can a judge arrive at a decision one way or the other and yet avoid being arbitrary?”²⁴⁰ In the end the judge has to “arrive . . . at a value judgment as to what the law ought to be and to spell out why.”²⁴¹

Courts, in Traynor’s view, had “been slow not only in drawing pertinent analogies from statutes but also in expanding the connotations of their own terms to keep pace with the incessant inventiveness of our economy.”²⁴² Because “legislatures are neither omnipresent nor omniscient. . . . we must expect our statutory laws to become increasingly pliable to creative judicial elaboration.”²⁴³

An especially striking instance of “creative judicial elaboration”²⁴⁴ of a statute took place in divorce law in an opinion written by Traynor for the California Supreme Court.²⁴⁵ Under the pre-no-fault divorce law, a person seeking a divorce had to establish one of the specified grounds for divorce, such as adultery.²⁴⁶ Even then, however, divorce statutes had been interpreted to require the trial court to deny the divorce if recrimination, such as the party seeking a divorce on the grounds of adultery also having committed adultery, was proven.²⁴⁷ In *DeBurgh v.*

240. Roger J. Traynor, *La Rude Vita, La Dolce Giustizia; or Hard Cases Can Make Good Law*, 29 U. CHI. L. REV. 223, 234 (1962).

241. *Id.*

242. Traynor, *supra* note 3, at 60.

243. *Id.*

244. *Id.*

245. *DeBurgh v. DeBurgh*, 250 P.2d 598 (Cal. 1952).

246. *See id.* at 599-600.

247. *Id.*

DeBurgh, decided in 1952, however, Traynor held that trial courts had discretion to grant or deny a divorce as the public interest indicated.²⁴⁸ This holding and its rationale are widely credited with laying the foundation for the California legislature's enactment of the nation's first no-fault divorce law.²⁴⁹

Reflecting on *DeBurgh* four years later, Traynor wrote that courts "do a great disservice to the law when [they] neglect that careful pruning on which its vigorous growth depends and let it become sicklied over with nice rules that fail to meet the problems of real people."²⁵⁰ In divorce law there had been a stark "discrepancy between law in dogmatic theory and law in action," the result of which had been "a triumph, not for dogma, but for hypocrisy. Rules insensitive to reality have been cynically circumvented by litigants and attorneys with the tacit sanction of the courts."²⁵¹ Even after *DeBurgh*, Traynor wrote, "divorce law in California as in other jurisdictions is still a formidable antique around which people step warily."²⁵² In his view it was "time for lawyers to rouse themselves from their inertia and work actively for legislation in this field that will make the integrity of the law a meaningful phrase[.]"²⁵³ Precisely this did occur in California, resulting in the nation's first no-fault divorce law.²⁵⁴

Turning to constitutional law, Traynor wrote that, a "state judge is also bound to be aware of the signs that we may cross new frontiers in constitutional law. In no other area has there been such a dramatic interrelation between law and social change."²⁵⁵ He noted "the decline of substantive due process as a limitation on legislative power to deal with social and economic problems," but also wrote that "social changes have brought about the rise, fall, or

248. *Id.* at 603-07.

249. See FIELD, *supra* note 38, at 64-65.

250. Traynor, *supra* note 229, at 236.

251. *Id.*

252. *Id.*

253. *Id.*

254. See FIELD, *supra* note 38, at 64-65.

255. Traynor, *supra* note 229, at 237.

modification of other constitutional doctrines.”²⁵⁶ In particular, “changes in public opinion on race discrimination have compelled reinterpretation of the fourteenth amendment, itself a product of violent social change.”²⁵⁷ Traynor’s own opinion in his court’s 1948 decision in *Perez v. Sharp*²⁵⁸ holding California’s anti-miscegenation statute unconstitutional was in the forefront of this movement, preceding the United States Supreme Court’s similar holding by twenty years.²⁵⁹ By 1956, Traynor wrote, it was “widely, if not universally, accepted that there is no rational basis in any law for race discrimination, that it is an insidiously evil thing that deprives the community of the best of all its people as it deprives individuals and groups to give of their best.”²⁶⁰

Traynor recognized, however, that “the task of law reform is that of the legislators.”²⁶¹ Thus “however sensitive judges become to the need for law reform . . . they must necessarily keep their dispassionate distance from that ball of fire that is the living law.”²⁶² The United States Supreme Court had “stated that it is not for them to pass judgment on the wisdom of legislation,”²⁶³ and the California Supreme Court had “accepted that thesis.”²⁶⁴ To do otherwise might “summarily put an end to certain laws that may be foolish but also to certain laws that may be wise, and particularly to laws that may be wise in the long run although they appear foolish at the moment.”²⁶⁵

Of course, there was a “qualification to this general thesis articulated by Justice Jackson in *Board of Education*

256. *Id.*

257. *Id.*

258. 198 P.2d 17 (Cal. 1948).

259. See *Loving v. Virginia*, 388 U.S. 1 (1967).

260. Traynor, *supra* note 229, at 237.

261. *Id.* at 239.

262. *Id.*

263. *Id.* at 240 (“The forum for the correction of ill-considered legislation is a responsive legislature.” (quoting *Daniel v. Family Sec. Ins. Co.*, 336 U.S. 220, 224 (1949))).

264. *Id.*

265. *Id.* at 240-41 (quoting *Werner v. S. Cal. Ass’d Newspapers*, 216 P.2d 825, 831 (Cal. 1956)).

v. Barnette: “The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”²⁶⁶ Courts, in Traynor’s view, have an “active responsibility in the safeguard of those civil liberties that are the sum and substance of citizenship.”²⁶⁷ Here Traynor parted company with Learned Hand who in his essay *The Spirit of Liberty*²⁶⁸ had suggested that “we . . . rest our hopes too much upon constitutions, upon laws, and upon courts.”²⁶⁹ Hand had written that

[t]hese are false hopes . . . Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court, can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.²⁷⁰

Traynor’s rebuttal was that “precisely because it lies there . . . it has declared itself in a constitution to be invoked by the courts insistently, unflinching, against those in power, in legislatures or out of them, who threaten to use that power to make men fearful and finally still[.]” In Traynor’s view, “[t]he judges whose job it is to apply [the constitution] must carry liberty in their hearts even when other men have ceased to.”²⁷¹ This responsibility, however, “is not an easy one in a day when we must reconcile national security and personal liberty.”²⁷²

266. *Id.* at 241 (quoting *Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

267. *Id.*

268. LEARNED HAND, *The Spirit of Liberty*, in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 189 (Irving Dilliard ed., 1952).

269. *Id.* at 189-90.

270. *Id.* at 190.

271. Traynor, *supra* note 229, at 241.

272. *Id.* For a discussion of Traynor’s First Amendment decisions, see Robert B. McKay, *Constitutional Law: Ideas in the Public Forum*, 53 CAL. L. REV. 67, 70 (1965) (“Traynor’s contributions to the development of federal constitutional law have been substantial.”). On Traynor’s 1955 opinion for the court adopting the exclusionary rule for illegally obtained evidence, *People v. Cahan*, 282 P.2d 905 (Cal.), and reversing his own 1942 opinion for the court in *People v. Gonzales*, 124 P.2d 44 (Cal.), see Monrad G. Paulsen, *Criminal Law Administration: The Zero Hour Was Coming*, 53 CAL. L. REV. 103, 104-20 (1965) (discussing Traynor opinions liberalizing criminal discovery rules for both defendants and

In a 1977 article, *The Limits of Judicial Creativity*, written seven years after his retirement, Traynor stated that it is a "rare occasion" when judges are called upon to render "a decision of constitutional tenor."²⁷³ When such an occasion does arise, however, and a judge considers rendering "a decision of constitutional tenor, intended to prompt legislators to take action," the judge "must first analyze exhaustively the claimed urgency of such action, particularly in the context of possibly equally strong competing claims, no one of which might be fulfilled without cost to the others."²⁷⁴ Even if that "hurdle is cleared, [the judge] must still analyze whether legislators would otherwise remain delinquent toward the federal or state constitution."²⁷⁵ And, finally, the judge "must . . . analyze whether his own decision is one that the legislature can implement with justice to all and within the time prescribed."²⁷⁶

Traynor's combination of creativity and caution in the realm of statutory and constitutional interpretation resembles the views later articulated by Judge Posner. Posner's pragmatic jurisprudence derives, as he has often noted, from Holmes. When applied to issues of constitutional law this approach, according to Posner, counsels deference to legislative judgments—but not always. When constitutional issues "turn on disagreement over moral or political ultimates[,] [t]he judge has two choices."²⁷⁷ The first "is to say that if public opinion is divided on a moral issue, courts should leave its resolution to the political process." The second, which is the choice of Holmes and Posner, "is to say . . . that while the political process is ordinarily the right way to go, every once in a while an issue on which public opinion is divided so excites the judge's moral emotions that he simply cannot stomach

prosecutor, as well as opinions dealing with confessions and the right to counsel), and David W. Louisell, *Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma*, 53 CAL. L. REV. 89 (1965).

273. Roger J. Traynor, *The Limits of Judicial Creativity*, 63 IOWA L. REV. 1, 13 (1977).

274. *Id.*

275. *Id.*

276. *Id.*

277. POSNER, *PROBLEMATICS*, *supra* note 10, at 142.

the political resolution that has been challenged on constitutional grounds.”²⁷⁸ Posner notes that this was “the position in which the first Justice Harlan found himself in *Plessy v. Ferguson* and in which Holmes found himself from time to time.”²⁷⁹ Posner has referred to this stance as the “outrage school of constitutional interpretation.”²⁸⁰ Traynor’s holding in *Perez v. Sharp* that California’s anti-miscegenation legislation was unconstitutional reflected Traynor’s view of the “insidiously evil thing”²⁸¹ of racial discrimination and qualifies as an application of an “outrage jurisprudence.”²⁸²

Working from the premise of the outrage school, Posner writes that an implication of his pragmatic jurisprudence is that “courts will tend to treat the Constitution and the common law, and to a lesser extent bodies of statute law, as

278. *Id.*

279. *Id.* (citation omitted).

280. *Id.* at 147 (quotation marks omitted).

281. Traynor, *supra* note 229, at 237.

282. “Outrage,” of course, is not a formula; and what provokes outrage in one judge may not do so in another. A judge’s ideological outlook will influence what will outrage him; and this, in turn, will be influenced by, among other things, the judge’s moral and religious values and his upbringing, education, personality traits, and life experiences off and on the bench. See POSNER, *supra* note 2, at 94, 370.

An example of the latter influence may be seen in Justice Traynor’s experience with the issue of the exclusionary rule in cases of evidence illegally seized by the police. In an opinion for the court in 1942, Traynor declined to adopt the exclusionary rule. See *People v. Gonzales*, 124 P.2d 44 (Cal. 1942). Then, thirteen years later in another opinion for the court, Traynor overruled *Gonzales* and adopted the exclusionary rule, six years prior to the adoption being mandated by the United States Supreme Court. *People v. Cahan*, 282 P.2d 906 (Cal. 1955); see *Mapp v. Ohio*, 367 U.S. 657 (1961). In the years between *Gonzales* and *Cahan*, Traynor had “clung to the fragile hope that the very brazenness of lawless police methods would bring on effective deterrents other than the exclusionary rule.” Roger J. Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 324. By 1955, “[e]xperience ha[d] demonstrated . . . that neither administrative, criminal, nor civil remedies are effective in suppressing lawless searches and seizures.” *Cahan*, 282 P.2d at 913.

