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THAT THOSE ALONE MAY BE
SERVANTS OF THE LAW WHO LABOR
WITH LEARNING, COURAGE, AND
DEVOTION TO PRESERVE LIBERTY
AND PROMOTE JUSTICE.

— Leslie H. Buckler, Professor, UVa School of Law, 1931

Inscribed on the face of Clay Hall

THIS PUBLICATION CELEBRATES THE SCHOLARSHIP of the University of Virginia School of Law. Each year, the *Virginia Journal* presents in-depth intellectual profiles of three scholars, plus a survey of recent publications by the entire faculty. The tradition began in 1998, with an inaugural issue honoring Kenneth Abraham, Michael Klarman, and Elizabeth Scott. Subsequent issues have featured profiles of Lillian BeVier, Anne Coughlin, Barry Cushman, John Harrison, David Martin, John Monahan, Daniel Ortiz, James Ryan, Paul Stephan, George Triantis, G.E. White, Ann Woolhandler, Barbara Armacost, Kim Forde-Mazrui, and Paul Mahoney, plus a symposium issue devoted to the collaborative work of Charles Goetz and Robert Scott.

The individuals who have been profiled in these pages reflect a wide variety of interests, perspectives, opinions, and methodologies, but a consistent dedication to excellence. Our goal is to maintain an intellectual community where the broadest range of opinion and debate flourish within a framework of common purpose. Every person honored by the *Virginia Journal* has contributed to that goal, not only by his or her published work, but also by constructive participation in our community of scholars.

This year's *Virginia Journal* presents the following members of our faculty:

Jody Kraus approaches legal theory through the eyes of a formally trained analytic philosopher. Both his scholarship and his teaching reflect an unflinching commitment to rigorous standards of logical reasoning. Targeting the deepest and most intransigent debates in contract theory, Jody lays bare their logical structure, which enables him to make connections that others have missed and to lay the foundation for his ultimate goal of a unified account that explains and justifies contract law. In addition to his superb analytic gifts, Jody's wide knowledge of political philosophy, economic analysis of law, and contract theory make him an unparalleled resource for both students and colleagues.

Elizabeth Magill writes about the institutions of the federal government and the law governing their interaction. Within the fields of separation of powers and administrative law, Liz has written on a variety of different topics, using different sources and methodologies, but all of her scholarship is characterized by creativity, intellectual ambition, and great analytic clarity. Liz's work also reflects her determination to ground theorizing in the lessons of institutional history and practice and the details of institutional design. In combining a taste for large questions with a fine-grained appreciation of context, Liz produces scholarship that is penetrating, persuasive, and, as recognized by her ABA Annual Award for Scholarship in Administrative Law, highly influential.

George Rutherglen is an intellectual polymath. In an era when many legal scholars specialize in a single subject and a single method, George does just the opposite. He teaches a wide array of courses, ranging from Employment Discrimination to Professional Responsibility to Admiralty, and draws on an equally broad array of sources, including law, philosophy, economics, and history. Despite this diversity of issues and approaches, George's scholarship is united by a common theme and by common virtues. All of it addresses the ways in which procedural rules affect the exercise of substantive rights, and all of it reflects the wisdom, balance, and intellectual clarity of its author.

JOHN C. JEFFRIES, JR.
Dean

JODY KRAUS

A Philosophical Approach to the Economic Analysis of Contract Law

JODY KRAUS HAS DEVOTED MUCH OF HIS SCHOLARLY CAREER to understanding the field of contract theory. In Kraus's view, contemporary contract theory began when Christopher Columbus Langdell joined the Harvard Law School faculty in 1870 and decided to teach contracts. At that time contracts treatises were organized largely on the basis of the traditional common-law "forms of action." Although the forms of action had been abolished more than 20 years earlier, Langdell was the first legal academic to attempt to understand how contract doctrines together might comprise a distinct area of law apart from their common procedural ancestry. When Langdell examined the contracts cases, he claimed to discern a set of legal rules that were logically deducible from coherent legal principles.

When Kraus first started teaching law, the dialogue between autonomy and efficiency theories was one-way.

Langdell's inspired and historic attempt to understand contract law as a principled and coherent body of law marked the inception not only of the

modern American understanding of contract doctrine but of contemporary contract theory as well. By the time Jody Kraus joined the University of Virginia Law School faculty in 1990, the core of Langdell's understanding of American contract law remained viable, but Langdell's vision of a unifying contract theory had endured half a century of withering criticism.

Legal Realists and Critical Legal Studies scholars argued that express judicial reasoning was mere window dressing, causally irrelevant to which party prevailed in a dispute. According to the Realists, results actually turned on informal commercial practices or the psychological idiosyncrasies or policy preferences of judges. According to CLS scholars, the rhetoric of judicial decisions masked decisions based on politics. Pluralists, in turn, argued that express legal reasoning was relevant to deciding common-law cases but that no single theory could comprehend all the disparate values that necessarily bear on those decisions. For pluralists, case outcomes resulted from wise judgment, based on years of judicial experience, about how to reconcile the multiple and often incommensurable values at stake in adjudication. Legal Realism, CLS, and pluralism each argued, against Langdell's most basic conviction, that no area of law, including contract law, could be rationalized under a set of coherent, let alone morally defensible, principles.

Against this accumulating skepticism, two theoretical movements emerged side-by-side in the last quarter of the 20th century. Building on long traditions and recent developments in moral and political philosophy, Charles Fried wrote his now classic monograph, "Contract as Promise." In Fried's view, the basic core of American contract law could be explained and justified by the principle of autonomy: that everyone has equal value and therefore an equal right to make, revise, and pursue their life plans subject to the equal right of others to do the same. Contract law maximizes individual autonomy by enabling individuals to undertake obligations to one another, thereby expanding their life choices, without fear of detrimental reliance. The legal enforcement of promises ensures that promise-breakers compensate their victims for the harm they cause.

At the same time Fried was unifying contract law under the single moral

principle of autonomy, Richard Posner and others had begun the economic analysis of law. Posner argued that contract law could be explained and justified by a single principle of efficiency. According to Posner, contract law should be understood as part of a broader legal effort to provide individuals with incentives to take efficient precautions and to enable them to transfer resources to higher-valued uses. Specifically, Posner argued that much of contract law consisted of "default" rules that allocated contractual risks to the party who could bear it at least cost, even if that party had not agreed to bear it. Posner ultimately claimed that much of law, and virtually all of contract law, could be explained and justified as a mechanism for efficiently allocating resources.

Both the autonomy and efficiency theories of contract share Langdell's conviction that contract law can be explained and justified as an objectively reasoned and principled institution. They would therefore seem to be kindred spirits, united by their unequivocal rejection of the theory-skepticism that dominated much of the 20th century. When the economic analysis of law first emerged, however, autonomy theorists such as Jules Coleman and Ronald Dworkin leveled deep philosophical objections to its explanatory and normative credentials. After an initial round of responses by Posner and others, the autonomy theorists returned seemingly decisive replies. Indeed, even Posner appeared to concede that he had no satisfactory defense of the central idea of efficiency as a normative criterion for evaluating legal regimes. Yet despite the apparent victory of the autonomy theorists, the economic analysis of contract law continued unabated. Indeed, there is no question that economic analysis has been and continues to be the dominant mode of analysis of American contract law. While a few autonomy theorists of contract have continued to labor in relative obscurity, their theories have never achieved prominence or significant influence in the American legal academy.

When Kraus first started teaching law, the dialogue between autonomy and efficiency theories was one-way. The autonomy theorists continued to raise fundamental flaws with economic analysis. The economic analysts ignored those criticisms and continued to produce analyses that became

the legal academy's received wisdom for contract doctrines. The core motivation of Kraus's scholarship is to understand contract theory from Langdell through today's debate between autonomy and efficiency. His scholarship, just as his teaching, is marked by intense intellectual rigor, curiosity, and a willingness to take a fresh look at academic debates that seem stalled.

Kraus began with two contemporary puzzles. The first is why the economic analysis of contract law has thrived despite its failure to provide a sustained, let alone compelling, response to the trenchant objections autonomy theorists have leveled against it. The second is why autonomy theories, despite their evident rigor and eminent philosophical credentials, have not captured a greater audience in the American legal academy. Over the years, Kraus's scholarship has expanded to use the lens of contract theory to examine the nature of legal theory in general.

