Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics

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Phil Frickey's death leaves an irreparable hole in the fabric of legal scholarship. Frickey never deviated from the perfect balance of integrity and tact. He was generous and kind, yet his Midwestern virtues were tough and supple as steel. He radiated the instinct of justice, yet his judgment was clear eyed and impervious to distraction. His scholarship was unmistakable: judicious, perspicuous, wide ranging, and generative.

I treasured my association with Professor Frickey. I learned from him in dimensions scholarly and non-scholarly. I mourn his loss in the best way I can, by examining seriously a question that haunted Professor Frickey throughout his long and distinguished career: Should judges take account of the political consequences of their decisions when these consequences affect the ongoing legitimacy of law? In this Article, I explore whether the virtue of technical legal craft, which exemplifies the ideal of a formally autonomous law, can appropriately be joined to the virtue of judicial statesmanship, which exemplifies the ideal of politically responsive law.1

Frickey applauded “the average American lawyer’s instincts” to create an open-textured “legal culture.” He liked the rough and tumble, the unpredictability and responsiveness, of conceiving law in this porous way. The mechanistic and “transcendental nonsense” of legal formalism—which pretends to draw a sharp, definitive line between law and the political culture in which law is incurably embedded—repelled Professor Frickey. He believed that legal practice should resist reduction to any mechanical method because the stakes were simply too momentous.

Yet, if I interpret Frickey correctly, he also dreamt of a law of principles that can yield “predictable and nonsubjective conclusions.” He longed for a law that could justify its decisions in the language of reason and impersonality. In the collision between these ideals, Frickey ultimately stood for the “view . . . that no sharp disjunction can be legislated between law and life, between judge and context, between neutrality and value.” As he once put it, “[l]aw without life is no more functional to a thriving society than would be life without law.” Frickey evidently believed that judicial statesmanship should be inseparable from judicial craftsmanship, because law and politics should be mutually interdependent and sustaining.

I agree with this view, and in this Article I ask how it can be justified. I take as my text a recent article that surely numbers among Frickey’s masterpieces, Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court. The article discusses a widely accepted canon of statutory interpretation, the avoidance canon, which holds that legislation should be interpreted so as to avoid raising and deciding difficult questions of constitutional law. The Supreme Court recently appealed to the avoidance canon to sidestep the question of whether Section 5 of the Voting Rights Act was constitutional: “[i]t is a well-established principle governing the prudent exercise of this Court’s jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.”

6. Id.
7. Philip P. Frickey, Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court, 93 Calif. L. Rev. 397 (2005) [hereinafter Frickey, Getting from Joe to Gene (McCarthy)].
In *Getting from Joe to Gene (McCarthy)*, Frickey demonstrates that the avoidance canon is "a powerful judicial tool," an "aggressive technique" that can authorize courts to rewrite statutes even "in the face of clear statutory language suggesting a contrary interpretation." Frickey establishes that the avoidance canon "protects even those values the Court is not prone to enforce by traditional judicial review," and that it therefore "has the hybrid quality of quasi-constitutional law. It is a tool of public law on the borderline between constitutional law and subconstitutional law, and between judicial and legislative functions." Frickey concludes that the early Warren Court used the avoidance canon to protect significant national values and to deflect strident McCarthyite anti-communist legislation that was plainly inimical to the spirit of a healthy democracy. As Frickey puts it:

By generally deciding these cases at the subconstitutional level through the rules of avoidance, the Court used techniques that might defuse political opposition while incrementally adjusting public law to better respect individual liberty. Employing avoidance also shifted the burden of overcoming legislative inertia to those opposing the Court's understanding of public values. The canons allowed a divided and besieged set of Justices to avoid the sharpest confrontations with Congress and each other so as to preserve the Court's stature and integrity. They also gave the Court time for the political furor to subside, for First Amendment and due process values to reemerge in the general consciousness, and for Congress and, indeed, the Court, to change composition and move past a crisis. In short, the rules of avoidance, putatively about judicial restraint and deference to political institutions, allowed the Court to play a game of high-stakes politics, to correct individual injustice in some circumstances, and to protect its independence and future autonomy.

Frickey discusses decisions of the early Warren Court that deployed the avoidance canon and that are now "virtually neglected."

Frickey's aim was to rehabilitate these quiet but effective decisions, which today have fallen into obscurity because in retrospect they seem tepid and cautious. They neither give full-throated expression to the constitutional values we identify with the later Warren Court, nor do they defend the virtues of professional formalism. They are instead indirect and subtle, using lawyerly skills to efface their innovation and moral commitments. Frickey manifestly loved these decisions and invited us to share his appreciation. His point was precisely that these modest, unknown cases used the avoidance canon to bestride the boundary between law and politics by joining brilliant "legal craftsmanship" to wise "judicial

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10. Id.
11. Id. at 401.
12. Id. at 453.
statesmanship."

The fusion of craftsmanship and statesmanship renders the avoidance canon controversial. The fusion underscores a tension that has pervaded American constitutional law since its inception. When Alexis de Tocqueville observed that federal judges must be not merely competent legal professionals but also "statesmen," he meant that they must understand and use the power of public opinion "to confront those obstacles that can be overcome, and to steer out of the current when the tide threatens to carry them away, and with them the sovereignty of the Union and obedience to its laws." In *Getting from Joe to Gene* (McCarthy), Frickey makes an analogous point about the Warren Court. He demonstrates that the Warren Court was savvy enough to use technical legal reason to protect fundamental constitutional values like freedom of speech despite the overbearing "current" of McCarthyite repression.

Judicial decision making is always enveloped within a larger political context that endows judicial work with legitimacy and effectiveness. This context matters. It is why, for example, President Lincoln did not think to end the secession of Southern states by petitioning for an injunction from the Supreme Court. To function, law must be perceived by its audience as properly authoritative. Because judicial statesmanship requires courts to theorize the preconditions of their own effectiveness, it requires them also to take account of this larger political context. To affirm judicial statesmanship is to assert that it can sometimes be appropriate for technical judicial reason to consider this ambient political environment.

This assertion is highly contentious. Many believe that judges should restrict themselves to the professional virtues of technical lawyers. "To expect judges to take account of political consequences—and to assess the high or low degree of them—is to ask judges to do precisely what they should not do."
Judges, on this account, have no business considering public opinion; they should remain mere expert craftsmen, learned and proficient in the law, oblivious to political consequences. They ought not to meddle in politics, even to save significant legal values like "the sovereignty of the Union" or freedom of speech.

In this Article, I defend Frickey’s position that judicial craft may at times appropriately be supplemented by judicial statesmanship. I do so by offering a sociological account of the relationship between law and politics that suggests how judicial statesmanship can further the essential social functions of both law and politics.

I begin in Part I by considering Herbert Wechsler’s concept of "neutral principles," which even today remains the single most influential justification for repudiating judicial statesmanship. Wechsler’s contrast between law as a realm of reason and politics as a realm of arbitrary fiat continues to resonate powerfully in contemporary thinking. Part I argues that this dichotomy is empirically false and theoretically misguided. It does not help us to understand how law and politics are or should be connected to each other.

Part II discusses the work of the legal process school, which advocates that judges should regard politics as a realm of purposive and reasonable behavior. Frickey himself has been powerfully influenced by legal process jurisprudence. Part II argues that although legal process jurisprudence grasps important and essential forms of social solidarity, it nevertheless fails adequately to account for the stubborn and irresolvable disagreements that characterize politics. Legal process jurisprudence cannot justify judicial statesmanship because legal process jurisprudence does not respect the unreasonable controversies that pervade politics.

Part III offers a new and distinct conception of politics that I hope will enable us better to grasp the phenomenon of judicial statesmanship. I argue that politics is a complex social form that, on the one hand, presupposes fundamental agreement that controversies should be resolved through the peaceful medium of politics, but that, on the other hand, presupposes that political actors will continue to disagree about their political agenda and political goals. Whenever political actors come to believe that they have reached agreement about their agenda or their goals, or whenever they wish to act as if they had reached such an agreement, they characteristically turn to distinct social forms of organization like bureaucracy or law. Bureaucracy and law each rest on the presumption of agreement, although not necessarily on the fact of agreement.