It might be noted that Judge Posner has pointed out that judicial self-restraint is only one factor in responsible judicial decision making. Other factors include such qualities as knowledge of law, common sense, lucid writing style, the power of logical analysis, and many others. Richard A. Posner, *The Meaning of Judicial Self-Restraint*, 59 IND. L.J. 1 (1983).

a kind of putty that can be used to fill embarrassing holes in the legal and political framework of society.”²⁸³ In the constitutional realm, for example, Posner rejects the view that “the Eighth Amendment’s prohibition against cruel and unusual punishments has reference only to the *method* of punishment or to the propriety of punishing *at all* in particular instances (for example, for simply being poor or an addict).”²⁸⁴ Under that view a state would be able “with constitutional impunity [to] sentence a sixteen-year-old to life imprisonment without possibility of parole for the sale of one marijuana cigarette—which in fact seems to be the Supreme Court’s . . . view.”²⁸⁵ Posner would find that “difficult to stomach.” He writes that he doubts “a pragmatic Justice of the Supreme Court *would* stomach it, although he would give due weight to the implications for judicial caseloads of bringing the length of prison sentences under judicial scrutiny and to the difficulty of creating workable nonarbitrary norms of proportionality.”²⁸⁶ Posner’s “pragmatic judge does not throw up his hands and say ‘sorry, no law to apply’ when confronted with outrageous conduct that the framers of the Constitution neglected to foresee and make specific provision for.”²⁸⁷

Along the same lines, Posner writes that the same “principle of pragmatic judging has received at least limited recognition by even the most orthodox judges It is accepted that if reading a statute the way it is written produces absurd results, the judge may rewrite it [although] judges do not put it quite this way.”²⁸⁸ And, as previously mentioned, “in this country . . . judges reserve the right to ‘rewrite’ the common law as they go along.” Moreover, in Posner’s view, a “similar approach, prudently employed, could guide constitutional adjudications as well.”²⁸⁹

Posner recognizes, however, that such an approach “is not without dangers” as [p]eople can feel very strongly

283. POSNER, PROBLEMATICS, *supra* note 10, at 258.

284. *Id.*

285. *Id.* (citing *Harmelin v. Michigan*, 501 U.S. 957 (1991)).

286. *Id.*

287. *Id.*

288. *Id.* at 258-59.

289. *Id.* at 259.

about a subject and be quite wrong.”²⁹⁰ And he cautions that “[i]n a pluralistic society . . . a judge’s unshakable convictions may not be shared by enough other people that he can base a decision on those convictions and be reasonably confident that it will be accepted.”²⁹¹ Thus “the wise judge will try to check his convictions against those of some broader community of opinion, as Holmes suggested in referring in *Lochner* to ‘fundamental principles as they have been understood by the traditions of our people and our law’”²⁹²—and as Traynor did in the case of racial discrimination when he wrote of “changes in public opinion . . . [that] compelled reinterpretation of the fourteenth amendment.”²⁹³

C. *Dispelling Formalist Fears*

Traynor recognized that many lawyers and judges were formalists, or as Traynor called them, “formulists” who either denied that courts are lawmakers or, citing *stare decisis*, argued that they should not be.²⁹⁴ Although the formalism that held “sway in the nineteenth century . . . has long since been discredited by its cumulative inadequacies and distortions,” Traynor wrote in 1956, “it remains to haunt our own time,”²⁹⁵ and there remained “suspicion that creativeness is . . . at odds with circumspection, darkly menacing the stability of the law.”²⁹⁶ The reality is that “judges participate significantly in lawmaking whenever they interpret constitutional or statutory language, resolve a case of first impression, expand or diminish a precedent, or overrule it outright.”²⁹⁷

290. *Id.*

291. *Id.*

292. *Id.* (quoting *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) (italics omitted)).

293. Traynor, *supra* note 229, at 237.

294. See Roger J. Traynor, *Badlands in an Appellate Judge’s Realm of Reason*, 7 UTAH L. REV. 157, 165 (1960).

295. Roger J. Traynor, *Statutes Revolving in Common-Law Orbits*, 17 CATH. U. AM. L. REV. 401, 403 (1968).

296. Traynor, *supra* note 3, at 52.

297. Traynor, *supra* note 40, at 618.

Like Posner, Traynor recognized that for the “great mass of appeals” courts are able to “invoke readily available and singularly appropriate precedents for the disposition” of the case.²⁹⁸ That left “the still substantial remainder of appeals whose disposition entails much troubled inquiry as to which of several appropriate lines of precedent should govern.”²⁹⁹ He would later describe these as the “hard cases that could plausibly go either way.”³⁰⁰

Traynor sought to allay fears that “activist” judges would write their idiosyncratic policy preferences into the law. He wrote that “[a]lthough the judge’s predilections may play a part in setting the initial direction he takes toward the creative solution, there is little danger of their determining the solution itself, however much it bears the stamp of his individual workmanship.”³⁰¹ This is because “[o]ur great creative judges have been men of outstanding skill, adept at discounting their own predilections and careful to discount them with conscientious severity.”³⁰²

Moreover, “[t]he disinterestedness of the creative decision is further assured by the judge’s arduous articulation of the reasons that compel the formulation of an original solution and by the full disclosure in his opinion of all aspects of the problem and of the data pertinent to its solution.”³⁰³ And, finally, the opinion “must persuade his colleagues, make sense to the bar,”³⁰⁴ “pass muster with scholars and practitioners on the alert to note any misunderstanding of the problem, any error in reasoning, any irrelevance in data, any oversight of relevant data, any premature cartography beyond the problem at hand[.]”³⁰⁵ “and if possible allay the suspicion of [the] man in the

298. Traynor, *supra* note 294, at 159; see POSNER, *supra* note 2, at 8.

299. Traynor, *supra* note 294, at 159.

300. Traynor, *supra* note 240, at 224.

301. Traynor, *supra* note 3, at 52.

302. *Id.*

303. *Id.*

304. Traynor, *supra* note 294, at 166.

305. Traynor, *supra* note 3, at 52.

street.”³⁰⁶ Thus “[e]very opinion is . . . subject to approval.”³⁰⁷

Again, Traynor’s view foreshadowed that of Judge Posner who writes that judicial “decisions are anchored in the facts of concrete disputes between real people,” and “[j]udges are schooled in a profession that sets a high value on listening to both sides of an issue before making up one’s mind, on sifting truth from falsehood, and on exercising detached judgment.”³⁰⁸ Moreover, “[a]ppellate judges in nonroutine cases are expected to express as best they can the reasons for their decision in signed, public, citable documents (the published decisions of these courts), and this practice creates accountability and fosters a certain thoughtfulness and self-discipline.”³⁰⁹

Traynor also confronted the claim that “tolerance for anachronistic precedents” was justified by their having engendered “so much reliance as to preclude their liquidation.”³¹⁰ He pointed out that “statutes of limitation, by putting an end to old causes of action, markedly cut down the number of possible hardship cases.”³¹¹ Also, “outworn precedent may be so badly worn that whatever reliance it engendered would hardly be worthy of protection.” Moreover, “[i]n some areas, as in torts, it may be unrealistic to assume reliance at all.”³¹² Prospective overruling (perhaps with an isolated retroactive application in the instant case to reward the litigant who brought the challenge) was also available to lessen any hardship that might result from retroactivity. Such overruling “may appear particularly appropriate in such areas of the law as contracts and property, where reliance is apt to count heavily.”³¹³ Of course, prospective overruling flies in the face of “[t]he fairy tale [that] persists that the court does not make the law but merely declares what it has always been

306. Traynor, *supra* note 294, at 166.

307. Traynor, *supra* note 3, at 52.

308. POSNER, *PROBLEMATICS*, *supra* note 10, at 257.

309. *Id.*

310. Traynor, *supra* note 40, at 622-23.

311. Traynor, *supra* note 240, at 231.

312. *Id.*

313. *Id.* at 232.

and that an overruling decision must hence be retroactive.”³¹⁴ The choice between retroactive and prospective overruling “[r]ealistically [depends] . . . not on such mysticism but on whether or not the hardship of defeating the reliance of one party would outweigh the hardship of subjecting the other to a precedent unfit to survive.”³¹⁵

D. *Justice Traynor’s Response to the Legal Process Scholars and Their “Magic Words”*

Of course, it was not just the formalists who would leave lawmaking—or, more precisely, *some* lawmaking—to the legislature. Legal process scholars, as we have seen, would rule out lawmaking that could be characterized as “political” or “nonneutral,” such as lawmaking based on the loss spreading policy that was at the heart of Traynor’s and the enterprise liability scholars’ reform agenda for tort law.

The conflict between Traynor and the legal process scholars was made clear in Traynor’s 1961 article *No Magic Words Could Do It Justice*,³¹⁶ which was published shortly following the publication of Herbert Wechsler’s 1959 *Toward Neutral Principles of Constitutional Law*³¹⁷ article and Henry Hart’s 1959 Foreword to the Supreme Court issue of the *Harvard Law Review*, entitled *The Time Chart of the Justices*.³¹⁸ These articles called into question the lawmaking of the United States Supreme Court and, by implication, that of the California Supreme Court.

In Traynor’s view, there had been “too much idle disputation as to whether [the judiciary or legislature] is the primary or ultimate or most social or most appropriately gowned source of law.”³¹⁹ In the past, legal thinkers had “been wont to view with alarm as legislatures . . . recurrently sent forth statutes that reached deep into the

314. Traynor, *supra* note 294, at 167-68.

315. *Id.* at 168.

316. Traynor, *supra* note 40.

317. Wechsler, *supra* note 35.

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

319. Traynor, *supra* note 40, at 616.

common law.”³²⁰ By the 1950s, however, “they [were] wont to view with alarm any judicial lawmaking, such as [had] gone on for centuries, as an encroachment on the legislative function.”³²¹ If we were to “become susceptible to the curious reasoning that judicial lawmaking must now atrophy because statutory lawmaking is growing apace,” Traynor wrote, “we would commit our courts to invoking magic words more blindly than in the past.”³²²

Traynor wrote that judges have the “major responsibility for lawmaking in the basic common-law subjects.”³²³ Although legislative reform of the common law is “theoretically available,”³²⁴ the reality is that the responsibility falls to judges. Indeed, they often “have no choice but to undertake it, in view of legislative indifference or legislative sensitivity to political considerations or legislative involvement in investigation and lawmaking on other fronts.”³²⁵ It would be “unrealistic to expect that legislators [would] close their heterogeneous ranks for the single-minded purpose of making repairs and renewals in the common law.”³²⁶ The “reluctance of courts to depart from stare decisis, . . . [and] their soporific view that they can abandon their own responsibility because legislative action is theoretically available[,] . . . combine to perpetuate recurring grotesqueries in the evolution of the law.”³²⁷

As examples of “magic words,” Traynor cited the “incomprehensible” reasoning of a 1603 English decision upholding a “spurious” legal rule and hapless law students desperately searching for “magic words” at examination time.³²⁸ Having planted these images, Traynor then wrote of “[m]odern equivalents [that] decorate the law journals,

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.* at 618.

324. Traynor, *supra* note 294, at 165.

325. Traynor, *supra* note 40, at 618.

326. *Id.*

327. Traynor, *supra* note 294, at 165.

328. Traynor, *supra* note 40, at 622-23.

such as Professor Herbert Wechsler's 'neutral principles.'³²⁹

Wechsler, it will be recalled, had criticized the Supreme Court's decision in *Brown v. Board of Education*³³⁰ as not resting on neutral principles. For Wechsler, a principled decision was one "that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved."³³¹ Traynor wrote that "[n]eutral principles sound pure and simple to a judge who confronts problems ridden with impurities and complications."³³² And he asked, "What did Professor Wechsler have in mind beyond magic words?"³³³

Is his vision of sweet reasonableness a pictorial one, in which judges make deft transitions from the past through the instant case to the future perfect along the curvy, narrow path that artful or clumsy adversaries trace out in a bog of facts? Is it an abstraction of embryonic syllogisms about adversary values that swirl in the judicial mind until at last all values have disappeared but one contained within the luminous logic that lawyers and judges describe as inescapable when at last it no longer escapes them?³³⁴

Traynor wrote that judges who are "hospitable to the idea of being reasonable would welcome . . . some usable standards."³³⁵ Wechsler's article had been published five years after *Brown* and three years after Traynor had written that "there is no rational basis in any law" for the "insidiously evil thing" of racial discrimination.³³⁶ In Traynor's view, Wechsler had "ignored the abundant opportunities available to a scholar with hindsight to compose a symphony of neutral principles that would

329. *Id.* at 623 (citing Wechsler, *supra* note 35).

330. 347 U.S. 483 (1954).