Already a trained philosopher, Kraus had developed views in political philosophy before he came to the legal academy. His first scholarly efforts were devoted to refining those views, which he published in his first book, *The Limits of Hobbesian Contractarianism* (1993). That book focuses on the power of hypothetical consent to justify the exercise of political coercion. Not coincidentally, one of the central normative claims of economic analysis at that time was that hypothetical consent could justify a number of legal doctrines and decisions. Kraus argued that, upon careful analysis, even the most sophisticated efforts to explain the normative force of hypothetical consent failed. Later, in "Political Liberalism and Truth," 5 *Legal Theory* 45 (1999) Kraus argued that John Rawls' final attempt to provide a justification for coercion could not avoid taking positions on the controversial philosophical questions on which it claimed to remain agnostic.

Before comparing autonomy and efficiency theories directly, Kraus first deepened his understanding of economic analysis by practicing it. In "Decoupling Sales Law from the Acceptance-Rejection Fulcrum," 104 *Yale L.J.* 129 (1994), Kraus provided an original economic analysis of the central doctrines of Article 2 of the U.C.C., arguing that current law should be revised to facilitate more efficient transactions. In "Legal Design and the Evolution of Commercial Norms," 26 *J. Legal Stud.* 377 (1997), Kraus

challenged the conventional view that the evolution of informal commercial practice would produce efficient practices. That idea was based on an analogy to the concept of "survival of the fittest" in biological evolutionary theory. Using a state-of-the-art theory of the evolution of social norms, Kraus demonstrated that inefficient evolution was not only possible but likely, given the actual mechanisms for cultural evolution that would operate on commercial norms. Just as biological evolution has produced countless biological mechanisms that are obviously inferior to mechanisms humans can design, so too commercial practices are often sub-optimal. As a result, Kraus rejected the received view that commercial law should without exception simply incorporate informal commercial norms. Instead, Kraus argued that legal scholars should question the efficiency of informal practice and that law-makers should welcome careful attempts to design new commercial law regimes.

Drawing on his understanding of philosophical theories of explanation and justification, Kraus then turned directly to analyzing the relationship between autonomy and efficiency contract theories. In "Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy," *Philosophical Issues*, supplement to *Nous* (2000), and "Legal Theory and Contract Law: Groundwork for the Reconciliation of Autonomy and Efficiency in Contract Theory," 1 *J. S. Pol. & Legal Phil.* 385 (2002), he traced the fundamental conflict between autonomy and efficiency theories of contract law to the well-known divide between two different kinds of moral theory. Kraus argued that "[a]s normative theories, economic contract theories would seem to be logically incompatible with autonomy contract theories for the same reason that consequentialist moral theories are logically incompatible with deontological moral theories: The former claim that moral justification is solely a function of consequences, while the latter claim that moral justification is logically independent of consequences."

Kraus then identified three strategies for reconciling these two approaches. The first is *the convergence strategy*, which "attempts to demonstrate that efficiency and autonomy contract theories happily con-

verge in their normative assessment of most contract doctrines, even though they do so on logically incompatible grounds." The second is *the horizontal independence strategy*, which reconciles both kinds of theories "by construing them as making either different kinds of claims or claims about different kinds of things." For example, autonomy theories might claim only to evaluate the justification of contract law, while economic theories might claim only to explain the content of contract law. Alternatively, autonomy theories might claim to explain the express reasoning in contracts cases, while economic theories might claim only to explain case outcomes. Finally, *the vertical integration strategy* reconciles efficiency and autonomy contract theories by construing them as logically distinct elements within one unified theory. Ultimately, Kraus supports a vertically integrated contract theory in which there is a "division of theoretical labor" between autonomy and efficiency principles. Kraus argues that efficiency theories should play the role of providing fine-grained, institutional prescriptions for the resolution of hard cases, in part because the vagueness of key moral concepts in autonomy theory often disable them from accomplishing that task. On the other hand, Kraus claims autonomy theories should play the role of providing the moral justification of contract law because they are rooted in a philosophically credible moral theory. Unlike autonomy theories, economic theories derive their justificatory force entirely from the principle of efficiency, which long ago was discredited as a free-standing moral principle.

In "Philosophy of Contract Law," Jules L. Coleman and Scott Shapiro, eds., *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002), Kraus identified four methodological commitments that divide and define contract theories. The first issue is whether express judicial reasoning should be viewed as legal theories or as legal data for theories to explain. Economists offer theories to explain outcomes and pay less attention to judicial explanation, while philosophers focus on the reasoning offered by judges as the starting point for their own accounts. The second methodological issue is the relative priority accorded to explaining and justifying contract law. Kraus claims that "[t]he primary

goal of deontic theories is to demonstrate that contract law is a morally and politically legitimate institution, rather than to explain how contract law determines outcomes in particular cases. In contrast, economic theories are principally concerned with explaining how contract law determines outcomes in particular cases." The third methodological issue is whether the theory aspires to explain the distinctiveness of contract law. As Kraus explains, philosophers are much more concerned about what makes contract law distinct than are economists. The fourth methodological issue dividing autonomy and efficiency theories is whether they take an *ex post* or *ex ante* perspective on adjudication. Deontic theories take an ex post perspective because they view adjudication as an occasion to resolve a dispute by vindicating pre-existing rights. In contrast, economic theorists take an ex ante perspective by viewing adjudication as an occasion for prospective regulation.

Kraus concludes that these four differing methodological commitments effectively demonstrate that autonomy and efficiency theories of contract are not really competing theories. Since their conceptions of what contract law is (express doctrinal statements versus outcomes), what contract theories should do (explain versus justify contract law, explain or explain away the distinctiveness of contract law), and the object of adjudication (retrospective dispute resolution versus prospective regulation) are so different, these theories cannot be meaningfully compared. Thus, for example, when efficiency theories analyze the doctrine of consideration differently than autonomy theories, there is no meaningful disagreement over the doctrine of consideration. Instead, the real debate is the over the methodological presuppositions to which each theory is committed.

Building on his previous views, Kraus then turned to the autonomy theorists' most trenchant criticism of efficiency-based explanations of contract and tort law. In "Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis," __ *Va. L. Rev.* __ (forthcoming 2007), Kraus defends economic analysis against the claim that it fails what philosophers have labeled "the transparency criterion." That criterion holds that a legal theory's explanation must

provide a plausible account of the relationship between the reasoning it claims judges actually use to decide cases and the express reasoning judges provide in their opinions. The deontic theorists claim that the economic analysis cannot satisfy the transparency criterion because the judicial reasoning in contracts cases is usually cast in deontic moral terms.

Kraus claims that efficiency theories can account for the divergence between the non-consequentialist, moral language of judicial opinions and the consequentialist nature of economic analysis by offering an evolutionary theory of how the terms in judicial opinions acquire their meaning. In brief, Kraus's claim is that while contract and tort law might have first evolved with the aspiration to apply common deontic moral concepts to resolve disputes, the common law's focus on hard cases, in which the moral answer is unclear, forced judges to turn to consequentialist reasoning. Since no clear moral answer resolved the disputes before them, judges naturally used adjudication as an opportunity to set a sensible precedent for regulating future conduct. As the common law evolved, judges came to use deontic moral language to express essentially consequentialist reasoning. The difference between the plain meaning of express judicial reasoning and the best (economic) theory of the outcome of judicial decisions using that reasoning is therefore only superficial. According to economic analysis, the real meaning of express judicial reasoning in hard cases is given by economic, not deontic moral, theory.

Kraus also argues in this article that legal explanatory theories are subject not only to the transparency criterion but also to two additional criteria, which he calls "determinacy" and "normative force." The determinacy criterion holds that reasons fully explain an outcome only if they determine it, and that all else being equal, more determinate explanations are to be preferred to less determinate explanations. Since Kraus argues that economic theories are better at explaining case outcomes than deontic theories, they are preferred by the determinacy criterion. The normative force criterion holds that the reasons that explain an outcome must also constitute a plausible justification for the outcome. Kraus argues that while deontic theories can trace the normative force of their reasons directly to

credible moral theories, economic analysis need not make the unsustainable claim that its normative force derives from the justificatory power of the principle of efficiency. Instead, economic analysis can claim that its reasons justify outcomes because of the role the principle of efficiency plays in the overall set of institutions sanctioned by the normative political theory justifying political authority. Kraus recently expanded on the determinacy criterion in "Determinacy and Justification in Adjudication," 48 *Wm & Mary L. Rev.* 4 (forthcoming 2007).

Finally, in "The Jurisprudential Origins of Contemporary Contract Theory," a work in progress, Kraus returns to the classic "death of contract" debate famously begun by Grant Gilmore. Gilmore's claim was that Langdell and his fellow travelers in classical contract theory fraudulently represented the content of contracts precedents in order to provide precedential authority for what was, in fact, a wholly novel theory of contract law. Kraus argues that Gilmore's entire critique rests on the assumption that the precedential authority of cases resides in their express judicial reasoning rather than their outcomes. Yet Langdell and the classical theorists clearly believed the precedential authority of cases resides in their outcomes alone, and that express judicial reasoning is just one theory of the doctrinal precedent set by those outcomes. Building on that insight, Kraus demonstrates that the economic analysis of law is Langdell's contemporary legacy. The economic analysis of contract law is equally committed to Langdell's twin jurisprudential convictions: that case outcomes are the legal data express reasoning seeks but sometimes fails to explain and that contract law can be explained and justified by unifying it under a single set of coherent principles. In short, Kraus shows that the economic analysis of contract law is the classical theory of our day.