Part IV argues that questions of judicial statesmanship typically arise when the basic agreements necessary to sustain a polity, and hence to sustain legal institutions, are at risk. De Tocqueville precisely alludes to such circumstances, as does Frickey in his discussion of the Warren Court's use of the avoidance canon. Questions of judicial statesmanship arise whenever judges believe it important to retain the presumption of agreement that underlies legal modes of decision making. Judicial statesmanship flows from the recognition that modern heterogeneous societies maintain solidarity and control by using politics and law as distinct phases of a larger and more inclusive process of social integration.

Part V draws on this descriptive analysis to offer normative reflections about the role of judicial statesmanship. It argues that in light of the larger social function of law, it would be self-defeating for courts to ignore the need to maintain the fundamental forms of agreement that sustain both politics and the legal system.

I

HERBERT WECHSLER: NAKED DISCRETION AND NEUTRAL PRINCIPLES

Even as Frickey praises the avoidance canon cases of the early Warren Court for situating themselves "between judicial and legislative functions," he expresses nagging doubts about the legitimacy of their judicial stance. Frickey fears that formalist critics might indicted the early Warren Court decisions for interpreting statutes "less neutrally than constitutional text, structure, and history require." Frickey is worried by the charge that judges "are supposed to apply neutral principles regardless of societal context, letting the chips fall where they may." "Judges are not supposed to be statesmen or stateswomen."

Frickey's articulation of the potential tension between judicial craft and judicial statesmanship illustrates the enormous contemporary power of Herbert Wechsler's influential 1959 Oliver Wendell Holmes Lecture at the Harvard Law School, Toward Neutral Principles of Constitutional Law. In that lecture, Wechsler set forth a potent conception of the relationship between law and politics. Not only is Wechsler's conception reflected in the critics whom Frickey opposes, but its influence is also apparent in Frickey's own work.

Wechsler's goal in his Holmes lecture was to defend the institution of judicial review from the assault of Learned Hand during the preceding year.

19. Frickey, Getting from Joe to Gene (McCarthy), supra note 7, at 461.
20. Id. at 454.
21. Id.
22. Id.
Hand had famously observed, "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."25 Wechsler countered by contending that the Constitution required judicial review, and that such review was justified because it was fundamentally distinct from mere political decision making.26 Whereas political decisions register merely preference and desire, the "legal quality" of judicial decisions "inheres primarily in that they are—or are obliged to be—entirely principled. A principled decision . . . is 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."27

Wechsler distinguished law from politics on the ground that law consists of reason whereas politics consists of arbitrary will and power.28 He disagreed with "[t]hose who perceive in law only the element of fiat, in whose conception of the legal cosmos reason has no meaning or no place."29 Because reason expresses itself in "principles," the sign that a decision is legal rather than political is that it is "principled." Frickey signals the influence of this jurisprudential view when he offers to explain how "the avoidance canon can be used effectively in a principled manner."30

If law is distinguished from politics because it is "entirely principled," much depends on what it means to be "principled." Wechsler was badly confused on this point, and his confusion has influenced legal scholars ever since. To act from principle is to act from reason. This is a very weak condition to impose on human conduct. It is difficult to imagine human behavior that is utterly without reason. Yet Wechsler's effort to distinguish politics from law leads him to imagine politics as embodying simple "fiat"31 or "will."32 Wechsler writes that politics is the realm of "willfulness"33 and the "naked

25. Id. at 73. "It certainly does not accord with the underlying presuppositions of popular government to vest in a chamber, unaccountable to anyone but itself, the power to suppress social experiments which it does not approve." Id.
26. By contrast, Hand had argued that judicial review often depended upon little more than the "personal preferences" of judges. Id. at 70.
28. The effort to define law in terms of reason is of very ancient origin. Consider: Law, in all its divisions, is the strong action of Reason upon wants, necessities, and imperfections. No matter whether its ministration is by a legislative or through a judicial faculty, or by the consentaneous acts of individuals under no manifest compulsion; it is still the act of those on whom it has pleased divine Providence to bestow the attribute of reason, as distinguished from those who are guided only by instinct, and can make no rules for themselves.
WILLIAM RAWLE, A DISCOURSE ON THE NATURE AND STUDY OF LAW 4 (1832).
29. Wechsler, supra note 23, at 11. Compare Hand, supra note 24, at 70. Law, Wechsler asserts, must "be framed and tested as an exercise of reason and not merely as an act of willfulness or will." Wechsler, supra note 23, at 11.
30. Frickey, Getting from Joe to Gene (McCarthy), supra note 7, at 454.
32. Id.
33. Id.
power organ.\textsuperscript{34}

Of course, history suggests that persons in politics, like persons everywhere, may at times act from purely Hobbesian motives. But it is parodic to imagine politics as consisting merely of fiat and will. Even the most cursory survey of political history suggests that in politics citizens debate and settle great questions of national ideals and values.\textsuperscript{35} Significant principles were as much at stake in the political debates over the Civil Rights Act of 1964\textsuperscript{36} as they were in the Supreme Court’s subsequent decisions explicating and applying that statute.\textsuperscript{37} Reason and principle matter in politics, just as they matter in law.

We ought not condescend to Wechsler’s reductionist characterization of politics, however, for it remains the foundation of much contemporary political science. Political scientists typically conceptualize politics as an arena for the aggregation of “bare” preferences.\textsuperscript{38} They imagine preferences as exogenous desires bereft of reason.\textsuperscript{39} Preferences drive conduct without justification or explanation and are hence frequently characterized as “sovereign.”\textsuperscript{40}

Although it is questionable whether this concept of “preferences” is coherent,\textsuperscript{41} it is certainly intelligible. We understand it in the way that we understand that “individual welfare is all that matters in policy choices”;\textsuperscript{42} or in the way that we understand Pareto optimality\textsuperscript{43} or social choice,\textsuperscript{44} or in the way

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34. Id. at 19.
42. EDITH STOKEY & RICHARD ZECKHAUSER, A PRIMER FOR POLICY ANALYSIS 262 (1978).
43. DAVID WILLIAMS, LEGITIMATION AND STATUTORY INTERPRETATION: CONQUEST, CONSENT, AND COMMUNITY IN FEDERAL INDIAN LAW, 80 VA. L. REV. 403, 451 (1994); see also HOWARD F. CHANG, A LIBERAL THEORY OF SOCIAL WELFARE: FAIRNESS, UTILITY, AND THE PARETO PRINCIPLE, 110 YALE L.J. 173
\end{flushleft}
that we have come to conceive politics as the scene of an interest-group pluralism consisting of "uninhibited bargaining among the various participants, so that numbers and intensities of preferences can be reflected in political outcomes."\textsuperscript{45} In all these conceptions of politics and public policy, citizens do not act from reasons, principles, or values, but simply out of naked will; they are driven by exogenous bare preferences.

This picture of politics is even detectable in Getting from Joe to Gene (McCarthy). When Frickey ponders whether the avoidance canon can be justified on descriptive grounds, or whether it would induce "strategic" behavior "based on the political environment at the time the Court is deciding,"\textsuperscript{46} he observes:

\begin{quote}
[O]ne may suspect that, while Congress can certainly draft a bill explicit enough to force the Court to reach a constitutional question, support for or opposition to the bill will be based on policy preferences that are either unadorned by constitutional justification or that embrace such justifications as boilerplate simply because they are consistent with the politics driving the support or opposition.\textsuperscript{47}
\end{quote}

In passages like this, Frickey conceives politics in an essentially Wechslerian manner. Politics is a regime of bare preferences that drive behavior in ways that are uncontrolled by reason or principle.