331. Wechsler, *supra* note 35, at 19.

332. Traynor, *supra* note 40, at 624.

333. *Id.*

334. *Id.*

335. *Id.*

336. Traynor, *supra* note 229, at 237.

improve on the judicial ballads emerged from the mud of immediate cases without adequate transcendental shine.”³³⁷

Traynor next turned to Hart, who had argued in *The Time Chart of the Justices*³³⁸ that the workload of the Supreme Court had resulted in opinions of substandard quality and an excess of per curiam decisions.³³⁹ Traynor wrote that Hart, “disturbed to find upon painstaking analysis that Supreme Court opinions fall short of optimum workmanship[,] . . . charitably lays some blame to ‘The Time Chart of the Justices,’ and calls for an easier schedule that would promote the articulation of what he calls ‘impersonal and durable principles.’”³⁴⁰

Reflecting on Wechsler and Hart, Traynor commented that “[j]udges must somehow walk out of themselves into thin air and record a distilled impersonal judgment yet stay close enough to common people to gain their acceptance and hence its own durability.”³⁴¹ Traynor noted that Thurman Arnold had recently “storm[ed] at what he called ‘Professor Hart’s Theology.’”³⁴² “[D]eriding as unrealistic any vision of pearly unanimous decisions that purportedly would emerge from the ‘maturing of collective thought[.]’” Arnold “[had] unkindly suggest[ed] that it might lamentably ensue ‘if the Supreme Court were selected from a single law school whose faculty were recruited from like-minded dialecticians.’”³⁴³

Traynor mused that “[a] mere judge listening in on such persuasive adversaries is bound to speculate on how collective thought about neutral principles would mature

337. Traynor, *supra* note 40, at 624.

338. Hart, *supra* note 318.

339. *Id.* at 100-01.

340. Traynor, *supra* note 40, at 624 (quoting Hart, *supra* note 318, at 99).

341. *Id.*

342. *Id.* (citing Thurman Arnold, *Professor Hart’s Theology*, 73 HARV. L. REV. 1298 (1960)).

343. *Id.* at 625. Posner also quotes Arnold’s “rudely accurate assessment of Hart’s Foreword” and adds that “[f]rom a distance of half a century, Hart’s Foreword seems either naïve to the point of almost total cluelessness or intellectually dishonest.” POSNER, *supra* note 2, at 294.

were [Arnold and Hart] ever to be brothers on the bench.”³⁴⁴ Summing up, Traynor wrote:

The composite ideal of the professors, if I abstract it aright, is a judge who, after marshalling an impressive array of relevant facts, can write an opinion that gives promise of more than a three-year lease on life by accurately anticipating the near future, who respects established folk patterns by not anticipating the too distant future, and who walks a tightrope of logic to the satisfaction of a team of collective thinkers as well as to the plaudits of the philosophers.³⁴⁵

The reality, Traynor wrote, was that the judge is the source “of enduring principles, by default [since] [s]uch principles are hardly to be found in briefs . . . [and] they are not always to be found in textbooks, for the scholars who long for them are under no urgency to declare what they are.”³⁴⁶

Judge Posner’s views of the legal process school align him with Traynor. Legal process scholars, he notes, offered neutral principles “as the antidote to political decision making.”³⁴⁷ Judges were “to base their decisions on neutral principles rather than on the consequences for society, or for the litigants.”³⁴⁸ This flies in the face of Posner’s recognition that there is, inevitably, a “pronounced political element in the decisions of American judges,”³⁴⁹ and his view that for the pragmatic judge, the chief concern is “producing the best results for the future.”³⁵⁰

More fundamentally, the legal process scholars offered a false hope in the form of a “thin proceduralism, which by avoiding substantive commitments provided a common ground on which persons of antagonistic substantive views [could] meet.”³⁵¹ But their “content-free, technocratic-seeming precepts . . . are warm-up measures. Closure

344. Traynor, *supra* note 40, at 625.

345. *Id.*

346. *Id.*

347. POSNER, *supra* note 2, at 237.

348. *Id.* at 236.

349. *Id.* at 369.

350. POSNER, PROBLEMATICS, *supra* note 10, at 241.

351. POSNER, *supra* note 2, at 236.

requires agreement on substance. Without that, the choice of neutral principles is up in the air.”³⁵² In the end, Posner concludes, legal process scholars failed to “offer a substitute for legalism on the one hand and politics and emotion on the other.”³⁵³

A fundamental mistake in the thinking of legal process scholars was the belief that *Lochner*-inspired concerns over, and thus restrictions on, judicial lawmaking should be generalized to the common law. Holmes, it will be recalled, had seen no inconsistency in calling for deference in constitutional decisions while recognizing a creative role for courts in the common law realm.³⁵⁴ The fact is that judicial lawmaking in the common law is ultimately accountable to the political process because legislatures can always act to alter judicially created common law.

After a court acts, Traynor wrote, “[a]t best, the legislature might then let well enough alone or advance constructively in the wake of judicial initiative.”³⁵⁵ And “[a]t worst, the legislature might repudiate the judicial turn for the better.”³⁵⁶ If so, “a court would at least have focused attention on a sore problem and could now with good conscience await developments as the legislature henceforth exercised the major responsibility it had pre-empted.”³⁵⁷

Traynor spoke with first hand knowledge. His opinion for the California Supreme Court the previous year had repudiated the doctrine of sovereign immunity,³⁵⁸ and the legislature had responded by reinstating for two years “the doctrine of governmental immunity from tort liability . . . as a rule of decision in the courts of th[e] State.”³⁵⁹ Traynor was then literally awaiting legislative developments. The next year the legislature would pass legislation which, following the court’s lead, extended liability beyond

352. *Id.*

353. *Id.*

354. *See supra* text accompanying notes 138-51.

355. Traynor, *supra* note 240, at 231.

356. *Id.*

357. *Id.*

358. *See* *Muskopf v. Corning Hosp. Dist.*, 359 P.2d 457, 458 (Cal. 1961).

359. *Corning Hosp. Dist. v. Super. Ct.*, 370 P.2d 325, 327 (Cal. 1962).

previous limits, and which Prosser described as “[p]erhaps the most advanced and effective” in the nation.³⁶⁰

Not surprisingly, Judge Posner is on the side of Holmes and Traynor. In his 1983 article, *The Meaning of Judicial Self-Restraint*,³⁶¹ Posner pointed out that the major concern over activism in constitutional law centers on the fact that in holding a statute unconstitutional, a court is cutting back on the power of the legislature.³⁶² In the common law realm, however, when a court creates new remedies or new defenses in tort or contract law, it “may well be taking power over the allocation of resources away from private persons and putting it in [the court’s] hands, thereby enlarging the power and reach of government.”³⁶³ “But unless it is acting contrary to the will of the other branches of government it is not being activist in [Posner’s] terminology.”³⁶⁴ Thus—and this is the important point for judges as tort lawmakers—“when a judge is expounding private judge-made law, as distinct from public law, considerations of self-restraint are irrelevant.”³⁶⁵ For Posner, as for Holmes, there is no inconsistency in calling for restraint in constitutional law while suggesting the desirability of a creative lawmaking role for courts in tort law. Thus Holmes, who faulted *Lochner* era courts for “making hostility to socialism an element in judicial decisionmaking,” could consistently decide tort cases “in accordance with the individualistic, anti-collectivist—one might even say anti-socialist—philosophy that came naturally to him.”³⁶⁶ In contrast, Hart and Sacks in their analysis of their hypothetical *Norway Plains* decision, faulted their Shaw-like judge for his individualistic, industry-favoring, policy-based decision.³⁶⁷

As Holmes, Traynor, and Posner knew, concerns over the lack of electoral accountability of the judiciary are

360. PROSSER, *supra* note 49, at 987.

361. Posner, *supra* note 282.

362. *See id.*

363. *Id.* at 14.

364. *Id.*

365. *Id.*

366. *Id.* at 18.

367. *See supra* notes 205-09 and accompanying text.

misplaced because the “legislature can always step in and prescribe” an alternative rule if it disagrees with the judge-made law.³⁶⁸

E. *Justice Traynor and the Legal Process School:
Conflicting Perspectives*

Traynor and the legal process scholars had sharply conflicting perspectives on law and judicial lawmaking. Legal process scholars “urge[d] courts to avoid lawmaking that is ‘political’ or ‘nonneutral.’ In contrast, [Traynor called for] judicial lawmaking even though—or precisely because—[h]e recognize[d] its political content.”³⁶⁹ Because traditional common law rules are “laden with nineteenth-century values, the task of modernizing this law is intrinsically ‘political.’”³⁷⁰

Unlike the legal process scholars, Traynor’s goal was not to limit judicial lawmaking. It was to encourage it. He found “little ground for worry that judges . . . will become zealous to reach out for more responsibility than they now have. Judicial office has a way of deepening caution, not diminishing it.”³⁷¹ Indeed the “danger is not that they will exceed their power, but that they will fall short of their obligation.”³⁷² The “real concern,” for Traynor, was “not the remote possibility of too many creative opinions but their continuing scarcity.”³⁷³ In his view, the “growth of the law, far from being unduly accelerated by judicial boldness, is unduly hampered by a judicial lethargy that masks itself as judicial dignity with the tacit approval of an equally lethargic bar.”³⁷⁴ The consequence was that “[m]assive anachronisms endure in [the law’s] substance, their

368. POSNER, *PROBLEMATICS*, *supra* note 10, at 247.

369. Ursin, *Judicial Creativity*, *supra* note 19, at 251; *see also* Traynor, *supra* note 229, at 231.

370. Ursin, *Judicial Creativity*, *supra* note 19, at 251.

371. Traynor, *supra* note 40, at 620.

372. *Id.*

373. Traynor, *supra* note 3, at 52.

374. *Id.*

venerability discouraging judges from voicing the rude possibility that they may have reached retirement age.”³⁷⁵

F. *Constraints on Judicial Lawmaking*

Although the judge is a lawmaker, Traynor recognized that his lawmaking was not identical to that of a legislator. “Unlike the legislator . . . [the judge] invariably takes precedent as his starting-point: he is constrained to arrive at a decision in the context of ancestral judicial experience; the given decisions, or lacking these, the given dicta, or lacking these, the given clues.”³⁷⁶ Moreover, if the judge “confronts a truly unprecedented case, he still arrives at a decision in the context of judicial reasoning with recognizable ties to the past.”³⁷⁷ That “kinship [to the past] not only establishes the unprecedented case as a precedent for the future, but integrates it in the often rewoven but always unbroken line with the past.”³⁷⁸ Judge Posner has also called attention to this difference, writing that a “judge is a different kind of rulemaker from a legislator. He does not write on a clean slate.”³⁷⁹

Traynor also noted that “the judge is confined by the record in the case, which in turn is confined to legally relevant material, limited by evidentiary rules.”³⁸⁰ Moreover, “even a decision of far-reaching importance concludes with the words: ‘We hold today only that . . . We do not reach the question whether.’”³⁸¹ In this way,

a court remains uncommitted to unduly wide implications of a decision, it gains time to inform itself further through succeeding cases. It is then better situated to retreat or advance with a minimum of shock to the evolutionary course of the law, and hence with a minimum of shock to those who act in reliance upon judicial decisions.³⁸²

375. *Id.* at 53.

376. Traynor, *supra* note 43, at 203.

377. *Id.*

378. *Id.*

379. POSNER, *PROBLEMATICS*, *supra* note 10, at 248.

380. Traynor, *supra* note 43, at 203.

381. *Id.*

382. *Id.* at 203-04.