So how does Kraus answer the puzzles of autonomy and contract theory? Economic analysis has thrived, despite its failure to respond to deep philosophical criticism, because it does a better job of explaining outcomes. Since lawyers and law professors prize the ability to explain and predict outcomes above all else, the success of economic analysis in explaining common-law cases explains its dominance in the legal academy.

That also explains why autonomy theories have failed to gain traction. Despite their sophisticated and superior normative credentials, they fail to explain the outcomes in hard cases and so are perceived to be of little value in the classroom or the courtroom.

Ultimately, the best theory of contract law will, Kraus argues, combine the insights and virtues of both theories to produce a unified account that both explains and justifies much of contract law. Given his training in philosophy and his mastery of economic analysis, as well as his openness to what each approach has to offer, Kraus himself is uniquely positioned to provide that account.

EXCERPT

The Jurisprudential Origins of Contemporary Contract Theory

(Working Paper, 2006)

IN *HARRIS V. WATSON* (1791), LORD KENYON HELD THAT "NO ACTION would lie at the suit of a sailor on a promise of a captain to pay him extra wages, in consideration of his doing more than the ordinary share of duty in navigating the ship."[1] His decision was based expressly on a "principle of policy:" "if sailors were … in times of danger entitled to insist on an extra charge on such a promise as this, they would in many cases suffer a ship to sink, unless the captain would pay any extravagant demand they might think proper to make." In *Stilk v. Myrick* (1809), Lord Ellenborough held that an action did not lie on a captain's promise to pay the remaining sailors the wages of two sailors who had deserted the ship in a foreign port.[2] One report of *Stilk* quotes Lord Ellenborough as stating "I think *Harris v. Watson* was rightly decided, but I doubt whether the ground of public policy, upon which Lord Kenyon is stated to have proceeded, be the true principle on which the decision is to be supported. Here, I say, the agreement is void for want of consideration."[3] In 1920, Samuel Williston, the author of the first modern treatise on contracts and then-future Reporter of the First Restatement of Contracts, agreed with Lord Ellenborough, citing both *Harris* and *Stilk* for proposition in §130 of his treatise that a performance or promise to perform any obligation previously existing under a contract with the promisee is not valid consideration.[4] In his classic 1974 monograph, *The Death of Contract*, Grant Gilmore claimed "there is no conceivable way in which *Harris v. Watson* can be taken to have been decided on consideration theory."[5] According to Gilmore, either Lord Ellenborough actually decided *Stilk* on the public policy ground stated in

Harris but his reasoning was misreported, or he intentionally misinterpreted the ruling in *Harris* because he was "an owner's man all the way who would use any theory, however far-fetched– even 'want of consideration'– to strike down seamen's wage claims."[6] As to why Williston cited *Harris* and *Stilk* as authority for Restatement §130, Gilmore remained agnostic between the possibilities of "deliberate deception" and "unconscious distortion."[7]

An "owner's man all the way," "deliberate deception," and "unconscious distortion?" Those were fightin' words in 1974 and they still are today. Gilmore was taking aim at Williston's efforts to marshal cases as precedential authority for the "bargain theory of consideration," which together with the objective theory of intent comprised the doctrinal core of the 19th century classical conception of contract law. The doctrine of consideration holds that promises are not legally enforceable unless supported by consideration. The bargain theory, famously championed by Oliver Wendell Holmes,[8] defines consideration as a performance or return promise that is "bargained for," and states that a performance or return promise is bargained for if it is "sought by the promisor in exchange for his promise and … given by the promisee in exchange for that promise."[9] Gilmore claimed that Langdell single-handedly "launched the idea that there was—or should be—such a thing as a general theory of contract," that Holmes created the "broad philosophical outline" of that theory, and that Williston fraudulently legitimated the theory in the "meticulous, although not always accurate, scholarly detail" of case law.[10] *Stilk* and *Harris* are Exhibits A and B in Gilmore's brief to expose Williston's fraud.

Gilmore's specific claim is that Holmes and Williston[11] committed fraud by citing cases for doctrinal propositions that were unsupported by, and in some cases contradicted by, the express judicial reasoning of those cases. Once Gilmore purports to demonstrate the gap or inconsistency between the classical theorists' reading and the express reasoning of a case, he concludes the classical theorists engaged in either deliberate deception or unconscious distortion. The conclusion is a non-sequitur. Gilmore's critique presupposes that an interpretation of a case is proper

only if it constitutes a plausible interpretation of the express judicial reasoning in the case. In contrast, Holmes and Williston implicitly presuppose the view that the doctrine a case sets as a precedent is the one that best explains its outcome, whether or not that doctrine is also a plausible interpretation of, or even consistent with, the express reasoning offered by the deciding judge. On their view, the express reasoning in a case is merely a theory, rather than constitutive statement, of the doctrinal precedent set by that case. The bare outcomes of cases, and not the express reasoning in cases, provide the data that doctrinal theories must explain and justify. On this view, the outcome is the only component of a case's precedential authority that is exclusively within the control of the deciding judge. Even the outcome's correct characterization for purposes of identifying a case's precedential authority, beyond the mere description of which party prevailed, is determined by the doctrinal interpretation that best explains why the prevailing party won. For convenience, I will refer to this as the view that the precedential authority of cases resides in their outcomes alone, or the precedents-as-outcomes view for short. In contrast, if precedential authority resides in express judicial reasoning, the doctrine established by a case is identical to the justification for the outcome of that case expressly articulated by the judge who decided it, whether or not that justification provides an adequate or consistent, let alone compelling, explanation for that outcome.

Acknowledgment of the existence and plausibility of these competing views of the nature of precedential authority defuses Gilmore's incendiary charge that the classical theorists engaged in fraud or negligent misrepresentation. Instead, it exposes a much deeper disagreement, submerged below the surface of Gilmore's complaint, over the role of express judicial reasoning in the proper interpretation of precedent, and over the role of *stare decisis* in transforming bad precedents into good law. In this Essay, I re-examine Gilmore's case against the formalists and argue that it is constructed almost entirely on the suppressed premise that the precedential authority of cases resides in their express judicial reasoning. Against all but one of Gilmore's charges of improper citation of legal authority, the

classical theorists can effectively defend their citation as proper by arguing that their interpretation of the case provides the best explanation and justification of its outcome, regardless of its relationship to the express judicial reasoning in the case. Against the remaining charge, the classical theorists' view of *stare decisis* explains why they would insist that a doctrine entailed by their conception of contract law is a valid part of American contract law even though a well-known contrary line of cases left the question concededly unsettled. This re-examination, then, demonstrates that Gilmore's conclusions simply beg the question against the classical theorists' implicit view of the nature of precedential authority and the role of *stare decisis*. Gilmore's debate with the classical theorists only appears to be over the substantive doctrinal content of late 19th century contract law. Although he evidently didn't realize it, Gilmore's real disagreement with the classical theorists is over the nature of precedential authority. And that debate was never engaged because neither Gilmore nor the classical theorists explicitly articulated, let alone defended, their views of precedential authority.

ENDNOTES

1 *Harris v. Watson*, 170 Eng. Rep. 94 (1791).

2 *Stilk v. Myrik*, 6 Esp. 129, 170 Eng. Rep. 851; 2 Camp. 317, 170 Eng. Rep. 1168 (1809).

3 2 Camp. 317 (1809).

4 Samuel Williston, 1920, 1 *Williston on Contracts*, §130.

5 Grant Gilmore, 1995, *The Death of Contract*, 29. Ronald K.L. Collins ed., Columbus: Ohio State Univ. Press 2d ed.

6 Gilmore, *The Death of Contract*, 30 n.57.

7 Gilmore, *The Death of Contract*, 30.

8 Holmes wrote that "it is of the essence of a consideration, that, by the terms of the agreement, it is given and accepted as the motive or inducement of the promise. Conversely, the promise must be made and accepted as the conventional motive or inducement for furnishing the consideration. The root of the whole matter is the relation of reciprocal conventional inducement, each for the other, between consideration and promise." Oliver Wendell Holmes, Jr., 1963, *The Common Law*, 293-41-2. Mark DeWolfe Howe ed., Cambridge, Mass: Belknap Press of Harvard Univ. Press.