If we accept the dichotomy between politics as will and law as reason, it would be scandalous to permit politics to infect law. If the act of judging were no more than the legal imposition of preferences, there can be no justification for using life-tenured judges to clog political processes.\textsuperscript{48} This account of the dichotomy between law and politics licenses the work of those political scientists who imagine all collective life as simply the push and pull of desire.

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\item[45] Cass. R. Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29, 32 (1985). In this conception of politics, "[t]he common good amounts to an aggregation of individual preferences." Id. at 32–33.
\item[46] Frickey, Getting from Joe to Gene (McCarthy), supra note 7, at 449.
\item[47] Id. Frickey concludes, "[i]n the final analysis, even leaving aside cynical suspicions about manipulative Justices and politically driven members of Congress who freely ignore their oaths of office to uphold the Constitution, no judicial role as intrusive into Congress's law-creation function as that licensed by the avoidance canon can be easily justified based on descriptive notions." Id. at 450.
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These political scientists, who enjoy tasking legal scholars with naïveté for affirming that law can reflect principles, see law as a disguised venue for the ongoing struggle among preferences. They deny the distinction between law and politics because they deny the role of reason in human conduct. Once we imagine a stark contrast between reason and will, in other words, we have set in motion a dynamic in which law can become inconceivable from the perspective of politics, and in which politics is contamination from the perspective of law. On this account, Frickey’s ambition to combine “legal craftsmanship” with wise “judicial statesmanship” is a simple aporia.

The dichotomy between reason and will, however, is far too crude to capture the difference between law and politics. Reason exists in politics, just as will exists in law. If law and politics are to be convincingly distinguished, therefore, Wechsler must instead specify the kind of reasoning that defines law. Throughout his lecture, Wechsler associates legal reason with non-consequentialism. Wechsler sketches a portrait of political men “who, vouching no philosophy to warrant, frankly or covertly make the test of virtue in interpretation whether its result in the immediate decision seems to hinder or advance the interests or the values they support.” He warns that “[t]he man who simply lets his judgment turn on the immediate result may not... realize that his position implies that the courts are free to function as a naked power organ.” In passages like these, Wechsler explicitly equates decisions guided


50. See Shapiro, supra note 48, at 589 (noting political scientists’ “vision of the Court as one political actor among many”). This vision is most closely identified with the attitudinal school of political science, “[a] predominant, if not the predominant, view of U.S. Supreme Court decision making,” which “supposes that the ideological values of jurists provide the best predictors of their votes.” Jeffrey A. Segal et al., Ideological Values and the Votes of U.S. Supreme Court Justices Revisited, 57 J. POLITICS 812, 812 (1995); see, e.g., Segal & Spaeth, supra note 49, at 64–73.

51. Sometimes Wechsler seems to associate law with general reasons, as distinguished from particular reasons. But it is a common legal query to ask how general a rule should be. The appropriate generality of a rule is a judgment that can be ascertained only by careful and contextual inquiry. In some circumstances an abstract rule better achieves the purposes of the law; in other circumstances a concrete standard. See Kathleen M. Sullivan, The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards, 106 HARV. L. REV. 22 (1992). The same is true for political actors who sometimes act on general principle and sometimes on contextualized judgments. Either approach can be applied appropriately in law or in politics. Degrees of generality do not plausibly distinguish law from politics.

52. Id. at 12.
by immediate results with politics as distinct from law.

Although Wechsler attacks legal actors who act for consequentialist reasons, he is incorrect to assume that legal reasons are not consequentialist in form. Many legal rules direct us to cause some consequences, even immediate consequences, and to avoid others. For example, Section 1-103 of the Uniform Commercial Code provides that the Code must be liberally construed "to promote its underlying purposes and policies, which are: (1) to simplify, clarify, and modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and (3) to make uniform the law among the various jurisdictions." Another overtly consequentialist rule is the tort doctrine that "public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market." In the context of constitutional law, a plurality of the Court recently observed that "quite a few" constitutional rights "are clearly instrumental by any measure." So, for example, a central theme of First Amendment jurisprudence is that judges should establish doctrine that creates "breathing space" for the exercise of First Amendment freedoms; a central justification of the Fourth Amendment's exclusionary rule is to serve as an "effective deterrent to lawless police action."

There are countless such consequentialist doctrines in the law, in which the function of legal rules is "to hinder or advance" particular "values." How could such doctrines be objectionable in an age that understands law to be, in Roscoe Pound's famous formulation, "a means, not an end" for the "satisfaction" of social needs? Deontological reason is controversial enough in ethics and morals, but it is a puzzle why judges should imagine it desirable to decide cases in ways that are deliberately oblivious to consequences, immediate or otherwise.

55. Id. at 11.
57. U.C.C. § 1-103(a) (2005).
62. Wechsler, supra note 23, at 11; see supra note 52 and accompanying text.
64. Ronald Dworkin's famous distinction "between arguments of principle on the one hand and arguments of policy on the other," is not to the contrary. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 82 (Harvard University Press, 1978) (1977). Dworkin writes, "Arguments of principle are arguments intended to establish an individual right," whereas "arguments of policy are arguments intended to establish a collective goal." Id. at 90. Dworkin defines a "goal" as "a nonindividuated political aim, that is, a state of affairs whose specification does not . . . call for
Wechsler sought to bolster his anti-consequentialist account of law by using the adjective "neutral" to describe the kinds of reasons that define law. The adjective "neutral," as the Oxford English Dictionary informs us, always presumes a baseline; one is neutral with respect to "controversy, dispute, war, etc." On one interpretation, therefore, Wechsler's use of the adjective "neutral" means merely that legal decision makers must be neutral as between the parties before them. They must apply to a case the "neutral" reasons of the law rather than adopt the "partisan" reasons advanced by either side to a lawsuit. This seems true and unobjectionable, but it is also trivial. It is simply another way of saying that judges ought to apply legal reasoning no matter what parties appear before them. The question Wechsler needs to illuminate, however, is how to define legal reasoning itself.

Wechsler therefore deploys the adjective "neutral" in a second and distinct way. He asserts that legal principles can count as law only if they are themselves "neutral." He refers in the title and throughout his article to "neutral principles of constitutional law." But if it is clear what it means to apply a legal principle neutrally, it is not at all clear what it means for a legal principle itself to be "neutral." Wechsler never explains what a neutral principle is; he never specifies the contestants or controversies with respect to which principles of constitutional law must be neutral. If constitutional law must be neutral with respect to all contestants and all controversies, then constitutional law must be "neutered," which the Oxford English Dictionary defines as "castrated or spayed."

Wechsler's appeal to "neutral principles," therefore, implicitly but powerfully resonates with his rejection of consequentialist principles. Consequentialist principles are designed to advance particular values, and for this reason they cannot qualify as "neutral" with respect to those values.
Wechsler’s advocacy of neutral principles is thus best interpreted as another expression of his belief that legal reasoning must be non-consequenstialist. Wechsler advances an analytic framework designed to rebuke judges who aspire to exercise what Max Weber once acutely called an “ethic of responsibility” for consequences. 69

Wechsler’s fusion of neutrality and non-consequentialism has proved deeply influential. Frickey, for example, once felt it necessary to affirm, contra Wechsler, “that no sharp disjunction can be legislated . . . between neutrality and value.” 70 Such an affirmation could only be necessary to quiet a vague but nagging sense that judges ought not craft rules to nourish particular values. Few stop to ask what it might mean for a judge to be indifferent in principle to the consequences of the law that she makes. Frickey cogently speculates that a person who could do such a thing would find “self-satisfaction in the role of automaton rather than human being,” and that we should be “scared to death to give that person the power of the judge, the authority to exercise the coercive power of the state.” 71 It would seem absurd for a legal system to adopt rules that were not meant to nourish and sustain particular values.

Why, then, does the Wechslerian image of neutral principles cling so tenaciously to our skirts? One possibility is that it expresses our need to believe that judges apply law but do not make it. It might be said that judges are not responsible for the consequences of their decisions because they “are the mere instruments of the law, and can will nothing.” 72 Judges simply enforce the rules they are given and are immune from responsibility both for the rules and for their application.