In a similar vein, Posner writes that the pragmatist “worries about premature commitment to a position with unforeseeable consequences.”³⁸³ Thus, he “commends not only the distinguishing of precedents as a way of reaping the fruits of knowledge gained from fresh facts revealed by new cases but also the refusing to cut off further inquiry by laying down a broad principle in the first case in a line of cases.”³⁸⁴

Traynor wrote that the “greatest judges of the common law have proceeded in this way, moving not by fits and starts, but at the pace of the tortoise that steadily makes advances though it carries the past on its back.”³⁸⁵ It is “[t]he very caution of the judicial process [that] offers the best of reasons for confidence in its recurring reformation.”³⁸⁶ This caution “give[s] reassurance that when [the judge] takes an occasional dramatic leap forward he is impelled to do so in the very interest of orderly progression.”³⁸⁷ This was the case, Traynor wrote, with Mansfield in contract law, Holmes with respect to substantive due process, Cardozo in *MacPherson v. Buick*,³⁸⁸ and Stone “in the chaotic field of conflict of laws.”³⁸⁹

“A judge concerned with the orderly development of the law [is] aware that it must proceed slowly enough for the community to absorb it”³⁹⁰ Such a judge “is thus inclined to proceed far more cautiously in ridding the law of an anachronism than does a formulistic judge in reinforcing its defenses.”³⁹¹ Moreover, “the creative decision is circumspect in the extreme, for it reflects the most careful consideration of all the arguments for a conventional solution and all the circumstances that . . . render such a

383. POSNER, *supra* note 2, at 247.

384. *Id.*

385. Traynor, *supra* note 43, at 204.

386. *Id.*

387. *Id.*

388. 111 N.E. 1050 (N.Y. 1916).

389. Traynor, *supra* note 43, at 204.

390. Traynor, *supra* note 294, at 166.

391. *Id.*

solution . . . unrealistic.”³⁹² A Traynor-like judge is “well aware that courts . . . do not advance beyond the customs and beliefs of the community but traditionally lag behind them.”³⁹³ Traynor wrote of the “tradition that courts do not ordinarily innovate change but only keep the law responsive to significant changes in the customs of the community, once they are firmly established.”³⁹⁴ This “tenet of lag” is “deservedly respected.”³⁹⁵ Again, Traynor’s views resonate with those of Judge Posner who writes that “judges in a democratic society must accord considerable respect to the deeply held beliefs and preferences of the democratic majority when making new law.”³⁹⁶ It follows that “the wise judge will try to check his convictions against those of some broader community of opinion.”³⁹⁷

Justice Traynor cautioned, however, that this tenet of lag is to be distinguished from the cries of alarm from “bogus defenders of stare decisis [who] conjure up mythical dangers to alarm the citizenry [and who] do . . . injury to the law when the public takes them seriously, and timid judges retreat from painstaking analysis within their already great constraints.”³⁹⁸

G. *Electoral Accountability*

In California, state supreme court justices are appointed by the governor for a twelve year term if approved by the three person commission on qualifications.³⁹⁹ If a justice seeks a second term, he must stand for reelection, although he runs unopposed. Voters vote yes or no, and thus have only a veto power.⁴⁰⁰ This is a form of electoral accountability, although Traynor noted in

392. Traynor, *supra* note 3, at 52.

393. Traynor, *supra* note 294, at 166.

394. Traynor, *supra* note 43, at 205.

395. *Id.*

396. POSNER, *PROBLEMATICS*, *supra* note 10, at 251.

397. *Id.*

398. Traynor, *supra* note 43, at 205.

399. See Roger J. Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211, 213 (1957).

400. *Id.*

1957 that the voters of California had “never used their veto power to reject an incumbent.”⁴⁰¹ (This would change, however, in 1986 when voters rejected three justices in a campaign waged over unpopular death penalty cases but financed by manufactures and other business enterprises and their insurers.)⁴⁰² Although this electoral check seems not to have weighed heavily on justices of the Traynor era, it does take some of the air out of the claim that judicial lawmaking is not subject to the “check of the ballot box.”⁴⁰³

H. *Improving Judicial Lawmaking*

Traynor was “sharply aware of how much need there is to improve the effectiveness of the judicial process.”⁴⁰⁴ If the concern of legal process scholars was with the relative lack of lawmaking competence of courts, Traynor’s response was to seek ways to improve their competence. One way to do this could be to borrow from the product of the legislative process itself.

Traynor, for example, suggested that the Uniform Commercial Code could serve as the “source for analogous judicial rules to govern situations not explicitly covered by the Code.”⁴⁰⁵ The “key to the Code’s success as a model for judicial lawmaking,” he wrote, lay in the manner in which it was promulgated.⁴⁰⁶ The culmination of years of scholarly work, the final product “was of a piece and . . . it also travelled well, as one state legislature after another adopted it.”⁴⁰⁷ Even a diehard judge, “resistant to the use of statutes in the formulation of common-law rules, could hardly ignore such a rich source of law.”⁴⁰⁸

401. *Id.*

402. See Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 737 (1995).

403. See HART & SACKS, *supra* note 162, at 375; see also Stephen D. Sugarman, *Judges as Tort Law Un-Makers: Recent California Experience with New Torts*, 49 DEPAUL L. REV. 455, 471 (1999).

404. Traynor, *supra* note 40, at 625.

405. Traynor, *supra* note 295, at 423.

406. *Id.* at 424.

407. *Id.*

408. *Id.*

Traynor envisioned a distinctive role for lawyers and law professors in the continuing development of the law. The "conscientious advocate enables the judge to see clearly in all directions on a narrow problem and make an informed decision."⁴⁰⁹ In contrast, the "law professor has the privilege of perspective. It is for him to make prophetic generalization from the host of cases that speak out the variations of a . . . problem."⁴¹⁰ In Traynor's view, law professors should not be "passive observers . . . with no more responsibility than to write reviews of what others have done."⁴¹¹ "Theirs is . . . a preventive task, to train their specialist eyes to the early detection of malevolent growths."⁴¹² This is their unique role. "For this task the advocate is partly disqualified by special interest."⁴¹³ The judge is also ill-suited to this task because of

the diffusion of his energies on an endless variety of problems, by the relentless clock that compels him to move swiftly to preclude delays that bring their own injustice, that drives him to decision without benefit of that seasoned reflection on a particular subject that marks the work of the scholar.⁴¹⁴

Traynor noted "how grateful the courts are when they look to the scholar's work and find an illuminating insight . . . [that is] an imaginative synthesis of . . . precedents."⁴¹⁵ He wrote of the "immeasurable help [scholars] give [judges] when they go beyond a pedestrian catalogue and work at the hard task of clearing away deadwood."⁴¹⁶

There remained, however, a lack of "effective communication among judges and lawyers in practice and in law schools on the orderly development of the law."⁴¹⁷ There was a need to "do much more to clarify and improve the appellate process upon which we depend for articulation

409. Traynor, *supra* note 229, at 232.

410. *Id.*

411. *Id.* at 233.

412. *Id.*

413. *Id.*

414. *Id.*

415. *Id.*

416. *Id.*

417. Traynor, *supra* note 294, at 158.

of the law.”⁴¹⁸ Traynor’s concern was that “[m]any still seem to believe there is a touchstone for precedent that reveals the magic words for decision.”⁴¹⁹ As a consequence, too few “lawyers have any real awareness of how courts arrive at a decision.”⁴²⁰ All “[t]oo often [the judge] does not get the help he should have had from the briefs Too often both sides set forth issues that float upon the surface of a problem.”⁴²¹

An important avenue for improving the lawmaking competence of courts grew out of the “growing recognition that judges can approach the ideal of decision by intensifying their examination of data surrounding a controversy that may be essential to its understanding.”⁴²² Traynor wrote that “[w]hen hard cases make good law, . . . it [is] usually because the judges had before them the data requisite for an informed judgment[.]”⁴²³ Although “only a small fraction of cases are of a complexity that calls for inquiry beyond the facts about the parties and available precedents, they may be of major significance in the development of the law.”⁴²⁴ Traynor suggested that courts “inquire, the better to resolve a hard case, into what Professor Kenneth Davis calls the ‘legislative facts,’ or what we might call environmental data, as distinguished from the selected litigated facts presented to the court.”⁴²⁵ Scholars such as Davis had “advanced beyond academic tintinnabulation of enduring principles to the concrete suggestion that they will materialize only if we understand that the courts must sometimes be informed on matters far beyond the facts of the particular case.”

Judges, in Traynor’s view, might profitably look to studies “written by an economist [,] or anthropologist or an engineer.”⁴²⁶ Traynor saw no need to “distrust judicial

418. *Id.*

419. *Id.*

420. *Id.*

421. *Id.* at 159.

422. Traynor, *supra* note 40, at 626.

423. *Id.* at 627.

424. *Id.*

425. *Id.*; see also KENNETH CULP DAVIS & RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE § 7.5 (3d ed. 1994).

426. Traynor, *supra* note 43, at 212.

scrutiny of such extralegal materials.”⁴²⁷ With their “continuous adjustment of sight to varied problems [,] [judges] tend to develop . . . some skill in the evaluation of massive data. They learn to [evaluate information from] medicine [,] scientific findings [,] [and findings of] social scientists [and] economists.”⁴²⁸ Of course, judges “are bound in fairness to direct the attention of counsel to such materials . . . and to give them the opportunity to submit additional briefs.”⁴²⁹

Finally, in “novel cases” when environmental data in the form of economists’ or others’ studies are not available, “[o]ur most perceptive judges have . . . been driven to construct what we might call environmental assumptions.”⁴³⁰ Traynor noted that we can “understand how inevitable are such assumptions when we go back to the meager legal texts of only a few generations ago.”⁴³¹ However, Traynor reminded readers, the judge “must be mindful . . . to keep so close to the case and what it adumbrates that his inquiry will be as restrained as it is searching.”⁴³² The need is “for judgment of the highest order that combinations of analysis and intuition culminating in decisions that time proves prophetic.”⁴³³

To those who might cringe at the suggestion that courts should rely on combinations of analysis and intuition—especially the “intuition” part—the answer is that courts have no choice. Judge Posner points out that “[c]ases do not wait upon the accumulation of a critical mass of social scientific knowledge that will enable the properly advised judge to arrive at the decision that will have the best results.”⁴³⁴ For example, “when the [Supreme] Court decided to redistrict state legislatures according to the ‘one man, one vote’ principle it cannot have had a clear idea about the effects, on which political scientists still do not

427. *Id.*

428. *Id.*

429. *Id.*

430. Traynor, *supra* note 40, at 629.

431. *Id.*

432. *Id.* at 628.

433. Traynor, *supra* note 294, at 160.

434. POSNER, *PROBLEMATICS*, *supra* note 10, at 255.

agree more than thirty years after the Court got into the redistricting business.”⁴³⁵ Similarly, “judges had to resolve such issues as whether to extend the domain of strict liability, substitute comparative negligence for contributory negligence [and] simplify the rules of occupiers’ liability . . . long before economists and economically minded lawyers got around to studying the economic consequences of these choices.”⁴³⁶ In Posner’s view, judges should try to make the decision that will produce the “best results.”⁴³⁷ Where there is no “body of organized knowledge to turn to for help, they must rely on their intuitions.”⁴³⁸

I. *Changed Norms of Judicial Decision Making and Opinion Writing*

From the earliest years of his tenure on the bench, Justice Traynor urged his court to engage in policy-based lawmaking that violated the norms of decision making and opinion writing of, first, the formalists of the 1940s and 1950s and, then, the legal process scholars of the 1950s and 1960s. In the 1950s he converted the California Supreme Court to his view, and thus altered the norms of judicial decision making and opinion writing for his court, which served as an example for courts across the nation.⁴³⁹ During the 1950s and 1960s the California Supreme Court left both formalism and legal process thinking in the dust as it emerged as the most innovative court in the nation.⁴⁴⁰ Moreover, that jurisprudential perspective has persisted even as the court has consisted of a majority of conservative justices appointed by Republican governors since the mid-

435. *Id.* at 256.

436. *Id.*

437. *Id.*

438. *Id.*

439. Certainly Justice Traynor was not alone in influencing the norms of judicial decision making and opinion writing. The lawmaking of the United States Supreme Court obviously had an enormous impact on the courts of the country—as did the occasional writing on the subject of judicial lawmaking by Supreme Court Justices and other judges. But Traynor was the most conspicuous and persistent advocate of policy-based lawmaking both in his extrajudicial writings and in his opinions, which appeared over the period of three decades.

440. See GILMORE, *supra* note 45, at 91.

1980s.⁴⁴¹ The court has been an occasional—and in some fields a frequent—legislator, with policy at the heart of its legislating.