9 Restatement (Second) of Contracts §71(1). The first Restatement of Contracts incorporated the bargain theory of consideration in §75 by defining consideration for a promise as "an act other than a promise … or a return promise bargained for and given in exchange for the promise." Restatement of Contracts §75.

10 Gilmore, *The Death of Contract*, 15.

11 Gilmore never provides an example of a case that Langdell allegedly misinterpreted. Instead, he claims Langdell's theory of contract simply lacked sufficient precedent.

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ELIZABETH MAGILL

Making Sense of the Government We Have

ELIZABETH MAGILL SPENT FOUR YEARS ON CAPITOL HILL before she entered law school, and her interests and scholarship reflect that experience. Few think of Capitol Hill as a place that shapes intellectual attitudes, but Magill's scholarly approach owes something to the Hill. It was there that she became interested in fundamental questions about the architecture of government and the relationship among its institutions. It was also there that she began to appreciate the complexity of those relationships.

Magill's work in constitutional law focuses on the division of authority and relationship among the institutions of the national government.

Magill joined the Law School faculty in 1997, after clerkships with Court of Appeals Judge J. Harvie Wilkinson III and Supreme Court Justice Ruth Bader Ginsburg. Magill's intellectual interests are wide-ranging, as her teaching experience shows. She has taught ten different subjects in her time at Virginia, and has co-taught with colleagues on five separate occasions. In the same relatively short period of time, Magill has become one of the most admired and beloved members of the faculty.

Magill has concentrated her scholarly work in her core fields of constitutional and administrative law. In her writings, Magill takes up large questions about the design of and relationship among governmental institutions, but she also pays close attention to the details and historical context of institutional arrangements. Her work, which has drawn considerable attention and accolades from other scholars, is notable for the creative perspective it brings to longstanding issues.

Magill's work in constitutional law focuses on the division of authority and relationship among the institutions of the national government. That focus has spawned several articles that, taken together, revise our understanding of issues that are both timeless and of increasing contemporary importance.

In "The Real Separation in Separation of Powers Law," 86 *Va. L. Rev.* 1127 (2000), Magill casts a critical eye on existing debates over legal approaches to separation of powers questions. She argues that the conventional understanding of what is at stake in those disputes is incorrect and, worse, a distraction from more pressing questions. According to conventional wisdom, courts and commentators are divided between two schools of thought, formalism and functionalism. Magill argues that, in fact, underneath this debate there is a hidden consensus about the substantive theory of separation of powers. Both formalists and functionalists, she contends, accept that separation of powers law can and should delimit three separate branches of government and maintain balance among them. Yet neither side in this debate, as Magill shows, has explained or defended their shared assumptions regarding the need for functional separation, balance, or the relationship between the two. After illustrating the shortcomings of traditional thinking regarding separation of powers, Magill lays out the challenge facing anyone wishing to construct a more convincing theory.

In "Beyond Powers and Branches in Separation of Powers Law," 150 *U. Penn. L. Rev.* 603 (2001), Magill takes up that challenge. She begins by explaining why the current theory that guides judicial resolution of separation of powers controversies is a failure. One pillar of that theory requires courts to distinguish between legislative, executive, and judicial powers.

But in most contested cases, there is no available method to make those determinations. The other pillar of the theory requires courts to police the balance of power among the branches, but that effort also fails. The most important problem with conventional theory is that it imagines branches as entities with unitary institutional interests that they are seeking to advance. But that is a fantasy. The branches of government are complex institutions made up of many subparts; those subparts have varying interests that do not always coincide with one another or with the posited interest of the overall branch.

Having identified where separation of powers thinking goes wrong, Magill then identifies how it could go right. At the most general level, she urges that our thinking about these questions must take account of the world we live in, rather than chase abstractions. Her insight that governmental power, instead of being distributed among three unitary branches is actually dispersed among a large and diverse array of decision-makers, holds important lessons for separation of powers thinking. Separation of powers theory has conventionally aimed at assuring the fragmentation of state power—at "balancing" the branches of government. But government authority is already extremely fragmented in our system. Many government actors share in the exercise of power, and they have varied incentives, reflecting different selection and tenure rules and diverse constituencies. Further, they are located in institutions and sub-institutions with distinct internal organizations and norms. Such actors can be counted on to protect their slice of decision-making authority and, in that way, to work against concentrations of government authority.

Conventional separation of powers approaches have also been aimed at identifying and labeling exercises of power as "legislative," "judicial," or "executive" and at assuring that power is exercised by the appropriate governmental institution. Magill argues that in contested cases, that effort is fruitless. She also suggests that understanding the actual ways in which governmental power is exercised paves the way for a more useful set of questions. Instead of trying to identify the nature of the power being exercised, the law should ask *how* that power will be exercised. That question

requires us to look, not at the lofty abstractions of branches and powers, but at a level that is more meaningful. We must ask about the relevant decision makers, the context in which they act, the process by which they reach their decisions, and the constraints on their actions. Understanding how government actors are likely to exercise authority will not be easy, but focusing the doctrine in this way will at least move it in the right direction.

Having clarified, criticized, and offered an alternative vision of separation of powers thinking, Magill's most recent contribution to that literature asks a different sort of question. She asks why separation of powers doctrine looks the way it does. In "The Revolution that Wasn't," 99 *Nw. U. L. Rev.* 47 (2004), Magill asks why the Rehnquist Court made a serious effort to revise federalism doctrines, but did little to alter the basic approach to separation of powers cases. Many would expect developments in these two areas to mimic one another, but, in the Rehnquist Court, they did not.

Magill explains that the factors that drive doctrine in federalism and separation of powers cases are quite distinct. The incentives of judges in the two areas vary because federal courts have a much more direct stake in separation of powers controversies than they do in federalism controversies. In addition, the provisions of the Constitution that govern separation of powers controversies are more specific than those governing federalism issues. This makes it less likely that federal courts will do what they have done with respect to federalism disputes, that is, treat some of the most important questions as nonjusticiable.

The external influences on the two doctrinal regimes are also different. To take one example, consider the difficult problem of squaring the vast administrative state with the provisions of the Constitution that establish the three branches of government. After the end of the *Lochner* era, administrative regulation became a far more established feature of American governance, and courts were reluctant to use traditional separation of powers doctrines to declare vast swaths of the administrative state unconstitutional. They had more than enough opportunity to tame the exercise of bureaucratic power through their interpretations of statutes, such as the Administrative Procedure Act, that governed administrative agencies. By

the time the post-New Deal constitutional settlement receded—the point in time at which the Rehnquist Court began self-consciously to revive federalism—the administrative state did not need taming.

Finally, Magill argues that another key to understanding developments in the two areas lies in recognizing that the political valence of federalism and separation of powers questions is quite different. Altering the law governing structural arrangements at the federal level may seem dramatic, but it is still re-arranging authority within a federal political system. Transferring power away from the federal government to the states, by contrast, is to transfer authority to genuinely distinct political systems. The stakes, in other words, are higher to changes in federalism doctrines than they are with respect to separation of powers doctrine. Higher stakes means that the pressure surrounding the doctrines—either to change them or resist changing them—will be greater.

Magill's other scholarship is in the field of administrative law. Her most important article, "Agency Choice of Policymaking Form," 71 *U. Chi. L. Rev.* 1383 (2004), was recognized by the American Bar Association Administrative Law and Regulatory Practice Section as the best piece written in the field in 2004. The article has renewed interest among scholars in neglected but important questions about agency behavior and practice. Magill starts with the observation that an administrative agency which has been delegated some task—to protect the environment, assure the integrity of the securities markets, or improve auto safety—might be able to carry out that obligation by adopting a legislative rule, bringing or deciding a case, or announcing an interpretation of the relevant statute in which the authority was delegated. In fact, an agency might choose to rely on all of those quite distinct policymaking tools in the course of implementing its statutory mandate. Not only will an agency be permitted to choose its preferred policymaking instruments, but under long-settled administrative law doctrine, it will not be required to explain to courts why it chose one instrument or the other.

This phenomenon is well-known and generally treated as unremarkable. But, Magill argues, it *is* remarkable. Most government actors are not

free to select from a menu of policymaking tools. The legislature adopts statutes; prosecutors bring cases; courts decide cases brought to them by parties. Confining legislatures, prosecutors, and courts to particular jobs is no accident. Those assignments spring from the most essential aspects of the Constitution's design. But most administrative agencies are not so constrained. Many can rely on policymaking instruments that look like legislating, enforcing, *and* adjudicating.