This line of thought, however, is unacceptable. Judges must be responsible for the consequences of applying rules so long as the rules they apply are consequentialist in nature. And we are long past the day when we can plausibly imagine judicial work as merely ministerial and mechanical, like the work of a scribe or a computer. Because everyone knows that judges have discretion in their interpretation of the law, judges cannot be excused from the consequences of fashioning legal rules in one way or another. 73 If the point of legal rules is to nourish human ends, and if judges can shape the content of

70. Frickey, Revisiting the Revival of Theory in Statutory Interpretation, supra note 5, at 220.
71. Philip P. Frickey, Wisdom on Weber, 74 Tul. L. Rev. 1169, 1196 (2000). Frickey continues, “[m]y own sense is that most judges are pretty much like the rest of us: when we are faced with an important decision, we work from the current context backwards, attempting a thoughtful mediation of whatever important, crosscutting values are at stake.” Id.
73. From the internal point of view of the law, of course, judges merely follow the law. For an example of the knots that judges get themselves into when they seek to reconcile this internal perspective with the fact of judicial discretion see, e.g., Danforth v. Minnesota, 552 U.S. 264, 270 (2008).
legal rules in differing ways, it is difficult to see how judges can be free to adopt what Weber calls "an ‘ethic of ultimate ends,’" an "absolute ethic" that "just does not ask for ‘consequences.’" 74

Wechsler’s effort rigorously to separate law from politics is thus unconvincing. It does not follow, however, that judges ought to be statesmen. To establish his position, Frickey needs a positive account of law that will authorize the union of judicial craftsmanship with judicial statesmanship. For this account, Frickey turns to an understanding of law developed by Wechsler’s contemporaries at Harvard, Henry Hart and Albert Sacks.

II
THE LEGAL PROCESS SCHOOL: PURPOSES, POLITICS, AND LAW

Frickey was one of the great contemporary scholars of the legal process school. 75 The founders of that school, Henry Hart and Albert Sacks, did not conceive law as "neutral" or non-consequentialist. They instead believed that law was purposive. They understood law as serving values that emerged from a political arena that was itself purposive. As Frickey puts it:

Their approach understood all law—including the legislature’s role in statutory creation and the administrative and judicial roles of statutory implementation and application—as a purposive endeavor designed to promote social utility. They assumed the legislature to be made up of reasonable persons pursuing reasonable purposes reasonably, and the judges interpreting statutes to be engaged in the reasoned elaboration of those purposes as they could be made to fit within the broader legal fabric. 76

To understand this conception of law and politics, we need to unpack what it means to act in a “purposive” manner. We need to distinguish purposive conduct from instrumentalist rationality.

Wechsler imagines politics as an “instrumental” regime in which persons act to satisfy their preferences. This view is well developed in the literature of contemporary political science: members of a polity seek “to maximize individually held goals,” 77 and therefore act as “egoistic, rational, utility maximizer[s].” 78 Whenever human behavior is conceived as guided by instrumental reason, one must assume that human ends are given and that persons seek to satisfy these pre-existing ends. 79 This view is well expressed in

74. WEBER, supra note 69, at 120.
76. Frickey, Getting from Joe to Gene (McCarthy), supra note 7, at 405.
79. “A central tenet of classical theories of rational choice is that people harbor a stable,
the metaphor of "exogenous" preferences, which expresses the fixity and "givenness" of human objectives.

Although this concept of instrumental reason is not absent from the jurisprudence of Hart and Sacks, their account of purposive behavior differs from mere instrumental rationality. The "purposivism" of the legal process school envisions human objectives as neither fixed nor given, but instead as chosen or constructed.\textsuperscript{81} Hart and Sacks believe that reasonable individuals can achieve the right balance between competing ends, not because individuals can maximize their second-order preferences, but because they can make deliberate decisions about which goals to pursue in which circumstances. Purposivism thus poses a threshold question: how can people choose ends that do not merely reflect their own pre-existing, subjective preferences? How can they escape from the prison of instrumental reason?

The legal process school responds to this question by postulating that persons are "reasonable," meaning that they possess the capacity for judgment. Judgment is not about maximizing the attainment of particular ends, but instead about the interpretation and application of intersubjective norms or standards. "Judgment implies a community that supplies common grounds or criteria by which one attempts to decide."\textsuperscript{82} Judgment is impossible unless there are "underlying grounds of judgment which human beings, qua members of a judging community, share, and which serve to unite in communication even those who disagree (and who may disagree radically)."\textsuperscript{83} Because "we require a definition of community in order to know how the judgment shall proceed,"\textsuperscript{84} the reasonable person always inhabits a particular community\textsuperscript{85} and always

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well-defined, and discernable order of preferences, and have computational skills that enable them to choose the courses of action that maximize their preferences.” Dan Simon, Daniel C. Krawczyk & Keith J. Holyoak, \textit{Construction of Preferences by Constraint Satisfaction}, 15 \textit{Psychol. Sci.} 331, 331 (2004). The authors argue:

Research has challenged the axiom of preference invariance. Rather than being stable, well-defined, and discernable, preferences have been shown to be constructed; to some degree they are labile, reversible, and obscure. Preference invariance is violated under different descriptions of essentially the same options, when different modes of elicitation are invoked, and when options are presented in different contexts.

\textit{Id.} (citations omitted).


81. John F. Manning, \textit{What Divides Textualists from Purposivists?}, 106 \textit{Colum. L. Rev.} 70, 76 (2006) ("One can . . . plausibly cast purposivism as an objective framework that aspires to reconstruct the policy that a hypothetical 'reasonable legislator' would have adopted in the context of the legislation, and not the search for a specific policy that Congress actually intended to adopt."); see also \textit{Id.} at 90–91 ("[T]he theory of Legal Process purposivism, much like that of modern textualism, treats the attribution of meaning as a construct.").


83. \textit{Id.} at 142 (emphasis omitted).

84. \textit{Id.} at 143.

seeks to give the best possible account of the values of that community.86

The reasonable person is thus not trapped within a set of subjective preferences; she instead participates within a continuously rewoven intersubjective web of values.87 Because intersubjective values are socially constructed rather than merely given, the reasonable person does not conceive these values as fixed. The meaning of these values continuously emerges through shared processes of interpretation and application.

This distinction between intersubjective values and exogenous personal preferences fundamentally differentiates reasonableness from instrumental reason. Intersubjective values acquire their meaning through social processes of explanation and justification. Preferences, by contrast, need not and often cannot be explained or justified; they simply exist. Instrumental reason maximizes the fulfillment of given and determinate ends; reasonableness emerges from dialogic processes by which ends are determined.

As a jurisprudence, therefore, purposivism has important implications for understanding the process of interpretation. Frickey makes these explicit when he explains:

Interpretation is a method by which a community—an interpretive community—goes about part of its business. . . . It is only by capturing the broader assumptions about the enterprise that we can make sense out of the lesser included function to be performed by interpretation for that enterprise.88

Interpretation on this account is neither a matter of simple craft, nor a matter of mechanical instrumental reason. It is instead a process of meaning-construction, through which social values are ascertained and applied. A purposivist jurisprudence cannot exist in a society that lacks common social values. That is why Frickey objects so strongly to the “unhealthy trend in our society” of “increasingly privatizing the public sphere.”89 To live a purely private life, to be answerable only to private preferences, is to unravel the social connections that constitute both persons and law.

The purposivism advanced by Frickey and the legal process school imagines law as an institution that serves the public values of the community. Law should be “neutrally” applied as between the parties to a dispute, but law does not itself consist of “neutral” principles that are non-consequentialist. Law is instead purposive, incorporating and sustaining relevant social values.

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86. See Sagoff, supra note 39.
88. Frickey, Faithful Interpretation, supra note 4, at 1092–93.
The idea that law promotes social values is attractive and easy to understand. The question we are pursuing, however, is whether this conception of law will help us understand whether judicial craftsmanship should be joined to judicial statesmanship, such that judges can properly take account of the political consequences of their decisions. We cannot parse this question unless we have some account of what it means for consequences to be "political."