Nowhere is Traynor-style decision making and opinion writing more apparent than in tort law. Justice Traynor's *Escola* proposal for judicial adoption of strict products liability,⁴⁴² which can be traced to Llewellyn's work in the 1930s,⁴⁴³ was heresy to formalists of the 1940s and 1950s. And it, as well as its controversial loss spreading policy, violated 1950s legal process norms of "neutrality" and "reasoned elaboration." Both the strict liability doctrine and its underlying policies, however, were written into California law beginning in the 1960s with *Greenman v. Yuba Power Products, Inc.*⁴⁴⁴ Based on these policies, the court, with little hesitation, extended strict liability beyond manufacturers to include retailers,⁴⁴⁵ wholesalers,⁴⁴⁶ and lessors.⁴⁴⁷ Prosser wrote in 1971 that the development of strict products liability during the preceding decade represented "the most rapid and altogether spectacular overturn of an established rule in the entire history of the law of torts."⁴⁴⁸

441. See generally Ursin & Carter, *supra* note 51 (discussing policy-based decision making by the more conservative court).

442. *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring).

443. LLEWELLYN, CASES AND MATERIALS, *supra* note 174.

444. 377 P.2d 897 (Cal. 1963). Prominent among the policies is the loss spreading policy. See Ursin, *Judicial Creativity*, *supra* note 19, at 302 n.470. This policy, controversial at the time of Traynor's *Escola* concurrence, has also been questioned more recently, in part because tort recoveries include pain and suffering damages. See, e.g., AMERICAN LAW INSTITUTE, REPORTERS' STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 30 (1991). But damages reform, linked to expansive liability rules—and other features that meet additional criticisms of the loss-spreading policy—were part of the enterprise liability scholars' agenda. See, e.g., Fleming James, Jr., *Damages in Accident Cases*, 41 CORNELL L.Q. 582, 584-85 (1956). Common law proposals crafted along no-fault lines can avoid these critics' objections. See, e.g., NOLAN & URSIN, *supra* note 37, at 168-77.

445. See *Vandermark v. Ford Motor Co.*, 391 P.2d 168, 171 (Cal. 1964).

446. See *Conifoux v. Hercules Powder Co.*, 46 Cal. Rptr. 552, 554 (Cal. Ct. App. 1965).

447. *Id.*

448. PROSSER, *supra* note 49, at 654.

The same phenomenon can be observed within negligence law. In 1929, Leon Green had proposed that policy, or “duty,” factors should replace traditional analysis to determine liability and duty rules.⁴⁴⁹ One of these, the “justice factor”⁴⁵⁰—“the capacity to bear the loss”⁴⁵¹—was said at the time to have “no place in a restatement of the existing law of the United States and not that of Utopia.” This factor was said to have “never consciously or . . . unconsciously influenced the decision of any court.”⁴⁵² In 1968, the California Supreme Court, in its landmark decision in *Rowland v. Christian*, wrote policy factors derived from Green into California tort law as it discarded the traditional landowner rules in favor of a general duty of due care.⁴⁵³ In considering whether to retain, discard, or modify traditional no-duty rules in the future, the court would consider:

the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the *availability, cost and prevalence of insurance for the risk involved*.⁴⁵⁴

The “fundamental principle,” the court wrote, is that liability should be imposed “for injury occasioned to another by [a] want of ordinary care or skill.”⁴⁵⁵

449. Green, *supra* note 169.

450. *Id.* at 255-56.

451. See Magruder, *supra* note 171, at 415.

452. See Bohlen, *supra* note 172.

453. 443 P.2d 561 (1968).

454. *Id.* at 564 (emphasis added). *Rowland*’s duty factors would provide the framework for California decisions expanding the concept of duty in later years; and with a more conservative court in the last two decades they also provided the framework for cutting back liability. Compare *Isaacs v. Huntington Mem’l Hosp.*, 695 P.2d 653 (Cal. 1988), with *Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207 (Cal. 1993) (limiting *Isaacs*).

455. 443 P.2d at 563.

This policy orientation guided the Traynor-era court as it eliminated or modified other traditional doctrines that protected negligent defendants from tort liability. In a series of cases the court abolished the doctrines of charitable,⁴⁵⁶ intrafamily,⁴⁵⁷ and governmental⁴⁵⁸ immunity; and, operating in similar fashion, also abandoned the zone of danger requirement in bystander emotional distress cases,⁴⁵⁹ crafted expansive new doctrines of causation,⁴⁶⁰ and eased the requirements of *res ipsa loquitur*.⁴⁶¹

During the 1960s, and into the 1970s, the California Supreme Court was a frequent legislator, comfortable with basing its lawmaking on policies that had been anathema to both formalists and writers of the legal process school. This did not mean, however, that lawyers and law professors would give up their formalist claims or their legal-process-like worries over judicial lawmaking. They persist to this day and, indeed, are targets of Judge's Posner's jurisprudential writings. Before returning to Judge Posner, however, it is instructive to examine the views expressed by Judge Henry Friendly in a 1978 article that stands as a link between Traynor and Posner.

IV. JUDGE FRIENDLY ON JUDICIAL DECISION MAKING

Judge Friendly sat on the Second Circuit from 1959 until his death in 1986.⁴⁶² During this period, his output of judicial opinions and extrajudicial writings—"almost one thousand opinions, several books, thirty or so full-scale articles, and many tributes and book reviews"—was

456. See *Malloy v. Fong*, 232 P.2d 241, 247 (Cal. 1951).

457. See *Gibson v. Gibson*, 479 P.2d 648, 652-53 (Cal. 1971) (parental immunity); *Klein v. Klein*, 376 P.2d 70, 71-72 (Cal. 1962) (interspousal immunity for negligence); *Self v. Self*, 376 P.2d 65, 69 (Cal. 1962) (interspousal immunity for intentional tort); cf. *Emery v. Emery*, 289 P.2d 218, 224 (Cal. 1955) (refusing to create a sibling immunity).

458. See *Muskopf v. Corning Hosp. Dist.*, 359 P.2d 457, 462-63 (Cal. 1961).

459. *Dillon v. Legg*, 441 P.2d 912, 924-25 (Cal. 1968).

460. *Summers v. Tice*, 199 P.2d 1 (Cal. 1948).

461. See, e.g., *Rose v. Melody Lane of Wilshire*, 247 P.2d 335, 338 (Cal. 1952).

462. Michael Boudin, *Judge Henry Friendly and the Mirror of Constitutional Law*, 82 N.Y.U. L. REV. 975, 975 (2007).

prodigious.⁴⁶³ Judge Michael Boudin echoes Judge Posner's previously quoted assessment of this great judge⁴⁶⁴ when he writes that the "power and quality of [Friendly's work] made him the most admired legal scholar and craftsman sitting on the federal circuit courts, dominating his era as Learned Hand had dominated the 1930s through the 1950s."⁴⁶⁵

A. *The Use of Social Policy in Judicial Decision Making*

In an important 1978 article, *The Courts and Social Policy: Substance and Procedure*,⁴⁶⁶ Judge Friendly articulated a view that placed him squarely in the Holmesian tradition, and applied this view to the substantive issues that had been—and continued to be—central to the debate about the lawmaking role of courts. These issues included the judicial creation of the doctrine of strict products liability and the landmark Supreme Court decisions in *Brown v. Board of Education*⁴⁶⁷ and *Roe v. Wade*.⁴⁶⁸ In Friendly's view judicial lawmaking based on policy was a fact of our system of government. The question scholars should face is how to *improve* the use of policy by courts in their lawmaking.

Writing in 1978, Judge Friendly addressed the same issues that Traynor had addressed and offered a similar—and even more nuanced, or at least detailed—analysis. In a 1977 article Traynor had rejected the contention that "policy is a matter for the legislators alone,"⁴⁶⁹ writing that "judicial responsibility . . . connotes the recurring choice of one policy over another."⁴⁷⁰ Judge Friendly's 1978 article was divided into two parts. The topic of the first part was

463. *Id.* at 975-76; see, e.g., HENRY J. FRIENDLY, BENCHMARKS (1967); Henry J. Friendly, *In Praise of Erie and the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

464. See *supra* text accompanying note 1.

465. Boudin, *supra* note 462, at 976.

466. Friendly, *supra* note 21.

467. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

468. *Roe v. Wade*, 410 U.S. 113 (1973).

469. Traynor, *supra* note 273, at 11.

470. *Id.* at 12.

“Should courts decide issues of social policy?”⁴⁷¹ Friendly’s answer mirrored Traynor’s: “The courts must address themselves in some instances to issues of social policy, not because this is particularly desirable, but because often there is no feasible alternative.”⁴⁷²

Friendly recognized that writers associated with the legal process tradition (he quoted Justice Frankfurter and Judge Learned Hand)⁴⁷³ had raised legitimacy and accountability concerns, as well as questions of competence.⁴⁷⁴ For Friendly, however, judicial lawmaking based on policy was a fact of our system of government: “[I]t is apparent that [courts] have been doing so for a long time.”⁴⁷⁵ From nineteenth-century courts “mold[ing] English common law in light of their perceptions of the special needs of our society”⁴⁷⁶ to the most recent “striking examples . . . concerning strict products liability[,]”⁴⁷⁷ the “motive power [had been] . . . notion[s] of social policy.”⁴⁷⁸

Like Traynor, Friendly believed this recognition of judicial lawmaking based on policy should not even be controversial—at least with respect to the common law. The legal process objections to the judicial adoption of strict products liability had *no* resonance with Judge Friendly’s conception of judicial lawmaking. He wrote that “although there were some outcries from outraged manufacturers, few people today are concerned about this venture in applying judicial views of social policy.”⁴⁷⁹

Concern over legitimacy, absent in the common law arena, comes into play “in the public sector and is particularly intense when courts resort to notions of social policy to set aside actions of other branches of government strongly supported by many citizens.”⁴⁸⁰ Here, Friendly

471. Friendly, *supra* note 21, at 21.

472. *Id.*

473. *Id.* at 22.

474. *See id.* at 22-23.

475. *Id.* at 24.

476. *Id.* at 25.

477. *Id.*

478. *Id.* at 26.

479. *Id.* at 27.

480. *Id.*

wrote, is where the “storm has arisen . . . and is particularly intense.”⁴⁸¹

Even in the constitutional arena, however, “there are important distinctions. Some provisions of the Bill of Rights invite the courts to develop and then to apply notions of social policy.”⁴⁸² Friendly wrote that “[p]erhaps the plainest example is the cruel and unusual punishment clause of the eighth amendment.”⁴⁸³ In his view, “[n]early everyone agrees with Chief Justice Warren’s statement that the concept of cruelty is not static but must continually be reexamined in light of ‘the evolving standards of decency that mark the progress of a maturing society.’”⁴⁸⁴ Similarly, “the first amendment necessarily takes the courts into areas of policy.”⁴⁸⁵ Friendly characterized such areas as “relatively tranquil waters”⁴⁸⁶ where “only a few criticize courts for making the policy decision, although many disagree with the results.”⁴⁸⁷

Judge Friendly contrasted these areas of tranquility with “the two cases where the Court’s reliance on arguments of social policy has stirred the highest waves of criticism”:⁴⁸⁸ *Brown v. Board of Education* and *Roe v. Wade*.

481. *Id.* Friendly’s posture toward judicial lawmaking in common law subjects marks a clear departure from legal process orthodoxy. Judge Michael Boudin, however, has recently written that in constitutional decision making Friendly “reflected the outlook of the legal process movement.” Boudin, *supra* note 462, at 988. In my view, Friendly’s emphasis on the legitimate role that social policy, even controversial social policy, plays in constitutional decision making and his lack of interest in articulating formulas to limit such lawmaking are crucial departures from the outlook of the legal process school, and place Friendly in the tradition of Holmes and Traynor. Departure from that outlook, however, is consistent with a recognition of the general need for deference in constitutional decision making. Moreover, as Judge Boudin notes, “little in Friendly’s writings or decisions shows a mechanical hostility to judicial intervention. Friendly knew that much of constitutional law was open ended and that choices were available to judges.” Friendly “was not a skeptic about betterment. On the contrary, his pragmatic impulse was strong.” *Id.* at 992.

482. Friendly, *supra* note 21, at 27.

483. *Id.*

484. *Id.* at 27-28.

485. *Id.* at 28.

486. *Id.* at 29.

487. *Id.* at 28.

488. *Id.* at 29.