One of Magill's primary achievements in the article is to persuade her readers to critically examine agency decisions that are now considered unexceptional—indeed, have been ignored in the legal literature for many decades. Magill demonstrates that agency choices of procedure are both theoretically and practically significant. The choice among the agency's policymaking tools determines the process the agency follows, the legal effect of the agency's action, and the availability and nature of judicial examination of the agency's action. Having explained why this choice is important, Magill turns to the issue of why agencies choose one form or another. Unfortunately, scholars have little sense of how agencies' actually choose their policymaking form. In the article, Magill constructs a preliminary hypothesis about how an agency might choose among its available policymaking forms, identifies what might worry us about those choices, and articulates what responses might be available to respond to those concerns.

One method to respond to concerns about agency choice of procedure, of course, is judicial review. According to orthodox doctrine, courts will not require an agency to explain why it chose one policymaking form instead of another. As Magill demonstrates, however, courts *do* "review" agency choices of procedure, albeit in a roundabout way. Agencies are permitted to choose their form of policymaking, but the elements of the policymaking tools they choose are fixed by statutes and judge-made law. Moreover, judge-made law has played an important, even decisive, role in shaping the consequences that follow from an agency's choice of means. Courts are the primary architects of the standards by which agency action will be assessed; they have leeway to determine who can bring a suit to challenge agency action and when that suit can be brought; they some-

times have the ability to fix the legal effect of an agency's action; and they have some power to shape the procedures that an agency must follow when it relies on a policymaking tool. By adjusting the consequences of choosing one form or another, courts have the opportunity to articulate concerns about an agency's choice of procedure. Magill demonstrates that courts can, as a theoretical matter, respond to almost any concern about an agency's choice of procedural form. She also provides three examples of judicial developments that should be seen as examples of judicial regulation of agency choice of procedure, albeit in the indirect way Magill identifies.

It is an important step forward to understand that, contrary to what the black-letter doctrines would suggest, courts actually do react to (and thereby review) agency choice-of-form decisions. It raises the question, though, whether this *sub rosa* review of those discretionary agency decisions is a sufficient response to the larger issue of agency choice of policymaking form. To answer that question, scholars must first take up the challenge of constructing a convincing positive theory of agency choice of procedure. Magill's preliminary positive hypothesis paves the way for that analysis, but much more work must be done to determine just how agencies choose among their available options.

Magill's current project combines both the interests and inclinations she has demonstrated in her prior work. She is writing a book on the health, safety, consumers' rights, and environmental regulatory revolution of the 1960s and 1970s. Three significant developments combined in this period to produce a genuinely new regulatory order. The first development came from the halls of Congress. Starting in the middle of the 1960s, Congress embarked on what counts as the third major wave—the earlier two being the Progressive Era and the New Deal—of regulatory innovation in the 20th Century. This third period, often called the new social regulation, rivaled if not exceeded its predecessors in scope. Social and political movements organized around health, safety, the environment, and consumers' rights demanded action, and Congress obliged. The political branches created brand-new regulatory agencies, including the Consumer Product Safety Commission, the Environmental Protection Agency, the National Highway

Traffic Safety Administration, and the Occupational Safety and Health Administration.

The second development occurred in the legal profession. Regulated parties had long turned to the courts when confronted with regulation. For as long as federal regulatory bodies existed, those they regulated had challenged their actions in court. But in the 1960s, a new group of parties began to appear in court. Watchdog lawyers—who followed, critiqued, and challenged agency activity on behalf of "the public"—appeared and pursued their missions with vigor, both inside and outside the courts. Such public interest lawyers—now on the left and the right, but then mostly on the left—are so much a part of the contemporary fabric of regulatory disputes that it is hard to appreciate how recent they are. Most of the groups that now routinely litigate in the health, safety, environment, and consumers' rights arena started litigating in this period.

The final development was in the courts. Between the middle of the 1960s and the middle of the 1970s, courts transformed their own relationship with agencies. They required agencies (old and new) to be open, participatory, and reasonable. Courts broadened access to judicial review of agency decision-making. They did so by expanding standing doctrine, establishing a presumption that agency decisions were subject to review, and permitting pre-enforcement review of agency rules. When they reached the merits, courts required agencies to adhere to the statutes that governed them, but they did much more than that. They were demanding about both the process and substance of agency decision making.

In seeking to understand this era, Magill will once again combine her interest in large questions—here, what is really the birth of modern public law—with her characteristic attention to the details of that development. In Magill's view, embedding large questions about governance in the practicing details of governing institutions is the best way to advance our understanding of her primary fields. It is also, for her, a constant source of scholarly pleasure and inspiration.

EXCERPTS

Beyond Powers and Branches in Separation of Powers Law

150 *U. Penn L. Rev.* 603 (2001)

THE SEPARATION OF POWERS PROVISIONS OF THE CONSTITUTION are understood as a way of controlling the exercise of state power by fragmenting it among three different institutions and guaranteeing that fragmentation. Conventional separation of powers analysis relies on two mechanisms to achieve and maintain the dispersal of state power: separating legislative, executive, and judicial power in three different branches and preserving a balance among those branches. These ideas are not just the stuff of high school civics class; legal doctrine governing separation of powers questions is built around them. … There is vigorous disagreement about the proper characterization of each of these examples, but there is little controversy about the proper framework within which that debate should proceed.

There should be. The embarrassing secret is that both commitments at the center of separation of powers doctrine are misconceived. The effort to identify and separate governmental powers fails because, in the contested cases, there is no principled way to distinguish between the relevant powers. The available strategies for identifying those differences—and, given the centrality of the question, there are surprisingly few—either rest on formalistic rules that have no content and fail for that reason, or consist of vague normative judgments that cannot work in concrete cases. While there are other possible methods for answering this question that are not yet fully developed in the literature, upon examination, they are not promising. The honest assessment is that we have no way to identify the differences between the powers in contested cases, and we are not likely to have one soon.

The effort to maintain balance among the branches fares no better.

An obvious difficulty is that the claims made in the name of inter-branch balance—for instance, that a development has upset the balance of power between the branches—are made without conveying why we should care about that balance. Such claims rest on assumed salient differences between the branches of government; the distribution of authority among the branches matters because those institutions will not decide questions in the same way. That intuition about inter-branch difference is taken as truth, but it is weakly supported and open to question. Nonetheless, understanding why we should care about this question is a step forward. It does not, however, rescue the concept. Indeed, it is a hopeless enterprise to talk about balance among the branches of government. We have not come close to articulating a vision of what an ideal balance would look like. Even if we had tackled that normative question, we have no way to measure the distribution of power among the branches at any point in time and no method to predict the effect of an institutional arrangement. In short, we do not know what balance means, how to measure it, or how to predict when it might be jeopardized. All these deficiencies are partly explained by the final and most fundamental difficulty with this idea. Inquiring about inter-branch balance is incoherent because it assumes that branches of government are unitary entities with cohesive interests, but that is not true. The institutions of the national government are made up of individuals and sub-institutions with varying incentives that do not neatly track the institution within which they are located.

This Article argues that the two central commitments of contemporary separation of powers law are a failure. Fine-tuning these ideas will not redeem them. Abandoning these ideas, as we must, will make room for new ways of thinking about separation of powers law.

Reconstructing separation of powers law will be no easy task. Taking seriously the failings of current law offers at least two important lessons for its reconceptualization. The most significant lesson is that if one is interested in fragmenting state power and assuring that it remains fragmented, the failure of the conventional approaches is of little moment. Those approaches seek to disperse the three powers in three balanced branches,

in part, so that no single institution controls too much state power. That effort fails. But in the course of noticing that there is no such thing as three essential powers exercised by three undifferentiated branches, we will also notice that government authority is fragmented, widely so, albeit not according to the three-powers-in-three-branches formula. Instead, government authority is diffused among a large and diverse set of government decisionmakers who have a hand in the exercise of state power. The extent of that diffusion of state power is more than sufficient to put to rest any concerns about dangerous concentrations of government authority. And the character of that fragmentation is such that state power is likely to remain widely dispersed. Because the decisionmakers who share in the exercise of government authority have varied incentives—owing to their diverse constituencies, institutional locations, and ways of doing business—there is little chance that they would collude to concentrate government power in a few hands. If diffusion of state authority is what we are after—and that is what conventional approaches in part are seeking—we have it.

Understanding the character of the distribution of government authority also offers a second lesson for separation of powers law. That law aspires to something more than general diffusion of state power; it seeks to match the exercise of particular powers—legislative, executive, judicial—with corresponding institutions that are best suited to exercise those powers. The criticisms offered here suggest that current efforts go about this ambitious undertaking in exactly the wrong way. Conventional thinking about separation of powers operates as if it is meaningful to talk of powers and branches. But our system does not operate at those levels; government authority cannot be parceled neatly into three categories, and government actors cannot be understood solely as members of a branch of government. An effort to match particular state powers with particular government decisionmakers must start with an understanding of how those decisionmakers might exercise that authority. That requires a fine-grained appreciation of the forces that push and pull government actors in one direction or another. A doctrine built around such understandings will offer no easy answers, but it will at least ask the right questions.