The legal process school has great difficulty offering such an account. The premise of the legal process school is that judges should regard legislators as reasonable persons who use law to attain reasonable ends. But this poses a deep puzzle: how can our political life be so continuously driven by sharp and intense controversies if, as the legal process school imagines, political actors are to be regarded by the law as sharing the common purposes that constitute reasonable persons? The persistence of hot and intractable political disputes suggests that, in fact, politics is not inhabited by "reasonable persons" who participate in a shared, intersubjective web of meanings and values. The legal process school historically founedered on this problem; it shattered on the sharp rocks of 1960s-style contestation. The violent clashes of the period appeared to warrant those who believed that politics was a mere war of autistic preferences.

The legal process school declined after the 1960s because it did not contain a very clear picture of politics. It is highly uncertain what it might mean for judges to regard political actors as reasonable when politicians do not appear to act in a reasonable manner. In Getting from Joe to Gene (McCarthy), for example, Frickey portrays the Warren Court as resisting a Congress whose purposes were flatly inconsistent with democratic values. Was Congress acting reasonably when it enacted the repressive statutes that the Warren Court sought to ameliorate? If not, would the legal process school have nevertheless instructed the Justices of the Warren Court to act as if Congress were acting reasonably?


91. THE LEGAL PROCESS, supra note 75, at 1378. The crucial passage provides:

In determining the more immediate purpose which ought to be attributed to a statute . . . a court should try to put itself in imagination in the position of the legislature which enacted the measure.

The court, however, should not do this in the mood of a cynical political observer, taking account of all the short-run currents of political expedience that swirl around any legislative session.

It should assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.

It should presume conclusively that these persons, whether or not entertaining concepts of reasonableness shared by the court, were trying responsibly and in good faith to discharge their constitutional powers and duties.

The court should then proceed [to ask] . . . Why would reasonable men, confronted with the law as it was, have enacted this new law to replace it?

Id.
This suggests that at the heart of the legal process school lies a mute but stubborn refusal to recognize the distinctively unreasonable aspects of politics. To act reasonably is to act from mutually acknowledged principles and values. But if in fact politics is a domain in which principles and values are perennially subject to contestation and disagreement, a presumption of reasonableness must operate to deny the ongoing reality of political dispute.

This denial has important implications for the subject of this Article. So long as legal process jurisprudence authorizes judges to ignore the actual purposes of Congress and instead to presume that Congress acts from reasonable purposes, the necessity for judicial statesmanship need never arise. Courts are driven to work at the “borderline . . . between judicial and legislative functions” only when the exercise of their judicial craft would lead to manifestly undesirable results. Legal process jurisprudence deftly sidesteps this possibility.

For this reason, the jurisprudence of the legal process school cannot sustain Frickey’s support for judicial statesmanship. We cannot properly formulate the question of judicial statesmanship, nor can we comprehend the need for such statesmanship, until we first forge an account of politics that is as much about fundamental disagreement as it is about shared purposes. Politics is not populated merely by reasonable persons. But, unless we are to fall back into the trap of Wechsler’s neutral principles, neither is politics populated merely by preference maximizers.

III
Politics and Disagreement

In the past few decades, many have sought to offer an account of politics that accepts the persistence of vigorous, irreconcilable disagreement without reducing politics to a process of preference aggregation. This account portrays politics neither as a well-behaved dance of reasonableness nor as a clash of naked power organs.

Chantal Mouffe, for example, has advanced the idea that politics is founded on a relationship of “agonism” in which conflicting parties acknowledged that there is no rational solution to their conflict, [but] nevertheless recognize the legitimacy of their opponents. They are “adversaries” not enemies. This means that, while in conflict, they see themselves as belonging to the same political association, as sharing a common symbolic space within which the conflict takes place. Mouffe contrasts the relationship of agonism to that of “antagonism,” in which

92. I take this to be the fundamental point advanced by Manning, supra note 81.
93. On the presumption of reasonableness, see id. at 76.
94. Frickey, Getting from Joe to Gene (McCarthy), supra note 7, at 461.
95. I take this to be the fundamental point advanced by Manning, supra note 81.
"the two sides are enemies who do not share any common ground" and so "treat their opponents as enemies to be eradicated." 97 In a relationship of agonism, "[a]dversaries do fight—even fiercely—but according to a shared set of rules, and their positions, despite being ultimately irreconcilable, are accepted as legitimate perspectives." 98

Mouffe invites us to understand politics as a specific form of practice that is adopted when persons in a society agree to disagree. They disagree about what to do, but they agree that they belong to a common polity and that they will therefore use politics peacefully to settle differences among themselves. The practice of politics is thus to be distinguished both from open warfare, which occurs between antagonists who wish to destroy each other, and from social relationships that aspire to forms of cooperation and coordination, which presume agreement rather than disagreement. Examples of such cooperative relationships include bureaucracy and law.

Jacques Rancière offers a difficult but stimulating effort to explain the delicate balance between agreement and disagreement that lies at the foundation of politics. Rancière defines democracy as "a membership in a single world which can only be expressed in adversarial terms, and a coming together which can only occur in conflict." 99 He writes that politics always begins with a grievance that can be "addressed" but not "redressed." 100 "To assume that a common language and a comprehension by each side of the other's reasoning are prerequisites for the wrong's being made manifest and being debated is not the same thing as objectifying that wrong as a problem whose solution is sought by partners acting together." 101

Rancière's insight is that political participants are not simply engaged in mutual problem solving. A polity is not like a bureaucratic agency in which all members are tasked with jointly working together to solve a common challenge. Disagreement in politics runs deeper than that. Political participants disagree not only about what problems should be addressed, but also about how problems that are commonly acknowledged should be redressed. Political participants do agree, however, to use politics as the practice by which the agenda of a polity will be set and directed. If political participants reach agreement about the definition of a problem and about how it should be solved,

97. Id.
98. Id. at 52.
99. JACQUES RANCIÈRE, ON THE SHORES OF POLITICS 49 (Liz Heron trans. 2007). Rancière writes:

Democracy is neither compromise between interests nor the formation of a common will. Its kind of dialogue is that of a divided community. Not that it is indifferent to the universal, but in politics the universal is always subject to dispute. The political wrong does not get righted. It is addressed as something irreconcilable within a community that is always unstable and heterogeneous.

Id. at 103.
100. Id.
101. Id.
they will likely implement the solution based upon a social practice that is
designed to administer and enforce such an agreement. They will likely use law
or bureaucracy, neither of which should be confused with politics. That is why
Rancière insists that within politics wrongs can be only addressed, not
redressed. To redress a wrong is already to move out of the realm of politics
and into other distinct social practices.

From the perspective of social practices like law or bureaucracy, politics
appears anarchic and disorganized. That is because politics is the practice we
use when we agree to continue to disagree. As Bernard Crick thoughtfully
observes, when we are within the domain of social practices like law or
bureaucracy, in which disagreement is continuously repressed, we can lose
sight of “society...as a diversity of interests to which politics alone can give
the necessary degree of unity,” \(^{102}\) and we can begin to yield to the illusion that
society is “a natural unity which politics divides and disturbs.”\(^ {103}\) Nothing
could be more misleading:

> It is not administration but government itself which maintains order in
> any régime; and in a political régime it is the activity of politics itself
> which provides something permanent amidst the mutations. The
> administrator blames politicians for the very thing they can do so
> well—allow diversity and change amidst order.\(^ {104}\)

If we ever come to agree about the nature of our problems and about how
they are to be solved, we will indeed have transcended politics. We need
politics only when we wish to live together peacefully under conditions in
which we do not actually concur. Politics rests, as Hannah Arendt famously
writes, on “the fact of human plurality,” on the existence of “men” rather than
“man.”\(^ {105}\)

> If...there were to be some cataclysm that left the earth with only one
> nation, and matters in that nation were to come to a point where
> everyone saw and understood everything from the same perspective,
> living in total unanimity with one another, the world would have come
to an end in a historical-political sense.\(^ {106}\)