In understanding Friendly's analysis of these decisions, it is useful to distinguish between two of the features Friendly praised in Justice Traynor's lawmaking: "sense for the right result" and "craftsmanship."⁴⁸⁹ In Friendly's view, there "seems to be general agreement that . . . *Brown* was a good—indeed, as it now seems, an inevitable—decision."⁴⁹⁰ *Roe v. Wade* is more problematic, in part because "there was no real precedential support for the abortion decisions."⁴⁹¹ Nevertheless, Friendly wrote, he "would like to believe that in their core—forbidding prohibition of abortions in the early months of pregnancy—they were right."⁴⁹²

Friendly, however, found fault with the craftsmanship of both *Brown* and *Roe*. This part of Friendly's analysis has two (related) facets: the need for better craftsmanship to fortify the legitimacy of the Court's lawmaking; and the need (also addressed by Justice Traynor) to improve the procedure of judicial lawmaking.

In *Brown*, "[s]ocial policy entered the decision at two points—the Court's emphasis on the special importance of education and its determination that separate education was 'inherently unequal.'"⁴⁹³ In Friendly's view, the "Court [would] have done better to decide *Brown* on the basis of a jural principle . . . rather than on the basis of supposed psychological facts."⁴⁹⁴ Friendly noted that "[s]everal such bases could have been derived from the text and the history of the equal protection clause."⁴⁹⁵ These range in breadth from "saying that any governmental classification based on race was a denial of equal protection"⁴⁹⁶ to the less broad proposition "that any racial classification imposed upon blacks violated the equal protection clause."⁴⁹⁷ Or it might have been said that certain classifications were suspect and required a compelling state interest to be justified. Friendly

489. Friendly, *supra* note 23, at 1040.

490. Friendly, *supra* note 21, at 29.

491. *Id.* at 34.

492. *Id.* at 35.

493. *Id.* at 29.

494. *Id.* at 30.

495. *Id.*

496. *Id.* at 30-31.

497. *Id.* at 31.

recognized that these “jural bases . . . are not interchangeable”⁴⁹⁸ and had different implications.

Friendly’s point, however, was that “the Court and the country would have been better off”⁴⁹⁹ had the Court’s craftsmanship been better—“if the Court had placed the *Brown* decision on jural considerations which were clearly within its province as the interpreter of the Constitution and which would have yielded readier and more acceptable answers in future controversies rather than on unestablished facts concerning segregation’s psychological effects in public education.”⁵⁰⁰

In a sense, Judge Friendly’s critique of the Court’s craftsmanship in *Roe* is the mirror image of his critique of *Brown*. In *Roe*, the ultimate question was “how a case of such overwhelming social import could be translated into a principle of constitutional law, particularly in the face of what we now know to be deeply felt contrary views.”⁵⁰¹ Friendly found the Court’s “invocation of a ‘right of privacy’ . . . [un]convincing.”⁵⁰² And after analyzing other lines of authority, he found “no real precedential support for the abortion decisions.”⁵⁰³

In Friendly’s view, however, the “considerations of social policy militating against [the abortion prohibitions] . . . were strong indeed.”⁵⁰⁴ Justice Blackmun, had “described these only partially” and even then his description tended “to be obscured by the mass of historical data.”⁵⁰⁵ Friendly approached the abortion issue not just as an observer of the Supreme Court but as a federal judge who himself had been prepared to hear a constitutional attack on the New York abortion statute—which, he reported, “happily was repealed.”⁵⁰⁶ From this perspective, he supplemented Justice Blackmun’s discussion of the considerations of social

498. *Id.*

499. *Id.*

500. *Id.* at 31-32.

501. *Id.* at 33.

502. *Id.* at 34.

503. *Id.*

504. *Id.* at 32.

505. *Id.*

506. *Id.*

policy militating against the abortion statutes. Friendly pointed out that prohibition of abortions “had no more prevented them than prohibition of alcohol had prevented drinking.”⁵⁰⁷ In fact, “well-to-do women could afford a high-class, high-priced abortionist who rarely was subjected to prosecution, a hospital surgical procedure ostensibly for some other cause, or a trip to a foreign country where abortions were permitted.”⁵⁰⁸ These options were not open to the poor, who were at the mercy of abortions “threatening . . . health or even . . . life, or carrying an unwanted child to term and rearing it thereafter, often alone.”⁵⁰⁹ Quoting Justice Marshall, Friendly wrote that “abortion statutes ‘brutally coerce poor women to bear children whom society will scorn for every day of their lives.’”⁵¹⁰

Friendly believed that “Justice Blackmun must have been fully aware of all this.”⁵¹¹ In Friendly’s view, “[a] detailed presentation of these considerations of social policy would . . . have furnished a much more persuasive basis for judicial innovation than the opinion’s lengthy discussion of the Hippocratic Oath and the abortion practices of the ancient world or debate concerning the precise moment when a fetus becomes a person.”⁵¹² Friendly wrote that the lack of “real precedential support for the abortion decisions . . . does not necessarily mean that they were wrong[,]”⁵¹³ and he added that he “would like to believe that in their core . . . they were right.”⁵¹⁴

Turning to the scope of the decisions, Friendly wrote that, in his view, “the decisions would have been more justifiable and would have been somewhat better accepted if

507. *Id.*

508. *Id.* at 33.

509. *Id.*

510. *Id.* (quoting *Beal v. Doe*, 432 U.S. 438, 457 (1977)).

511. *Id.*

512. *Id.*

513. *Id.* at 34-35.

514. *Id.* at 35. *But see* A. Raymond Randolph, *Before Roe v. Wade: Judge Friendly’s Draft Abortion Opinion*, 29 HARV. J.L. & PUB. POL’Y 1035 (2006) (discussing 1970 draft opinion, written as a second circuit judge constrained by Supreme Court precedents, never filed because legislative repeal of statute, declining to overturn abortion legislation).

they had been less severe and less detailed.”⁵¹⁵ Moreover, “however unprincipled this may sound, I would have welcomed some language indicating that the decisions were limited to a social problem of the greatest moment and were not to be taken as announcing a set of rights to a liberty that had not been previously known.”⁵¹⁶

Returning attention for the moment to the subject of judges as *tort* lawmakers, the obvious lesson of Judge Friendly’s constitutional jurisprudence is that lawmaking in the *common law* raises few—or no—concerns even closely comparable to the concerns over legitimacy and competence raised by *Brown* and *Roe*. In the common law sphere, the legislature has the last say. Thus Friendly’s observation about the policy-driven judicial creation of strict products liability could be generalized to tort law generally: “[F]ew people today are concerned about this venture in applying judicial views of social policy.”⁵¹⁷

B. *Improving Judicial Lawmaking*

Friendly closed his article, in Part Two, with an analysis of great relevance to judges as tort lawmakers. In that segment, Friendly addressed the issue of judicial competence to employ social policy. He did so, however, not to discourage judicial lawmaking but, as was the case with Traynor, to suggest ways to enhance the capacity of courts as lawmakers.

Friendly wrote that the “main lesson [he] wish[ed] to draw from the abortion cases relates to procedure—the use of social data offered by appellants and amici curiae for the first time in the Supreme Court itself.”⁵¹⁸ In the abortion case over which Friendly had presided, “it was assumed from the outset that any social or medical facts or opinions on which the parties wished to rely, unless stipulated, should be offered in the three-judge district court and would be subject to cross-examination or, where the author was

515. Friendly, *supra* note 21, at 36.

516. *Id.* Friendly also expressed concern over the severity of the restrictions imposed by the court.

517. *Id.* at 27.

518. *Id.* at 36.

not readily available, to rebuttal.”⁵¹⁹ This had not been done in *Roe*. In fact, crucial aspects of the Court’s opinion “rested entirely on materials not of record in the trial court.”⁵²⁰

Friendly observed that if “an administrative agency, even in a rulemaking proceeding, had used similar materials without having given the parties a fair opportunity to criticize or controvert them at the hearing stage, reversal would have come swiftly and inexorably.”⁵²¹ In Friendly’s view, the “Court should set an example of proper procedure and not follow a course which it would condemn if pursued by any other tribunal.”⁵²²

Friendly recognized the time pressures the Court was under and thus did “not wish to appear too severe.”⁵²³ Nevertheless, “[w]hat [was] disturbing [was] the failure of the opinions even to advert to the procedural problem and to lay down a better course to be followed in the future.”⁵²⁴ His point was that “a fair opportunity must be afforded to controvert sociological, economic, psychological or scientific material offered to induce a court to hold a statute invalid.”⁵²⁵

Friendly’s analysis did not end with criticism. Rather, his goal was to *improve* the procedures used in judicial lawmaking. Thus he wrote that he did not mean that the opportunity to controvert “must be done in a full-scale, trial-type hearing. The Federal Rules of Evidence do not restrict judicial notice of ‘legislative facts.’”⁵²⁶ Like Traynor, Friendly relied on the pioneering work of Kenneth Culp Davis, who had “written [that] ‘the simplest common sense requires that when a judge is uncertain about needed legislative facts, he should let the advocates know what he

519. *Id.*

520. *Id.* at 37.

521. *Id.*

522. *Id.* at 38.

523. *Id.*

524. *Id.* (internal citations omitted).

525. *Id.*

526. *Id.*

contemplates and listen to—or read—what they have to say.”⁵²⁷

Friendly’s “submission [was] only that if a court wishes to rule on evidence of the type [relied on in *Brown* and *Roe*] to invalidate legislation, it must give the state a fair opportunity to controvert this evidence.”⁵²⁸ This could be accomplished by a “remand or, when this would be more effective, a reference to a master to hear and report.”⁵²⁹ The only alternative would be “to sustain the law without prejudice to another attack supported by a proper factual presentation.”⁵³⁰

Friendly also extended this analysis to the issue of affirmative decrees by courts—the “prototype [being] the desegregation decree directed by *Brown II*.”⁵³¹ In that context, he suggested that “a court should follow models developed by other subordinate legislators.”⁵³² One tool would be “the notice and comment procedure provided for rulemaking in the Administrative Procedure Act.”⁵³³ The opportunity for notice and comment, moreover, “should go well beyond the parties; it should include all who [might] be affected directly or indirectly by the proposed rulemaking.”⁵³⁴ Also, “[t]he judge should be free to call for advice from persons who will not be affected at all; experience in other states or cities is likely to be more helpful than the programs of hired experts.”⁵³⁵ Each of these suggestions might also prove to be helpful when courts act as *tort* lawmakers.⁵³⁶

527. *Id.* at 38-39 (quoting KENNETH CULP DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 15.00-2 (1976)).

528. *Id.* at 39.

529. *Id.* at 40.

530. *Id.* at 39.

531. *Id.* at 40.

532. *Id.* at 41.

533. *Id.*

534. *Id.*

535. *Id.*

536. See Virginia E. Nolan & Edmund Ursin, *An Enterprise (No-Fault) Liability Suitable for Judicial Adoption—with a “Draft Judicial Opinion,”* 41 SAN DIEGO L. REV. 1211, 1240 (2004) (suggesting the California Supreme Court appoint a special master “to collect data, hear from interested parties, analyze

C. *A Preview of Future Jurisprudential Debate*

Friendly also took the occasion to comment in passing on the jurisprudential debate generated by a rising jurisprudential star.⁵³⁷ Ronald Dworkin had recently published his article *Hard Cases*,⁵³⁸ in which he took issue with the view—which, Friendly noted resonates with Holmes's writings—that “where existing law is indeterminate, judges of higher courts exercise a ‘legislative’ discretion in which policy considerations may be taken into account.”⁵³⁹ Dworkin, in contrast, argued that in such cases “the judge may rely on a newly discovered but nevertheless preexisting ‘principle’ which shows that ‘the decision respects or secures some individual or group right,’ but not on considerations of ‘policy’ which show only that ‘the decision advances or protects some collective goal of the community as a whole.’”⁵⁴⁰

Although stating that he wished “to remain aloof” from the debate, Friendly noted that “it is not clear . . . how far apart, in any practically significant sense, the disputants really are.”⁵⁴¹ Then Friendly noted the “problem created for [Dworkin]” by the judicial adoption of the doctrine of strict products liability.⁵⁴² Dworkin had sought “to explain the new doctrine as the result of preexisting ‘principles.’”⁵⁴³ But, Friendly wrote, “this merely moves the inquiry back to the question of where some of these principles come from and why they should be applied not only to manufacturers of automobiles but to all products manufacturers, although not to other persons.”⁵⁴⁴ Dworkin's answer was that the “origin of these as legal principles lies not in a particular

damages alternatives” suitable for judicial adoption as part of a no-fault enterprise liability).