Agency Choice of Policymaking Form

71 *U. Chi. L. Rev.* 1383 (2004)

AN ADMINISTRATIVE AGENCY DELEGATED SOME TASK—PROTECT the environment, assure the integrity of the securities markets, improve auto safety—might carry out that obligation by adopting a rule, bringing or deciding a case, or announcing its interpretation of the statute. In fact, it might rely on all of those quite distinct tools in the course of implementing its statutory mandate. Agencies are unique institutions in this respect. Most government actors are not free to select from a menu of policymaking tools. The legislature adopts statutes; prosecutors bring cases; courts decide cases brought to them by parties. Confining legislatures, prosecutors, and courts to particular ways of doing their jobs is no accident. Those assignments spring from the most essential aspects of the Constitution's design. But the typical administrative agency is not so constrained. Most agencies can rely on policymaking tools that look like legislating, enforcing, *and* adjudicating.

This strange state of affairs, oddly enough, is considered normal. To be sure, the peculiar mix of powers—part legislative, part executive, part judicial—that Congress is constitutionally permitted to bestow on administrative agencies generates much of the heat in the debate over their constitutional status. But that is usually where interest in the issue ends. The nonconstitutional dimensions of agencies' ability to rely on a mix of policymaking tools generate little interest or investigation. This Article aims to rectify that by identifying, evaluating, and coming to terms with the phenomenon of agency choice of policymaking form. That phenomenon can be simply stated: the typical administrative agency is authorized to use a range of distinct policymaking forms to effectuate its statutory mandate and its choice about which tool to rely on appears, at first glance at least, to be unregulated by courts.

A typical administrative agency is authorized by statute and case law to use a range of policymaking forms to address problems within its purview. … [An agency like the Securities and Exchange Commission might engage in legislative rulemaking, administrative adjudication, judi-

cial enforcement action, and guidance.] The agency's choice among these policymaking forms matters because each is distinct. The differences are significant and they run along three dimensions: the process the agency follows, the legal effect of the instrument, and the availability and nature of judicial examination of the agency's action.

That agencies often have multiple tools available to effectuate a given policy objective is interesting in itself. But the judicial reaction to this fact heightens the intrigue. That judicial reaction, at least at first blush, can be simply described: hands-off. An agency can choose among its available policymaking tools and a court will not require it to provide an explanation for its choice. This judicial reaction is out of step with the rest of the law of judicial review of agency action. Courts usually demand that agencies provide reasoned explanations for their discretionary choices, but there is no such reason-giving requirement when agencies select their preferred policymaking form. [There is no satisfying explanation for why courts might treat this exercise of discretion differently than other exercises of discretion.]

[A close examination of the structure of administrative law, however, reveals a surprise:] Courts have the ability to react to agency choices of procedure without demanding that an agency provide an explanation for its choice. That is because courts have a surprising degree of control over the consequences of an agency's choice of form. Courts are the primary architects of the standards by which agency action will be assessed (arbitrary-and-capricious, substantial evidence, reasonable interpretation of law), and they also have leeway to determine who can bring a suit to challenge agency action and when that suit can be brought. In addition, courts have some ability to shape the procedures that an agency must follow when it relies on a policymaking tool. By adjusting the consequences of choosing one form or another—for instance, intensifying the standard of review, permitting a party to sue at a particular point, or shaping the procedures that must be followed—courts have the opportunity to respond to whatever concerns they might have about an agency's choice. [Not only do they have the opportunity to do so. Several prominent developments in the law of judicial review of agency action demonstrate that they have done so.] This judicial freedom to design the elements

of an agency's procedural form explains the otherwise puzzling vitality of the principle that agencies are permitted to select their preferred policymaking form without providing an explanation for that choice. It is not that courts permit agencies to choose their form without evaluation; courts in fact review those choices, but they do so in a roundabout way.

THIS ARTICLE HAS TAKEN AS ITS PRIMARY FOCUS A BACKSTAGE phenomenon in administrative law and practice. Everyone knows that agencies choose their policymaking forms, that they choose differently across time and across agencies, and that courts do not directly inquire into that choice. But these facts are not considered worthy of attention. This Article is, first and foremost, an argument that they do merit our attention and investigation. It has argued that agency choice of procedure is both crucial and little understood as a positive matter. It has also demonstrated that judicial reaction to that choice is not, as it first appears, hands-off. Courts do in fact review such choices—albeit indirectly—by altering the consequences of those choices.

This Article has answered some questions, but it has raised others. The indirect form of judicial review identified here not only provides an explanation for the vitality of long-standing administrative law doctrine. It also opens a window onto another model of judicial review of agency action, one that should be understood to stand alongside the conventional approach to judicial control of administration. The comparison between the two models of judicial review—one direct, the other indirect—must await future investigation. This Article has also laid the groundwork for an effort to come to terms with agency choice of form as both a positive and normative matter. The normative analysis cannot be fruitfully undertaken without a good theoretical and descriptive account of how agencies actually choose among their available options. This Article has started us down that road, but there is a long way to go. Many questions have thus been raised by this investigation. But the effort will have succeeded if it has convinced the reader that this backstage player should be invited out onto the stage.

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GEORGE RUTHERGLEN

Connecting Civil Rights and Civil Procedure

SIR HENRY MAINE FAMOUSLY OBSERVED THAT SUBSTANTIVE law is "secreted in the interstices of procedure." George Rutherglen, the John Barbee Minor Distinguished Professor of Law, is among the many Civil Procedure professors who invoke this saying, if only to persuade skeptical students not immediately impressed with the inherent importance of procedure. (He has, however, seen no need to inform his students that this observation was offered in a book entitled *Ancient Laws*.) Wholly apart from the pedagogical value of this maxim, it highlights the inevitable connection between procedural rules and substantive rights. In much of his teaching and in articles on an astonishing array of subjects, Rutherglen has explored this connection.

His overriding concern has been to ask what happens to a legal rule once it becomes the subject of litigation.

In particular, he has focused on what might be considered a variant of Maine's observation, the idea that the protection of *liberty* also lies within the interstices of procedure. Rutherglen's teaching and writing

thus emphasizes the link between civil rights and civil procedure. In his scholarship on employment discrimination, for example, Rutherglen has analyzed how procedural rules and devices such as class actions, joinder of parties, and the burden of proof have shaped the substantive law. In civil procedure itself, he has written on such issues as mass torts, personal jurisdiction, and the *Erie* doctrine. He has also written in the field of professional responsibility, which seeks to define and limit the role of lawyers within our adversary system of justice. Last but not least, he has written and taught in Admiralty, a subject where procedure and substance also are deeply intertwined. In all these fields, his overriding concern has been to ask what happens to a legal rule once it becomes the subject of litigation—how it operates, with what consequences, and at what costs.

Rutherglen came to the Law School in 1976 and has taught an unusually wide variety of courses, including Civil Procedure, Federal Courts, Conflict of Laws, Employment Discrimination, Philosophy of Law, Professional Responsibility, and Admiralty. Rutherglen joined the faculty after clerking for Justices William O. Douglas and John Paul Stevens on the Supreme Court. Both justices are known for their protection of civil rights and civil liberties. Rutherglen had previously served as a law clerk to Judge J. Clifford Wallace on the United States Court of Appeals for the Ninth Circuit, after receiving both his law degree and his bachelor's degree from the University of California at Berkeley.

Rutherglen's undergraduate degree, in philosophy, informed both his legal education and his subsequent scholarship. His studies also provided a welcome contrast to the many extracurricular activities at Berkeley during the late 1960s and early 1970s when he was a student there. Even at a distance (preferably up-wind, he says, from any clouds of tear gas), these events offered their own unique political education, revealing all too vividly the uneasy balance between dissent, disorder, and the rule of law.

These events also revealed what Holmes identified as the failure of general propositions to decide concrete cases. Many political pro-

grams expounded at Berkeley in those days made little practical sense. Those that did had to be tested against what could actually be achieved, whether it was ending a distant and costly war, achieving racial and gender justice, or promoting economic equality. Law seemed to Rutherglen at the time, and still does today, a way to bring political ideals down to earth, to see what difference they make and what consequences they have. This reformist agenda might seem far removed from the technicalities of Civil Procedure, but in fact, the conflict of opposing values, interests, evidence, and argument in our judicial system constitutes one way to give expression to and make meaningful our deepest societal commitments.