Something akin to this perspective also lies at the heart of Jeremy
Waldron’s recent effort to rehabilitate the dignity of legislation.\(^ {107}\) Waldron
postulates a world in which “the prospect of persisting disagreement must be
regarded...as one of the elementary conditions of modern politics.”\(^ {108}\) We

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\(^{102}\) BERNARD CRICK, IN DEFENCE OF POLITICS 103 (4th ed. 1992).
\(^{103}\) Id.
\(^{104}\) Id. at 108.
\(^{106}\) Id. at 176. The unanimité of opinion presupposed by fascist or totalitarian states is one
form of the “cataclysm” feared by Arendt. If unanimité were truly achieved, politics could persist
in neither a fascist nor a totalitarian state. Id.
\(^{108}\) Id. at 153. “[I]magining away the persistence of disagreement is like wishing away
engage each other in politics to promote a process that will bring "each citizen’s ethical views and insights . . . to bear on the views and insights of each of the others," ultimately "providing a basis for reciprocal questioning and criticism [that] enabl[es] a view to emerge which is better than any of the inputs and much more than a mere aggregation or function of those inputs."\(^{109}\) Even if this emergent view does not produce consensus, even if reasonable persons continue to disagree, and even if the view can be legitimated only by a brute majority vote of a legislature, Waldron insists that it should nevertheless be endowed with the respect due to “the achievement of concerted, cooperative, coordinated[,] or collective action in the circumstances of modern life,” which is to say "in the circumstances of politics, including the circumstance of disagreement."\(^{110}\)

Common to all these authors is the view that disagreement is essential to politics. Yet none of these authors conceptualizes politics as a regime of preference aggregation. Each believes that politics can exist only if there is a "coming together"\(^{111}\) in a shared “political association”\(^{112}\) that can produce the good of “concerted, cooperative, coordinated[,] or collective action.”\(^{113}\) Politics thus reflects a nest of paradoxes. The very existence and maintenance of a polity depends upon deep forms of agreement—agreement that political actors will be agonists and not antagonists, that differences will be settled peacefully through the practice of politics, and that members of the polity will together decide their common destiny and fate. But politics also presupposes and requires disagreement. It is a practice in which members of a polity seek to forge agreement about what to do under circumstances of disagreement. Within politics, members of the polity “interact with one another without compulsion, force, and rule over one another, as equals among equals, . . . managing all . . . affairs by speaking with and persuading one another.”\(^{114}\)

The practice of politics is, on this account, surprisingly fragile. It survives, we might say, between war and law. If our disagreement becomes too intense, if we wish to exterminate each other rather than peaceably to live together, we cannot engage in the practice of politics. Alternatively, if we agree too much, if we cease normatively to value disagreement because we expect all to concur on

scarcity in an account of distributive justice.” \(Id.\) at 154.

In the United States, in Western Europe, and in all other democracies, every single step that has been taken by legislatures towards making society safer, more civilized, and more just has been taken against a background of disagreement, but taken nevertheless in a way that managed somehow to retain the loyalty and compliance (albeit often grudging loyalty and compliance) of those who in good faith opposed the measures in question. \(Id.\) at 155.

109. \(Id.\) at 106.
110. \(Id.\) at 156 (emphasis omitted).
111. \textsc{Rancière, supra} note 99, and accompanying text.
112. \textsc{Mouffe, supra} note 96, and accompanying text.
113. \textsc{Waldron, supra} note 107, and accompanying text.
114. \textsc{Arendt, supra} note 105, at 117.
common remedies for common problems, we also cannot engage in the practice of politics. "[I]f ever there was a natural unanimity of opinion in any society on all great issues, politics would, indeed, be unnecessary."115 In politics, we strive for agreement under conditions in which we expect and protect the persistence of disagreement.

IV

LAW AND POLITICS: RECONCEPTUALIZING THE RELATIONSHIP

I have just sketched an account of politics as a distinct form of social order in which persons might live together in peace and social solidarity within a single polity and yet preserve the possibility of ongoing contestation about what actions the polity might take. This is an interpretive, sociological description of what the social organization of politics means for us. The interpretation does not rest on any story about particular faculties of the human personality, like the distinction between will and reason. Nor does it rest on any story about particular principles of human accountability, like the Weberian distinction between an absolute ethics and an ethics of responsibility. It rests instead on an interpretive account of the particular ways in which we expect a specific social practice to promote social solidarity.

My suggestion in this Article is that we conceive of law in roughly analogous terms—as a specific social practice expected to promote social solidarity in a particular way. An interpretive, sociological description of contemporary law would surely emphasize that we turn to law when we wish to accomplish a goal, like the establishment of efficient markets or the creation of safe streets, or when we wish to affirm values that we believe we hold in common, like equality or privacy. Law functions as an instrument of social control and expression in the service of these ends.

Sometimes the instrument of law works through sanctions and incentives. Those who drive unsafely will be penalized, as will those who cheat or who fail to meet their obligations to pay overtime to their employees. And sometimes the instrument of law works through an expressive authority to proclaim values that we deem to be shared and foundational.116 Brown was a significant legal achievement even if for many years it did not produce actual desegregation. In all these respects, however, we invoke law when we believe that we have reached agreement—or when we wish to act as if we had reached agreement—and when we wish to implement and entrench our putative agreement. Law, we might say, is a practice that presumes agreement, in contrast to politics, which presumes disagreement.

115. CRICK, supra note 102, at 64. "Politics is, as it were, an interaction between the mutual dependence of the whole and some sense of independence of the parts." Id. at 142.
Take a paradigmatic example. In politics, we can debate whether and how we should prohibit private racial discrimination by employers. If the matter is controversial in politics, it means that members of the polity disagree and perhaps disagree fundamentally. The plurality of possible political positions matches the diversity of the polity. The point of political engagement is to persuade others to take common, coordinated action. Insofar as this is accomplished through the enactment of legislation, the resulting statute will be taken as representing the attainment of social agreement, even if the statute is enacted by a simple majority of one. In our society, the enactment of a statute warrants the presumption of agreement. It is then the task of courts to identify and enforce that presumed agreement. That is their point, which is made manifest by the presumption of reasonableness proclaimed by legal process jurisprudence. In legal cultures that enforce customary or common law, by contrast, courts need not await the positive enactment of a statute in order to enforce values or principles that are presumed to represent warranted agreement.\(^{117}\)

Conceiving the nature of judicial decision making from this perspective clarifies a great deal about its structure, which everywhere seeks to render transparent the putative agreement that law takes as authority for its institutional legitimacy. Adjudication is conducted through the use of a highly controlled professionalized discourse that screens and monitors the reasons that will be officially recognized as legal.\(^{118}\) Legal doctrines like \textit{stare decisis}, and judicial structures like the hierarchical authority of courts, encourage law to develop in ways that systematically unfold and implement the values taken by the law as grounding its own legal authority. Legal practice sustains its own legitimacy by emphasizing and reinforcing the intellectual coherence and transparency of legal values, and by entrenching the stability and dignity of these values.

In all these respects, the social practice of adjudication differs from that of politics. The space of political argumentation and participation is not narrowly professionalized, but is open to all. Although professional politicians exist, they must draw support from ordinary citizens who have become politically mobilized through social movements or other provocations.\(^{119}\) The domain of politics is as motley and as confused as the persons who are moved to participate in politics. Political discourse is as plural and as united as the polity within which it takes place. Because politics must sustain disagreement, it does

\(^{117}\) See Post, \textit{The Social Foundations of Privacy}, supra note 85.