537. See Friendly, *supra* note 21, at 24 n.14, 27 n.30.

538. Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

539. Friendly, *supra* note 21, at 24 n.14 (referring to the view expressed in HART, *supra* note 180, at 124-32).

540. *Id.* (quoting Dworkin, *supra* note 538, at 1059).

541. *Id.*

542. *Id.* at 27 n.30.

543. *Id.*; see also DWORKIN, *supra* note 180, at 27.

544. Friendly, *supra* note 21, at 27 n.30.

decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time.”⁵⁴⁵ Friendly’s rejoinder was that this

sense of “appropriateness” . . . is nothing more or less than an opinion about policy, and whether immediately through the modulation of “principles” or [im]mediately through direct influence, it was “policy” and not “principle” that caused the courts to shift the automobile manufacturer into the strict liability regime while leaving the automobile operator under the rule of negligence.⁵⁴⁶

Friendly’s view was that Dworkin’s jurisprudence (and, of course, that of those who would follow his lead and pursue abstract theorizing) would be of little use to those concerned with how judges actually decide cases. By denying the central role that policy plays in judicial decision making, Dworkin, like the formalists and legal process scholars who preceded him, was not writing about the real world of judges. Perhaps because of this, Friendly relegated his discussion of Dworkin to two footnotes. But, of course, Dworkin was not to remain in the footnotes of the next generation of judges writing about judicial decision making, including Judge Posner, who took the judicial stage shortly after Friendly wrote.

V. THE EARLY JUDGE POSNER

In 1981, three years after Friendly’s article appeared, Richard Posner was appointed to the Seventh Circuit and began to turn his attention to the subject of judicial decision making. Unlike the legal process scholars, Posner did not offer “one-size-fits-all” formulas to limit judicial lawmaking, although he generally counseled deference in constitutional decisions. One of the first tasks he undertook was to clear away some of the brush surrounding the subject. In doing so he squarely aligned himself with Holmes, and thus with Traynor and Friendly. Posner’s 1983 article, *The Meaning of Judicial Self-Restraint*,⁵⁴⁷ written “well before [he] thought of [himself] as a pragmatist,”⁵⁴⁸ sought to bring

545. DWORKIN, *supra* note 180, at 40.

546. Friendly, *supra* note 21, at 27 n.30.

547. Posner, *supra* note 282.

548. POSNER, *PROBLEMATICS*, *supra* note 10, at 240.

clarity to the judicial vocabulary that teemed with shopworn “all-purpose terms of judicial abuse, ‘judicial activism,’ and ‘result-oriented,’ and their opposites, ‘judicial self-restraint,’ and ‘principled.’”⁵⁴⁹

A clue to where Posner’s jurisprudential journey would take him was that *Self-Restraint* was structured around Holmes’s analysis in *The Path of the Law*. Drawing on this analysis, Posner, as previously mentioned, pointed out that “self-restraint,” defined as “[a] judge’s setting as an important goal of his decisionmaking the cutting back of the power of his court system in relation to—as a check on—other government institutions,”⁵⁵⁰ is “irrelevant [when] a judge is expounding private judge-made law, as distinct from public law.”⁵⁵¹ In considering the constitutionality of legislation, in contrast, a court should be inclined to defer to legislative judgments because there it is being asked to cut back the power of the other branches of government.

Judicial self-restraint, Posner pointed out, is not a liberal or conservative stance as such “because it is independent of the policies that other government institutions happen to be following.”⁵⁵² Self-restraint is also different from stare decisis, that is, “deference to other judges in the same judicial system.”⁵⁵³ Finally, self-restraint is a “contingent good” because its desirability “depends on the particular historical situation in which the judge finds himself.”⁵⁵⁴ Thus, for example, “it would have been a disaster for Chief Justice Marshal [in] *Marbury v. Madison* . . . to have embraced judicial self-restraint.”⁵⁵⁵

In 1987, the *Harvard Law Review* celebrated the hundredth anniversary of its founding with an issue commemorating that anniversary. Judge Posner’s contribution, *The Decline of Law as an Autonomous*

549. Posner, *supra* note 282, at 1.

550. *Id.* at 11-12.

551. *Id.* at 18.

552. *Id.* at 12.

553. *Id.* at 13.

554. *Id.* at 14.

555. *Id.*

Discipline: 1962-1987,⁵⁵⁶ can be seen to mark the beginning of his foray into jurisprudence. Posner wrote that he had initially declined to contribute to the issue but had reconsidered because he now believed that “an apt subject for anniversary reflections is that the *Harvard Law Review* . . . may have reached the peak of its influence.”⁵⁵⁷ The reason for this became the theme of Posner’s article: the dethroning of the conception—dominant into the 1960s—“that law is an autonomous discipline, [that is] a subject properly entrusted to persons trained in law and in nothing else.”⁵⁵⁸

Posner traced that conception of law in academic thinking to Langdell in the 1870s, noting that this “perverse or at best incomplete way of thinking about law was promptly assailed by Holmes, who pointed out that law is a tool for achieving social ends.”⁵⁵⁹ In Posner’s view, Hart and Sacks (and Edward Levi) “had completed the edifice of what might be termed classical legal thought.”⁵⁶⁰ If legal process scholarship “completed the edifice of . . . classical legal thought,”⁵⁶¹ events in subsequent years had inflicted a “mortal blow” to that view.⁵⁶² In fact, Posner wrote, the “supports for the faith in law’s autonomy as a discipline have been kicked away.”⁵⁶³ For example, “[s]ince Hart and Sacks wrote, a large number of factors have combined to inflict a mortal blow on the comfortable view of statutory interpretation [and the legislative process] they espoused.”⁵⁶⁴ Posner noted that “[c]hief among these factors have been the breakdown of political consensus; the growth of social choice theory . . . ; the rediscovery of interest groups by economists and political scientists on both the left

556. Richard A. Posner, *The Decline of Law as an Autonomous Discipline 1962-1987*, 100 HARV. L. REV. 761 (1987).

557. *Id.*

558. *Id.* at 762.

559. *Id.*

560. *Id.* at 772.

561. *Id.*

562. *See id.* at 774.

563. *Id.* at 766.

564. *Id.* at 774.

and right; [and] the criticisms of the 'public-interestedness' of legislation."⁵⁶⁵

Writing specifically about statutory interpretation, Posner observed that although "the arguments from economics [and] social choice . . . have undermined the lawyer's naive faith in the easy interpretability of statutory and constitutional provisions," they unfortunately "have put nothing in its place."⁵⁶⁶ More generally, the problem was what to put in place of classical legal thought—and legal process scholarship.

Law's Autonomy was Posner's opening foray into articulating a jurisprudential view that could replace classical legal thought and legal process scholarship. As such, its suggestions were works in progress. Posner, for example, found hope in the "boom in disciplines that are complementary to law, particularly economics and philosophy."⁵⁶⁷ Also, he wrote that the "type of 'advocacy' scholarship in which political [positions] are concealed in formalistic legal discourse—a staple of modern law review writing—should be replaced by a more candid literature on the political merits of contested legal doctrines."⁵⁶⁸ Related to this is the "need [for] a new style of judicial opinion writing (really a return to an older style), in which formalistic crutches—such as . . . the pretense of deterministic precedent—that exaggerate the autonomous elements in legal reasoning are replaced by a more candid engagement with the realistic premises of decision."⁵⁶⁹ In the ensuing years, Posner would refine these (and other) suggestions—and find some, such as moral philosophy, to be dead ends.

But dead ends does not mean dead. Moral philosophy, for example, continues to thrive in academia, if not in the real world of judges and lawyers. And, in a perverse twist, Ronald Dworkin, "the most celebrated jurisprude writing in the English language,"⁵⁷⁰ and other liberal scholars

565. *Id.*

566. *Id.* at 777.

567. *Id.* at 767.

568. *Id.* at 778.

569. *Id.*

570. Eskridge, Jr. & Frickey, *supra* note 162, at lli.

commandeered legal process concepts—which had been designed to *limit* judicial lawmaking—and turned them into a charter for ambitious, and at times unconstrained, lawmaking.⁵⁷¹ For example, as Eskridge and Frickey have noted, Dworkin “followed Hart and Sack’s distinction between principle and policy and accepted Wechsler’s . . . position that constitutional activism must be justified by principles that are something more than policy judgments.”⁵⁷² Dworkin, however, “supported a progressive constitutionalism . . . going well beyond the Warren Court’s brand of activism.”⁵⁷³ This, Eskridge and Frickey write, “was analytically possible because Dworkin viewed principles more expansively than Wechsler . . . did. For Dworkin, principles are evolutive and normative, not static and neutral.”⁵⁷⁴ Posner’s 1999 book the *Problematics of Moral and Legal Theory* was devoted to demonstrating that “moral theory, and such cousins of it as jurisprudence and constitutional theory, are useless in the resolution of concrete legal issues.”⁵⁷⁵

571. See generally GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); RONALD DWORKIN, LAW’S EMPIRE (1986); JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

572. Eskridge, Jr. & Frickey, *supra* note 162, at cxvii.

573. *Id.*

574. *Id.*

575. POSNER, PROBLEMATICS, *supra* note 10, at x. In Posner’s view, these theoretical perspectives have “nothing to offer judges or legal scholars so far as either adjudication or the formulation of jurisprudential or legal doctrines is concerned.” *Id.* at viii. Moreover, their “influence is pernicious; [they are] deflecting academic lawyers from their vital role . . . of generating the knowledge that the judges and other practical professional require if they are to maximize the social utility of law.” *Id.* at xi.

Moral theory, jurisprudence, and constitutional theory, Posner wrote, are products of what he has called the “academification” of legal scholarship. Scholars who write in these fields have turned away from a reality-based approach to law in favor of theoretical analysis that is “barren of any engagement with reality.” Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 21 (1998). These scholars see themselves as “members of an academic community[.]” *id.* at 10, and “judges, practitioners, and government officials be damned.” Richard A. Posner, *Introduction to Baxter Symposium*, 51 STAN. L. REV. 1007, 1010 (1999). As a consequence, they “have little to offer those concerned about improving the legal system.” *Id.* at 1009. For a similar criticism of contemporary corrective justice tort theorists, see Virginia E. Nolan

As we have also seen, the “mortal blow” to classical legal thought—and the idea of law as an autonomous discipline—proved to be less than mortal. In this case it was politically conservative legal thinkers who came up with a jurisprudential tactic—originalism—to counter the “expansion of rights and liability . . . by judicial activists of the Warren Court . . . and their successors.”⁵⁷⁶ If anything, the concept of law as an autonomous legal discipline has grown in influence among legal academics since Posner’s *Law’s Autonomy*.⁵⁷⁷ Hence Posner’s *How Judges Think* which, in part, targets legal formalism, one version of which is originalism. But *How Judges Think* is not about how law professors think—as its title clearly states, it is about how *judges* think and one of its chapters is entitled, “Judges Are Not Law Professors.”⁵⁷⁸ And, as this Article has demonstrated, three of the greatest judges of the twentieth century—Holmes, Traynor, and Friendly—thought the way Posner thinks.

CONCLUSION

How Judges Think captures how Justice Roger Traynor and Judge Henry Friendly, two of the greatest judges of the twentieth century, thought—and how they thought judges *should* think about judicial decision making. In a nutshell, these judges believed, as Judge Posner writes, that when conventional legal materials “fail to generate acceptable answers” to legal questions, “judges perforce have occasional—indeed rather frequent—recourse to other sources of judgment, including their own political opinions or policy judgments, even their own idiosyncrasies.”⁵⁷⁹ At these times judges “are legislators as well as

& Edmund Ursin, *The Deacademification of Tort Theory*, 48 U. KAN. L. REV. 59 (1999).