Civil rights litigation provides the clearest example of how procedural rules create the framework for arguments on fundamental social issues. One such issue arose in the early years after passage of the Civil Rights Act of 1964. Title VII of that act prohibits discrimination in employment. Plaintiffs bringing Title VII claims frequently argued for certification of class actions on the ground that "racial discrimination is by definition class discrimination." In two articles, "Title VII Class Actions," 47 *U. Chi. L. Rev.* 688 (1980), and "Notice, Scope, and Preclusion in Title VII Class Actions," 69 *Va. L. Rev.* 11 (1983), Rutherglen analyzed the justification for special treatment of Title VII class actions and the particular circumstances in which class actions were certified. This analysis took account of both the procedural rule governing class actions and the substance of the plaintiff's claim. Rutherglen explained how neither the procedural rule nor the substantive law could be applied without considering the other, and he argued that both together, on the facts of each case, determined the suitability of class litigation.

Another area in which procedural rules framed the debate over Title VII was affirmative action, where third parties often sought to intervene to support or oppose such plans. In "Procedures and Preferences: Remedies for Employment Discrimination," 5 *Rev. Litigation* 73 (1986), Rutherglen analyzed the rights of third parties to intervene in this fashion and the consequences of allowing them to do so. Whatever

one concludes about the legality and wisdom of affirmative action, particular affirmative action plans cannot be assessed without considering the interests of all parties affected by them. Procedural rules on intervention and necessary parties assure that all these parties have a right to be heard.

From these procedural issues that affect the enforcement of Title VII, Rutherglen took the short step of considering how the substantive law under Title VII should be framed so that it can be effectively enforced. He took up this theme in a series of articles on sex discrimination in fringe benefits, burdens of proof under Title VII, the relationship between statutory and constitutional standards for affirmative action (with Daniel R. Ortiz), and more generally, the concept of discrimination itself. These articles led to others on statutes related to Title VII, such as the Age Discrimination in Employment Act, the Americans with Disabilities Act, Title IX of the Education Amendments of 1972 (concerned with sex discrimination in education), and most recently, the Reconstruction-era civil rights acts.

These last statutes provided an occasion to survey the entire history of civil rights law and its intimate connection with constitutional law. Rutherglen's article on this topic, "Custom and Usage as Action Under Color of State Law: An Essay on the Forgotten Terms of Section 1983," 89 *Va. L. Rev.* 925 (2003), is also a fine example of his extraordinary strength as a scholar. As the title suggests, this article concerns the meaning of the statutory phrase in Section 1983, which provides for damages against persons acting "under color of any statute, ordinance, regulation, custom, or usage of any State." By historical and jurisprudential analysis, Rutherglen showed that custom and usage were not, as is assumed today, summary terms for the enforcement decisions of government officials, but referred to patterns of private activity from which law might be derived.

On that view, custom and usage are not merely examples of action "under color of law," as the statute is always paraphrased, but also encompass pervasive private practices in which government officials

acquiesce, especially with regard to the institution of slavery. This insight is original and important, but Rutherglen's essay does not stop there. Rutherglen goes on to explain how understanding the original meaning of custom and usage sheds light on the scope of Congress' power under Section 5 of the 14th Amendment, a topic of considerable contemporary importance. In contrast to the Court's cramped reading of Section 5, Rutherglen explains how the original understanding of Section 1983 supports granting Congress the power to address specific customs when they are tolerated by the administration of state law, regardless of whether state law is in itself defective. As Dean John Jeffries remarked, when recently awarding Rutherglen the Traynor Prize in recognition of outstanding scholarship, this is a "wonderful essay—fine grained, nuanced, subtle" and contains the "first really new" insights about Section 1983 in a "generation of scholarship."

Along with this series of separate articles, Rutherglen has published several books that provide a more systematic treatment of the subject, in particular, *Employment Discrimination Law: Visions of Equality in Theory and Doctrine* (2001), and *Employment Discrimination: Law and Theory* (with John J. Donohue III) (2005). He has also co-authored a leading casebook on civil rights, *Civil Rights Actions: Enforcing the Constitution* (with John C. Jeffries, Jr., Peter W. Low, and Pamela S. Karlan) (2001). Perhaps the subtitle to this casebook best captures the common theme among his writings, as well as the perspective that he shares with his co-authors: in order to determine the real meaning of values, principles, and rights—whether they are found in the Constitution, statutes, or the common law—it is necessary to focus on how they are enforced.

Rutherglen's work does not stop there, however. His intellectual curiosity has led him recently to study the many complexities surrounding notice and compensation to class members, in contexts as varied as ordinary class actions and as extraordinary as the September 11th Victim Compensation Fund. In "Distributing Justice: The September 11th Victim Compensation Fund and the Legacy of the Dalkon

Shield Claimants Trust," 12 *Va. J. Soc. Pol'y & L.* 673 (2005), he found a powerful precedent for the September 11th Fund in the Dalkon Shield Claimants Trust, a trust established to compensate victims of a defective contraceptive device. This article, demonstrates the fusion of substantive and procedural rights which Rutherglen believes to be essential for truly successful legal innovations. Taking his cue from the late Judge Robert R. Merhige, who presided over the Dalkon Shield litigation, Rutherglen believes that the challenges confronting our legal system today require a sense both of the tensions between substantive rights and procedural values and of how to make them work together. Indeed, this has been the overarching theme of Rutherglen's scholarship and teaching.

As the description of his work suggests, Rutherglen is a rare combination of a true intellectual and careful lawyer. He is widely read but has an eye for detail shared by other outstanding attorneys. To quote Dean Jeffries once more, Rutherglen "understands everything from Fibinacci numbers to moral philosophy, including literature, a good deal of science, and even law school administration. At the same time, he is a superb lawyer who understands and demonstrates the careful, purposive, disciplined reasoning that are the hallmarks of quality lawyering." Rutherglen's scholarship and teaching nicely combine these two elements, and a generation of students and colleagues have benefited enormously from his learning and insights.

EXCERPTS

International Shoe and the Legacy of Legal Realism

2001 *Sup. Ct. Rev.* 347

THE MODERN LAW OF PERSONAL JURISDICTION OWES ITS existence, and most of its structure and detail, to Chief Justice Stone's magisterial opinion in *International Shoe v. Washington* (1945). It does not, however, owe its legal rules to this opinion, because Chief Justice Stone set out systematically to discredit most of the rules that had previously restricted the exercise of personal jurisdiction. In this effort, he succeeded beyond his wildest dreams—or, perhaps more accurately, his worst nightmares. The law of personal jurisdiction, and of such related fields as venue and choice of law, has been swept clear of nearly all rules, at least those that can be applied in a more or less determinate fashion, yielding all-or-nothing results. Rules in this sense have been in a steady retreat since the decision in *International Shoe*, and not just with respect to the constitutional issues addressed in that case. State statutes on the exercise of personal jurisdiction have generally been interpreted to reach to the constitutional limits, or at least to approach them. Venue rules often are so generous in identifying a proper forum that they provide only a preliminary to the case-by-case application of transfer statutes and the judge-made doctrine of forum non conveniens. And choice of law, at least at the constitutional level and in states that have abandoned the first Restatement of Conflict of Laws, has abandoned all but the most lenient restrictions on a state's ability to choose its own law to govern a case.

Not all of these developments followed *International Shoe*. Some preceded it, such as the decisions on conflict of laws. But none are so well known and or so clearly changed our understanding of the limits on state

power over civil litigation. Before *International Shoe*, the law of personal jurisdiction was governed by the venerable decision in *Pennoyer v. Neff* (1878), which established as constitutional doctrine the theory of territorial sovereignty articulated by Justice Story in his treatise on the *Conflict of Laws*. The decision takes as its premise the principle "that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory." Accordingly, the location of the defendant or the defendant's property within the forum state at the time of service of process became crucial to the exercise of personal jurisdiction. This principle was subject to several exceptions, whose scope and importance increased over the decades of the late nineteenth and early twentieth century. Yet these exceptions remain confined within the strict territorial theory of *Pennoyer v. Neff*, until *International Shoe* replaced this network of detailed exceptions with a single overriding principle: that a state court can exercise personal jurisdiction over a defendant if he has "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" This principle eventually displaced the entire conceptual structure of the strict territorial theory, and with it, most of the legal rules derived from that theory.

Some may deplore these consequences of *International Shoe*, while others may applaud them. Few deny that they have occurred. The only dispute, as a descriptive matter, is over how many remnants are left of the old formal territorial theory, such as the rule that service on an individual inside the forum state is always sufficient to confer personal jurisdiction. These exceptions stand like isolated ruins, revealing how completely the old rules have been devastated and how little reconstruction has occurred. This consequence should come as no surprise. The opinion in *International Shoe* is one of the enduring monuments of Legal Realism and this is, we are told, "a negative philosophy fit to do negative work." Only the Uniform Commercial Code has a comparable pedigree as a product of Legal Realism and a comparable influence on existing law. Its provisions in Article 2 are derived directly from the realist teachings of Karl Llewellyn and these, too, have had a destructive influence on legal

rules, but not nearly so apparent and so complete as *International Shoe*.