\(^{118}\) See also Owen M. Fiss, \textit{The Death Of the Law?}, \textit{72 Cornell L. Rev.} 1, 11 (1986) (Judges are “situated within a profession, bounded at every turn by the norms and conventions that define and constitute that profession. . . . [Judges] are disciplined in the exercise of their power. They are caught in a network of so-called ‘disciplining rules’ which, like a grammar, define and constitute the practice of judging and are rendered authoritative by the interpretive community of which the [judges] are part.”).

not contain a single, hierarchically enforced structure of authority, but is typically loosely jointed, with disarticulated and nodal points of authority. Power in law speaks through a single professional discourse; power in politics assumes a myriad of forms. Political actors can deploy the language of values, but they can also employ arts as disparate as mobilization, compromise, compulsion, fidelity, secrecy, and betrayal.

The salient features of our politics are designed to represent social reality as essentially agonistic, whereas the salient features of our law are structured to represent social reality as essentially unified. Because social life is in fact neither essentially agonistic nor essentially unified, both politics and law misrepresent actual social reality. Disagreement is a stubborn fact that does not diminish merely because we have chosen to deploy the social form of law, nor does agreement disappear merely because we are engaged in politics.

Consider the paradigmatic example of racial prejudice that we have been examining. It is clear that controversy about racial discrimination will not vanish either because society has enacted a statute prohibiting such discrimination or because courts have enforced such a statute. Disagreement is likely to persist and to become visible in conflicting judicial interpretations of the statute. Each court applying the statute may ask the identical legal question; each court may seek to determine what agreement society has called upon the judiciary to enforce. Yet everyone knows that different courts will nevertheless reach different conclusions so long as ongoing political disagreement about racial discrimination persists.

When judges experience disagreement that they cannot resolve, they resort to the same rules of majority voting as do politicians. A five-to-four vote of the Supreme Court has no less legal force because the legal judgment of four Justices differs from that of their majority colleagues. This illustrates that although law is a social practice that is premised upon the normative force of agreement, it also contains many subtle mechanisms for dealing with the persistent social fact of disagreement. Matters remain controversial in law just as they remain controversial in politics. Those literate in the law both recognize the persistence of such controversy and habitually ignore its theoretical significance.

Politics, by contrast, is a social practice that is premised upon the normative force of disagreement, yet politics cannot proceed unless agreement already exists about such basic matters as a mutual commitment to the peaceful processes of politics. Just as ongoing disagreement within law should not be underestimated, so the bonds of solidarity that make politics possible should not be overlooked. In politics, just as in law, continuity, stability, and


predictability are valued. Legislators no less than courts aspire to enunciate “rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs on the basis of this knowledge.”

In a successful polity, political actors must be agonists, not antagonists.

To accurately theorize the relationship between politics and law, therefore, we must recognize that agreement and disagreement are social facts that persist regardless of whether we engage in either politics or law. Politics is a social practice that presumes disagreement, yet politics nevertheless depends upon and seeks to expand the social fact of agreement. Law is a social practice that presumes agreement, yet law nevertheless must find ways to tame, channel, and resolve ongoing, persistent disagreement.

Politics and law are thus two distinct ways of managing the inevitable social facts of agreement and disagreement. As social practices, politics and law are both independent and interdependent. They are independent in the sense that they are incompatible. To submit a political controversy to legal resolution is to remove it from the political domain; to submit a legal controversy to political resolution is to undermine the law. Yet they are interdependent in the sense that law requires politics to produce the shared norms that law enforces, whereas politics requires law to stabilize and entrench the shared values that politics strives to achieve.

This suggests that any given controversy can be given legal form when we wish to act as if we had reached agreement about the meaning and implementation of a relevant social principle. Yet any discrete legal principle can also reassume political form whenever we discover that our putative agreement is chimerical and that we wish to create a valorized space for further disagreement. Law and politics should thus be conceived as distinct phases of a larger and more inclusive process of social integration by which modern heterogeneous societies produce solidarity and control. Modern societies require a healthy interrelationship between the social forms of law and politics.

The hypothetical antidiscrimination statute we have been considering aptly illustrates the dynamic interconnection between law and politics. The statute’s enactment signals the need to act as if society has reached agreement on a principle of antidiscrimination. Yet disagreement about the meaning of the principle will continue so long as the issues addressed by the statute remain divisive. A well-functioning modern society will tame such ongoing

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controversy by establishing an iterative relationship between law and politics. It will facilitate political outlets for continuing debate about the proper legal interpretation of the statute, perhaps by once again placing the question of racial discrimination on the agenda of political institutions. Contestation about the principle of racial equality will thus occur simultaneously in both legal and political venues. The initial statute may subsequently be amended. The amended statute will require yet further judicial interpretation, which may excite yet further political mobilization. The dynamic and dialectical interdependence of law and politics can continue ad infinitum.

Reva Siegel and I have observed how this same dialectical movement occurs within constitutional law, which (as a matter of formal jurisprudence) is theoretically independent of politics. Constitutional values represent sites of putatively deep, ongoing agreement, the kind of agreement that establishes the identity and nature of the polity itself. But the identity of the polity may be politically controversial. Courts may articulate what they believe to be a constitutional value, like reproductive freedom, and political actors may use their decisions to mobilize a political backlash that rebounds to affect judicial interpretations of the constitutional right. Or political actors may take the initiative and propose that certain constitutional values exist—like the right to bear arms or the right to enjoy gender equality—and courts may subsequently give these values legal form in the context of constitutional adjudication. At any given moment, constitutional values can be in play in legal

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126. Id. Bernard Crick long ago observed the dependence of judicial constitutional interpretation on political debate: "Constitutions are themselves political devices. They may be viewed as self-sufficient truths in the short-run; but in the long run it is political activity itself which gives—and changes—the meaning of any constitution." CRICK, supra note 102, at 147. Crick continues:

When we praise a constitution we are doing no more than praise a particular abridgement of a particular politics at a particular time. If the abridgement was a skilful one and circumstances are kind, it may last into a long middle period and help to give stability to a state. But, in the long run, though the words are the same and formal amendments to it may be few, the meaning of it will be different.

institutions, in political institutions, or in both simultaneously. The legal articulation of such values will affect their political articulation, and *vice versa*. Siegel and I use the term "democratic constitutionalism" to denominate these complex and interdependent relationships between constitutional law and politics.130

If the relationship between law and politics is conceptualized in this dynamic and dialectical way, the exact location of the boundary between law and politics is necessarily contestable. From the perspective of politics, it is always disputable whether present disagreements should be ceded to the expert grammar of the law, or whether extant legal decisions ought to be reclaimed as subjects of political dispute. From the perspective of law, it is always disputable whether contemporary political disagreements are ripe for legal intervention, or whether existing legal judgments can sustain sufficient social support to resist falling back into the vortex of politics. It is intrinsically uncertain whether ongoing conflicts over particular values will be addressed within legal practice, within political practice, or within both simultaneously. There is nothing inherent in the nature of law or politics that can settle this question.131

It follows that particular legal values are always at risk of slipping away from legal control and becoming re-entangled in political debate. In the context of statutory interpretation, where the authority of the legislature to reform agreed upon values is well understood, this risk is not typically experienced as threatening the integrity of law. But matters may be otherwise in the context of constitutional rights and structure.132 Constitutional adjudication typically articulates values that, from the perspective of the legal system, underlie the identity and nature of the polity itself.133 In such matters, legal institutions

129. In the context of appointments to the Supreme Court bench, for example, constitutional values are almost always simultaneously articulated in both legal and political registers, and the dialectical relationship between these two organizational practices is given concrete anthropological articulation. See Robert Post & Reva Siegel, *Questioning Justice: Law and Politics in Judicial Confirmation Hearings*, 115 YALE L.J. POCKET PART 38 (2006), http://www.thepocketpart.org/2006/01/post_and_siegel.html.


132. This is the essence of de Tocqueville’s observation. See *supra* note 14.

affirm values that they believe make possible the ongoing practice of politics. The whole point of *Getting from Joe to Gene (McCarthy)* is how the Warren Court used the avoidance canon in ways designed to preserve what it regarded as fundamental First Amendment principles necessary for the practice of democracy.