576. POSNER, *supra* note 2, at 372.

577. *E.g.*, SCALIA, *supra* note 13; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). *See generally* Symposium, *Formalism Revisited*, 66 U. CHI. L. REV. 527 (1999).

578. POSNER, *supra* note 2, at 204.

579. *Id.* at 9.

adjudicators”⁵⁸⁰—and “there is a pronounced political element in [their] decisions.”⁵⁸¹

These themes, as Posner himself would emphasize, are not original. They, in fact, can be traced to Holmes’s seminal writings, and before that to Chief Judge Lemuel Shaw, the great judge who shaped the common law of nineteenth century America. In *The Common Law*, Holmes wrote of Shaw that “the strength of that great judge lay in an accurate appreciation of the requirements of the community whose officer he was.”⁵⁸² Because the common law “can do no more than embody the preference of a given body in a given time and place,” however, a “large part of our law [was] open to reconsideration” by the turn of the twentieth century.⁵⁸³ Courts of that era, Holmes wrote in *The Path of the Law*, might appropriately have considered whether to replace the negligence requirement with a regime of strict liability in the field of workplace accidents.⁵⁸⁴ A court engaging in such large-scale lawmaking would not have been usurping legislative authority because the legislature can always step in to unwrite the common law that judges write.

Such is not the case in the realm of constitutional law, where *The Path of the Law* counseled deference to the legislature. Anticipating his *Lochner* dissent, Holmes warned that courts had discovered “new principles . . . outside the bodies of [Constitutions], which may be generalized into acceptance of the economic doctrines which prevailed about fifty years ago, and wholesale prohibition of what a tribunal of lawyers does not think about right.”⁵⁸⁵ Holmes’s criticism of the judges of this era was that they had “failed adequately to recognize their duty of weighing considerations of social advantage.”⁵⁸⁶ If lawyers could be made “habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must

580. *Id.* at 118.

581. *Id.* at 369.

582. HOLMES, *supra* note 64, at 106.

583. Holmes, *supra* note 141, at 466.

584. *See id.*

585. *Id.* at 468.

586. *Id.* at 467.

be justified,” Holmes’s hope was that “they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions.”⁵⁸⁷

Hesitancy, however, was not to be found in the constitutional decisions of the *Lochner* era. And the legal formalism that was the norm in legal opinions and scholarship during the first half of the twentieth century ruled out “weighing considerations or social advantage.” Judges, in this view, were to apply—not make—law; and policy was to play no role in judicial decision making. Judges were to articulate “principles deduced from cases,” with the guiding principle in tort law being that one is not liable without fault.⁵⁸⁸ Justice Traynor’s policy-driven call in his 1944 *Escola* concurrence for the adoption of strict products liability was a heretical break from this mainstream norm. It was, however, in the Holmesian tradition and reflective of the jurisprudence of the Legal Realists.

The Legal Realists of the 1920s and 1930s followed in Holmes’s path, with a critique of legal formalism and a call both for an end to *Lochner*-style constitutional decisions and for courts to rewrite traditional tort law to reflect the political values of the twentieth century. As we have seen, Leon Green and Karl Llewellyn laid out the tort agenda, identified today as the theory of enterprise liability, that Traynor’s California Supreme Court would write into law in the 1960s.⁵⁸⁹ These Legal Realists knew that if courts were to be able to adopt this enterprise liability agenda they would have to abandon formalist pretenses. The Legal Realists failed, however, to anticipate a new jurisprudential obstacle that would stand in the way of courts adopting this agenda. This obstacle was the jurisprudence of the legal process school.

By the 1950s the legal process school was dominant among legal academics and had begun to influence courts. By demanding that judicial lawmaking be “neutral”⁵⁹⁰ and

587. *Id.* at 468.

588. Seavey, *supra* note 28, at 373.

589. See NOLAN & URSIN, *supra* note 37, at 116-22.

590. Wechsler, *supra* note 35, at 16.

“nonpolitical”⁵⁹¹ legal process scholars, such as Herbert Wechsler and Henry Hart, denied the “essential datum” about judicial decision making—that there “is a pronounced political element in the decisions of American judges.”⁵⁹² But there was a pronounced political *effect* of legal process scholarship when it came to tort law: the restrictions legal process scholars would impose on courts would assure that tort law reflected *their* political values by placing the ideas of the Legal Realist/enterprise liability scholars, such as the doctrine of strict products liability and proposals to limit or eliminate many no-duty rules, beyond the bounds of substantive debate.

Just as legal process scholarship reached maturity, however, the jurisprudential torch of Holmes and the Legal Realists was picked up by Justice Traynor, who spelled out a jurisprudential view that would foreshadow Posner’s legal pragmatism. In the first of his many jurisprudential articles, Traynor in 1956 observed that “*laissez faire* commanded easy acceptance,” in the nineteenth century but those political values “had ceased to be acceptable” in twentieth century America.⁵⁹³ Moreover, the modernization of American law was not for legislatures alone. Indeed, courts have “the major responsibility for lawmaking in the basic common-law subjects,”⁵⁹⁴ for the “recurring formulation of new rules to . . . displace the old,” and for the “choice of one policy over another.”⁵⁹⁵

Traynor wrote that legal process scholars, who invented “magic words”⁵⁹⁶ to restrict judicial creativity, had overlooked the reality of “legislative indifference or legislative sensitivity to political considerations.”⁵⁹⁷ It was simply “unrealistic to expect that legislators [would] close their heterogeneous ranks for the single-minded purpose of

591. KEETON, *supra* note 35, at 43; *see also* Hart, *supra* note 318. Commenting on Hart’s *Time Chart* article, Posner writes that “Hart’s was the Progressive dream of policy emptied of politics by procedure.” POSNER, *supra* note 2, at 294.

592. POSNER, *supra* note 2, at 369.

593. Traynor, *supra* note 229, at 231.

594. Traynor, *supra* note 40, at 618.

595. Traynor, *supra* note 43, at 213.

596. Traynor, *supra* note 40, at 616.

597. *Id.* at 618.

making repairs and renewals in the common law.”⁵⁹⁸ In Traynor’s view, the real concern was not that courts would be too bold but that creative opinions were too scarce.⁵⁹⁹

Like Traynor, Judge Friendly also recognized that law reflects the political values of its time. Nineteenth century courts, for example, had “molded [the] common law in light of their perceptions of the special needs of [their] society,”⁶⁰⁰ and courts continued to do just that in Friendly’s time with the “striking example [of] strict products liability.”⁶⁰¹ The “motive power” behind that lawmaking was “a notion of social policy.”⁶⁰² Friendly thus confirms both Judge Posner’s positive account of judicial decision making and the success of Traynor and his court in altering the norms of judicial decision making in common law subjects. The prospect of courts adopting a policy-based doctrine of strict products liability, the subject of legal process hand wringing during the 1950s and 1960s, was, for Friendly, a nonissue: “[A]lthough there were some outcries from outraged manufacturers, few people today are concerned about this venture in applying judicial views of social policy.”⁶⁰³

Traynor’s success in altering the norms of opinion writing is demonstrated in the tort opinions of the past half century. The idea that, in common law subjects, judges are legislators with policy as the articulated basis of their lawmaking, heretical when Traynor took the bench, is now widely shared among judges, if not stated quite so boldly. Ideologically conservative in recent decades, the California Supreme Court has continued to rewrite tort law to reflect its perception of twenty-first century values.⁶⁰⁴ So it may be

598. *Id.*; see also Traynor, *supra* note 295, at 402.

599. Traynor, *supra* note 3, at 52.

600. Friendly, *supra* note 21, at 25.

601. *Id.*

602. *Id.* at 26.

603. *Id.* at 27.

604. This has meant a cutting back, or “refinement,” of some of the expansive holdings of the previous generation of judges. See, e.g., *Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207 (Cal. 1993) (limiting duty of business premises owner to protect persons against violent third-party crime); *Knight v. Jewitt*, 834 P.2d 696 (Cal. 1992) (limiting duty owed to co-participants in recreational sports); *Thing v. La Chusa*, 771 P.2d 814 (Cal. 1989) (restricting recovery for

that Posner is correct when he writes that even most legalists today accept the legitimacy of judicial lawmaking in the common law—that judges are common law legislators who “reserve the right to ‘rewrite’ the common law as they go along.”⁶⁰⁵

Traynor’s and Friendly’s views on constitutional adjudication also confirm Judge Posner’s positive account of judicial decision making, with the caveat that all three recognize, with Shaw and Holmes, that the element of deference to legislative judgments enters the picture here. Even so, Traynor believed that in the constitutional arena, it may be necessary for a court “on rare occasion . . . to prompt legislators to take action [when they have] remain[ed] delinquent toward the federal or a state constitution.”⁶⁰⁶ In this same vein, Posner writes that “while the political process is ordinarily the right way to go, every once in a while an issue on which public opinion is divided so excites a judge’s moral emotions that he simply cannot stomach the political resolution that has been challenged on constitutional grounds.”⁶⁰⁷ For Traynor, anti-miscegenation legislation and the “insidiously evil thing” of racial discrimination could not be stomachied.⁶⁰⁸ Moreover, like Posner, both Traynor and Friendly recognized that policy plays a major role in such decisions. Indeed Friendly, in commenting on *Roe v. Wade*, wrote that “[a] detailed presentation of . . . considerations of social policy would . . . have furnished a much more persuasive basis . . . than the opinion’s lengthy discussion of the Hippocratic Oath and the abortion practices of the ancient world or debate concerning the precise moment when a fetus becomes a person.”⁶⁰⁹

The moral, constitutional, and jurisprudential, including legalist and originalist, theories, fashionable in the academy today, in contrast, reject the jurisprudence of Posner, Friendly, and Traynor. But, as Posner writes, these theories are “either rationalizations of decisions based on

negligent infliction of emotional distress); *see also* Ursin & Carter, *supra* note 51.

605. POSNER, PROBLEMATICS, *supra* note 10, at 259.

606. Traynor, *supra* note 273, at 13.

607. POSNER, PROBLEMATICS, *supra* note 10, at 142.

608. Traynor, *supra* note 229, at 237.

609. Friendly, *supra* note 21, at 33.

other grounds or rhetorical weapons. None is a politically neutral lodestar guiding judges' decisions."⁶¹⁰ That, of course, was Holmes's view of the formalists of the *Lochner* era. And it was Traynor's view of the legal process scholars.

When I first wrote about Justice Traynor and the legal process scholars a quarter of a century ago, it seemed evident, and it seems even more evident today, that Holmes's classic statement that "[g]eneral propositions do not decide concrete cases"⁶¹¹ could usefully be applied to warn against "attempts to [fashion] general propositions [,in the form of sweeping jurisprudential theories, to guide] judicial creativity in the multitude of contexts in which courts are called upon to make law."⁶¹² From Shaw and Holmes to Traynor, Friendly, and Posner, *great* judges have known better than to look "to what passes as theory in jurisprudential circles."⁶¹³ When conventional legal materials fall short, these judges have recognized, as Posner writes, that "judges in our system are legislators as well as adjudicators"⁶¹⁴ and that their task is to "try to do the best they can do for the present and the future."⁶¹⁵ They have known that "the judge, like the legislator, has difficult choices to make, but [he must] do his best."⁶¹⁶ In making these choices judges are not guided, as Traynor put it, by "magic words"⁶¹⁷ that expand or restrict judicial power, but, as Holmes wrote, by "weighing considerations of social advantage. . . . This weighing is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious."⁶¹⁸

610. POSNER, *supra* note 2, at 13.

611. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

612. Ursin, *Judicial Creativity*, *supra* note 19, at 307.

613. POSNER, *PROBLEMATICS*, *supra* note 10, at x.

614. POSNER, *supra* note 2, at 118.

615. POSNER, *PROBLEMATICS*, *supra* note 10, at 241.

616. Ursin, *Judicial Creativity*, *supra* note 19, at 248.

617. Traynor, *supra* note 40, at 616.

618. Holmes, *supra* note 141, at 467. As Judge Friendly wrote: "The courts must address themselves in some instances to issues of social policy, not because this is particularly desirable, but because often there is no feasible alternative." Friendly, *supra* note 21, at 21.