What is surprising is that both of these contributions of Legal Realism have been attributed to the constructive rather than the skeptical branch of this movement in legal thought. The constructive phase of Legal Realism inclined towards empirical studies of law and reformist projects, like the Uniform Commercial Code, designed to bring the "law on the books" into closer harmony with the "law in action." In its skeptical aspects, Legal Realism has been identified as the predecessor of Critical Legal Studies: as a thoroughgoing conceptual critique of the foundations of all legal rules. Yet it is difficult, in all the controversy that Legal Realism generated when it came on the scene, to find a more effective and more thorough job of "trashing" legal rules than has been accomplished by *International Shoe*. What's more, this triumph of deconstruction was initiated by a pillar of the establishment, Harlan Fiske Stone, a former dean of the Columbia University School of Law, former Attorney General, Justice and then Chief Justice of the Supreme Court. Moreover, the scholars who recognized the critical implications of the opinion, to be sure some decades later, were hardly precursors of CLS: Philip Kurland and Geoffrey Hazard, both at the University of Chicago Law School at the time of publication of their articles, and Arthur T. von Mehren and Donald T. Trautman, both of the Harvard Law School. None of these authors sought to deconstruct the law of personal jurisdiction. On the contrary, they sought to build a general theory on the foundations of *International Shoe*. But what they built was not a theory of rules. At most, it was a call for particularized rules to be developed either through legislation or through case law. Neither of these developments has come to fruition.

This article offers one reason why not: Legal Realism made the criticism of legal rules far easier than the task of formulating and defending them, resulting in a systematic bias of modern jurisdictional analysis towards open-ended standards applied on the facts of each case. This conceptual bias has then been exploited by in-state interest groups—not the least of which has been the plaintiff's bar—to expand the reach of state long-arm statutes so that virtually no restraints remain on the exercise of

personal jurisdiction. Experience has now shown the need for some such restraints, and although the nature of these restraints remains a matter of dispute, the form that they take should not be slanted against legal rules. The roots of this bias lie in the realist origins of *International Shoe.*

Distributing Justice: The September 11th Victim Compensation Fund and the Legacy of the Dalkon Shield Claimants Trust

12 *Va. J. Soc. Pol'y & L.* 673 (2005)

THE SCALE OF MASS TORT CLAIMS SEEMS TO INCREASE inexorably and exponentially, as does the magnitude of the misfortunes giving rise to these claims. The terrorist attacks of September 11th furnish the latest and most tragic example of events giving rise to claims measured in the billions of dollars. The September 11th Victim Compensation Fund, established by Congress to compensate the victims of these attacks and their next-of-kin, paid out over $7 billion in awards, with over $4 billion more to be paid these recipients by insurance companies, charities, and other government programs. And these payments represent only a fraction of the compensation paid to businesses and others harmed by the terrorist attacks, which themselves bring the estimated total compensation to $35 billion.

Figures this large defy comparison with any antecedents. Yet one model for the September 11th Fund stands out among the institutions created to remedy previous mass torts. It is the Dalkon Shield Claimants Trust, in which the Special Master of the September 11th Fund, Kenneth Feinberg, himself served as a trustee. He did, to be sure, bring extensive experience with mass torts to his position as special master, among them serving in the same position in the Agent Orange litigation. But it is the scale, the structure, and the accomplishments of the Dalkon Trust that provide a compelling precedent for the September 11th Fund. This article documents those similarities and the remarkable innovations that both of these funds brought to the resolution of mass torts.

The Dalkon Trust was created to resolve over 400,000 claims arising from the use of the Dalkon Shield, a contraceptive device manufactured by the A.H. Robins Company in the 1970's. Of these claims, 200,000 were

eventually resolved on the merits, resulting in payments of over $2.8 billion from the trust. By way of comparison, many fewer individuals suffered direct injury from the September 11th attacks, but because so many of the victims died in the attacks, the resulting losses were far more severe. Almost 4,000 people were killed and almost 2,680 suffered physical injuries. The September 11th Fund handled many fewer claims than the Dalkon Trust–only a few percent of those considered by the trust–but paid out over twice as much in compensation.

If the size of the payments made by each of these funds is roughly comparable, so too, is the centralized control exercised over their administration. The Dalkon Trust resulted largely from the efforts of a single district judge, Judge Robert R. Merhige, to control the many claims arising from the use of the Dalkon Shield. Together with a bankruptcy judge, he presided over the reorganization of the A.H. Robins Co., the corporation that had manufactured the Dalkon Shield and that went bankrupt because of it. The reorganization plan eventually approved in these proceedings resulted in the sale of the company, the creation of the Dalkon Trust, and the funding of the trust from the proceeds of the sale. Judge Merhige also presided over a related class action involving claims against the company's insurers, which resulted in a settlement and the establishment of related trusts, and after all these trusts were established, he presided over their administration. Throughout these proceedings, many of the parties involved, and especially their attorneys, complained bitterly about Judge Merhige's control over the proceedings. These complaints echoed similar objections to the role assumed by Judge Weinstein earlier in the Agent Orange case.

These complaints, whatever merit they might have, carried no weight with Congress when it considered the legislation establishing the September 11th Fund. This statute and its implementing regulations give the Special Master virtually unrestricted discretion to determine the amount of compensation paid to claimants. By the very different methods of bankruptcy proceedings and congressional legislation, both compensation funds settled on a very similar administrative structure. Judge Merhige closely supervised the administration of the Dalkon Trust, even though it was formally

under the control of a board of trustees, and Kenneth Feinberg exercised still more power as the Special Master of the September 11th Fund.

The reason for concentrating control over these funds has less to do with how they were created than with the benefits resulting from foregoing the potentially ruinous cost of litigation on the scale necessary to resolve all the claims arising from a mass disaster. Procedures designed for deciding one claim at a time, or even hundreds of claims consolidated into a single case, cannot be used to decide cases involving a thousand times as many claims. These cases inevitably depart from the model of separate litigation of individual claims controlled by individual plaintiffs and their attorneys. Yet even as the inadequacies of this model of litigation are acknowledged, departures from it are recognized only as a matter of necessity: to avoid the cost and delay of adjudicating a seemingly unending series of similar claims. But the goals of mass tort reform must be broader: to exploit the gains from avoiding individualized litigation in order to secure more adequate compensation for individual claimants. And the proposals for reform must be correspondingly broader, embracing changes in the substantive rules of liability in addition to the procedures by which these rules are applied. Rights to recovery and exposure to liability must be modified in practice—even if they somehow remained unchanged as a matter of legal doctrine—to meet the needs of mass tort claimants.

If approximations are necessary, accurate approximations are also essential. This is the single most important lesson from the creation and operation of the Dalkon Trust and the one that was followed most faithfully in setting up and administering the September 11th Fund. [A] process of approximation achieves gains in efficiency by avoiding the costs, and in particular, the strategic behavior, associated with individualized adjudication. Those gains can be achieved, however, only if the resulting approximations approach or exceed the amounts that claimants could realistically have expected to recover through litigation. Otherwise, so many claimants will be dissatisfied with the relief offered to them that they will seek, by one means or another, to retain or revive their right to sue individually. Procedural and substantive rules should be shaped to achieve these two goals:

to save the cost of individualized litigation by offering only approximate recoveries, but by assuring that the approximation leaves claimants no worse off than they would be through litigation.

In seeking to achieve these goals, a compensation fund cannot neglect purely procedural values, such as individual participation in litigation, but it must recognize limits on their scope and force. Parties do not engage in litigation for its own sake, but only to serve some further purpose, such as obtaining compensation or avoiding liability for past injuries. Even the Due Process Clause conditions the existence of procedural rights on substantive interests in liberty or property that are threatened by government action. Procedure should follow substance, and not the other way around, inverting Maine's famous observation that "substantive law has at first the look of being gradually secreted in the interstices of procedures." In mass tort cases, the priority of substantive law requires procedural rights to be defined and allocated so as to encourage the acceptance of approximate remedies as a substitute for individual litigation.

Both the September 11th Fund and the Dalkon Trust sought to achieve this objective by a variety of different means, which nevertheless exhibit a surprising similarity in the overall approach taken by each fund and in the results that it achieved. [This article] examines the similar circumstances confronted by both compensation funds, and particularly the need to achieve a global resolution of many thousands of claims against multiple defendants. [It then] analyzes the way in which each fund effectively or formally altered the substantive rules that normally govern recovery of tort claims [and] the related changes in the procedural rules necessary to resolve these claims.

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