In preserving these principles, the Warren Court undoubtedly believed it was safeguarding prerequisite values for the ongoing constitutional identity of the nation. It is not uncommon for courts to take account of the political consequences of their decisions when they believe that such important values are at stake. Whenever legal institutions imagine themselves as the repository of values so fundamental that they define the polity itself, questions of judicial statesmanship tend to arise. Consider, for example, *Planned Parenthood v. Casey.* In that case, the Court stated:

> Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court’s legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court’s concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible.

The Court imagines itself as conserving the shared social values that make the nation possible and that are therefore essential to the preservation of the polity. Insofar as “rule of law is secured only by the principled exercise of political will,” courts will exercise analogous statesmanship to protect the integrity of the law itself.

In such contexts, courts face a dilemma. If they do not act to protect essential values, the contestation of politics might spin out of control and undermine both the stability of the polity and the rule of law. Agonism might degenerate into antagonism. But if courts act too aggressively, they can suppress the very possibility of disagreement that defines politics itself. This dilemma is insoluble if it is believed, as some do, that legal judgments “foreclose” the possibility of politics. But if, as I have suggested, the

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134. For examples, see Post & Siegal, *supra* note 125 at 427–30; Post & Siegel, *Theorizing the Law/Politics Distinction, supra* note 90.


boundary between law and politics is essentially contested, then judicial judgments engage but do not pre-empt politics. 139

In point of fact, judicial judgments typically provoke a larger, more encompassing arena of political disagreement in which legal decisions are themselves subject to affirmation, resistance, debate, and modification. Courts are, in this sense, necessarily political actors. Their decisions inspire, inform, and channel political debate and action. It follows that judicial opinions can be constructed in ways that are more or less effective in promoting political support for essential values like the stability of the polity or the rule of law. These distinct alternatives open the space that makes the practice of judicial statesmanship possible and desirable.

Judges have historically exploited this potential for judicial statesmanship. But should they? Because judges must base their decision making on legal principles, and because these principles inevitably and appropriately define themselves in opposition to criteria that are defined as “non-legal” or political, 140 the question is whether, from the internal perspective of the law, the preservation of fundamental values should count as proper “legal” criteria for judicial decision making. The paradox is that such criteria will not be derived from the ordinary norms of judicial craft.

V

SOME NORMATIVE IMPLICATIONS

I have suggested that law is a social practice that presumes agreement. From the internal perspective of the law, therefore, authoritative legal settlement of a divisive question presumes agreement. The professional and institutional structure of judicial decision making requires actors to argue cases as though they could be subject to definitive resolution. But the internal legal presumption of agreement should not blind legal actors to the ongoing social fact of disagreement. This is precisely the confusion that generates the enduring attraction of Wechsler’s non-consequentialism.

Wechsler’s invocation of neutral principles invites those of us in the legal system to imagine that professional legal reason suffices to sustain the legitimacy of the law and the effectiveness of legal values. Judicial decisions will retain their legitimacy so long as they remain true to legal craft. From this perspective, judicial statesmanship is either irrelevant to the law or inimical to the law. But this perspective is merely an illusion generated by the internal legal point of view. Jon Stewart ironizes the underlying hubris of this illusion in his summary of Roe v. Wade in his book, America (The Book): A Citizen’s Guide to Democracy Inaction: “The Court rules that the right to privacy protects a

woman's decision to have an abortion and the fetus is not a person with constitutional rights, thus ending all debate on this once-controversial issue."  

Once we adopt an external perspective and understand that disagreement with judicial decisions can always reanimate political controversies capable of undermining judicial legitimacy, the immaculate innocence inherent in the formulation of "neutral principles" can be understood as merely ideological. If courts genuinely believe that certain values are essential for the maintenance of the polity and of the rule of law, the fact that judicial decisions may undermine these values cannot blithely be dismissed as irrelevant to the internal purposes of the law. Insofar as law is concerned with the fundamental commitments that underpin the solidarity of the polity—and these emphatically include the relative autonomy of the law itself—it would be self-defeating for judges to define their role in ways that ignore these fundamental commitments. If judges incorrectly appraise these commitments—and in the past judges have been very badly mistaken in their estimations of the fundamental commitments of the polity—the political system will itself correct their error.

It is important to acknowledge that such political corrections can be very costly, even catastrophic. But this does not imply that judges must pretend that they are mere "automatons" without discretion to interpret the law, or that they must be oblivious to the consequences of their decisions, or that they must construct the internal practice of law entirely to avoid the possibility of a mistake, because inaction as well as action can carry potentially catastrophic costs. To grasp the actual interrelationship between law and politics is instead to understand, most precisely, that judges must bear an ethic of responsibility for their decision making. As Alexander Bickel has wisely noted, "The Court is a leader of opinion, not a mere register of it, but it must lead opinion, not merely impose its own; and—the short of it is—it labors under the obligation to succeed."

Perhaps the most famous and influential example of a court successfully using judicial statesmanship politically to entrench fundamental commitments like the rule of law is, after all, Marbury v. Madison, in which Chief Justice Marshall twisted judicial craft to establish the political legitimacy of judicial

142. The definition of commitments like the rule of law and judicial craft are subject to internal dispute and redefinition. See Post & Siegel, Theorizing the Law/Politics Distinction, supra note 90. They are not merely mechanical, in part because the establishment of the rule of law is itself a social achievement. Carla Alison Hesse & Robert Post, Introduction to Human Rights in Political Transitions: Gettysburg to Bosnia 13, 20 (Carla Alison Hesse & Robert Post eds., 1999).
144. See Frickey, Wisdom on Weber, supra note 71, and accompanying text.
review. The example of *Marbury* is continuously relevant to ongoing judicial practice. *Marbury* illustrates how judges have used statesmanship to construct essential elements of our legal structure. Judicial statesmanship does not concern merely passive virtues, but is woven into the affirmative fabric of American constitutional law. *Marbury*’s spectacular success institutionalizing constitutional review has all but eclipsed its manifest inconsistency with norms of judicial craft.

Judges turn to judicial statesmanship when the resources of legal craft have been exhausted. That is why narrow criteria of professional competence are inadequate to assess decisions like *Marbury*. Acts of judicial statesmanship must instead be evaluated in the same way as we evaluate the important initiatives of great political leaders, by the quality of the consequences that they produce. Judges who attempt judicial statesmanship must be assessed by an ethic of responsibility.

Because law is constituted by norms of professional practice, judges who forsake craft always threaten harm to the relative autonomy of the legal system. They invite criticism for corrupting the integrity of the law. As in the case of *Marbury*, however, an ethic of responsibility may vindicate such judges if their decisions are deemed necessary to secure overmatching benefits to the legal system or to the polity, or if their decisions are perceived as necessary to avert even greater harm to the legal system or to the polity. Of judges like Marshall we ask whether they have fulfilled their “obligation to succeed.” Judicial statesmen are vulnerable to the uncontrollable contingency of events.

If we focus merely on the single example that this Article has discussed, *Getting from Joe to Gene* (*McCarthy*) demonstrates how a great Court can enfold outstanding judicial craft into profound statesmanship in order successfully to protect the freedom of speech that is the lifeblood of any democracy. Phil affirms that the Warren Court was acting responsibly in these decisions. I agree with his conclusion, and in this Article I have attempted to sketch a way of understanding the relationship between law and politics that might justify Phil’s attraction to these forgotten but exemplary judicial masterpieces.

In essence, I have invited the reader to step outside the internal perspective of the law, which can sometimes be misleading, and to appreciate the function of judicial decision making within a more encompassing, external, sociological framework. The insights gained from this new perspective can profitably be used to modify our understanding of the nature of the judicial role and of the limits of judicial craft. It is by following this path that we can begin

146. Marshall’s interpretation of section 13 of the Judiciary Act of 1789 may have been implausible from the perspective of pure judicial craft, but it nevertheless empowered Marshall to "affirm the doctrine of judicial review in a way that would be unlikely to generate a political backlash. What’s more, amazingly little damage to doctrine would result." Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 462 (1989).
to understand just how deftly Phil has pointed us, as he always did, in the right direction.