

# THE PROJECT OF THE HARVARD FOREWORDS: A SOCIAL AND INTELLECTUAL INQUIRY

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Since 1951 the editors of the *Harvard Law Review* have selected a prominent scholar of constitutional law to write a "Foreword" to the *Review's* annual survey of the work of the Supreme Court. Within the community of scholars of constitutional law the "Forewords" are widely taken to be good indications of the state of the field. The Foreword project defines a vision of the field of constitutional scholarship. After describing the history and current reputation of the Forewords, this Essay examines some of the structural constraints on the project. It concludes with an analysis of some dimensions of the intellectual project the Forewords have defined. In addition to proposing a modest revision of the accepted understanding of the intellectual history of constitutional law scholarship, we hope that, by suggesting a less-than-obvious connection between constitutional scholarship and constitutional law, the analysis can give us insight into the directions constitutional law scholarship may take in the next decade.

## I. HISTORY AND IMPACT

The *Harvard Law Review* began to publish student-written Notes surveying the prior Supreme Court Term in 1949. Two years later the first Foreword appeared.<sup>1</sup> Since 1985, the *Review's* Supreme Court edition has included a legal scholar's case comment on one major decision of the previous term.<sup>2</sup>

The Forewords continue a tradition at the *Review* examining the work of the Court on a term-by-term basis.<sup>3</sup> The tradition began with a series of articles on the Court written by then

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1. *The Supreme Court, 1948 Term*, 63 Harv. L. Rev. 119 (1949).

2. See, e.g., Martha A. Field, Comment, *Garcia v. San Antonio Transit Authority: The Demise of a Misguided Doctrine*, 99 Harv. L. Rev. 84 (1985).

3. See *With the Editors*, 74 Harv. L. Rev. vii (1960).

Harvard Law Professor Felix Frankfurter,<sup>4</sup> who was joined by James M. Landis and Adrian S. Fisher, and by Henry M. Hart, Jr., who was to have his own Foreword in 1959.<sup>5</sup> At first these articles considered only one Supreme Court term, but in 1937 they began to consider two terms in one article.<sup>6</sup> Frankfurter's participation ended in 1938, a year before he was appointed to the Supreme Court. The series ended shortly after Frankfurter left.<sup>7</sup> The articles begun by Frankfurter are similar to the successor Forewords in that both rely predominantly on legal scholars, not students.

Over time, the Forewords have gained a considerable prestige and influence. For example, to support the proposition that "[o]ur age is obsessed with equal protection," James Liebman notes that "11 of the last 26 Forewords . . . have been principally concerned with equal protection."<sup>8</sup> The so-called "Republican

4. Felix Frankfurter and James M. Landis, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System*, 38 Harv. L. Rev. 1005 (1925); Felix Frankfurter, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System*, 39 Harv. L. Rev. 325 (1925); Felix Frankfurter and James M. Landis, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System*, 40 Harv. L. Rev. 1110 (1927); Felix Frankfurter and James M. Landis, *The Supreme Court Under the Judiciary Act of 1925*, 42 Harv. L. Rev. 1 (1928); Felix Frankfurter and James M. Landis, *The Business of the Supreme Court at October Term, 1928*, 43 Harv. L. Rev. 33 (1929); Felix Frankfurter and James M. Landis, *The Business of the Supreme Court at October Term, 1929*, 44 Harv. L. Rev. 1 (1930); Felix Frankfurter and James M. Landis, *The Business of the Supreme Court at October Term, 1930*, 45 Harv. L. Rev. 271 (1931); Felix Frankfurter and James M. Landis, *The Business of the Supreme Court at October Term, 1931*, 46 Harv. L. Rev. 226 (1932); Felix Frankfurter and Henry M. Hart, Jr., *The Business of the Supreme Court at October Term, 1932*, 47 Harv. L. Rev. 245 (1933); Felix Frankfurter and Henry M. Hart, Jr., *The Business of the Supreme Court at October Term, 1933*, 48 Harv. L. Rev. 238 (1934); Felix Frankfurter and Henry M. Hart, Jr., *The Business of the Supreme Court at October Term, 1934*, 49 Harv. L. Rev. 68 (1935); Felix Frankfurter and Adrian S. Fisher, *The Business of the Supreme Court at the October Terms, 1935 and 1936*, 51 Harv. L. Rev. 577 (1938); Henry M. Hart, Jr., *The Business of the Supreme Court at the October Terms, 1937 and 1938*, 53 Harv. L. Rev. 579 (1940).

5. Henry M. Hart, Jr., *The Supreme Court, 1958 Term, Foreword: The Time Chart of the Justices*, 73 Harv. L. Rev. 84 (1959).

6. These earlier articles, "while not considering the substance of the Court's decisions . . . scrutinized developments in the Court's jurisdiction and procedure and, in the broadest sense, its role in the American federal system." *With the Editors*, 74 Harv. L. Rev. at vii (cited in note 3).

7. Presumably, Frankfurter's departure contributed in part to the lapse of nine years before the Review began publishing its annual student written note and reinstated its term-by-term analysis.

8. James S. Liebman, *Desegregating Politics: "All -Out" School Desegregation Explained*, 90 Colum. L. Rev. 1463, 1541 and n. 360 (1990). See also Paul F. Campos, *Advocacy and Scholarship*, 81 Calif. L. Rev. 817, 819 (1993) (referring to the issue of the *Harvard Law Review* in which the "Foreword" appears as "the annual *pièce de résistance* of American legal scholarship," although Campos discusses one of the case comments in the issue rather than a Foreword).

Revival" was validated by Frank Michelman's Foreword of 1986.<sup>9</sup> This growing prominence is reflected in stylistic changes within the Forewords themselves, frequent citations to previous Forewords by subsequent Foreword authors and other scholars, and generalizations about the Forewords or their authors.

Two stylistic changes mark the transformation to prominence. First, through 1955 the Foreword author's name appeared at the end of the article, although lead articles placed the author's name at the front. In 1956 the name of the Foreword's author appeared at the front. The shift in 1956 acknowledges that the Forewords had become the intellectual equivalent of the lead articles.<sup>10</sup>

A second stylistic shift seen in the Forewords is their increasing length.<sup>11</sup> Although this increase in size was part of a general increase in the size of law review articles,<sup>12</sup> it does suggest that the Forewords were becoming more important. The change in length between the first and second decade of Forewords brought about a greater than proportional increase in quality. Among the first ten Forewords, several are brief, inconsequential essays likely dashed off rather quickly; unlike later Forewords, they do not attempt any systematic or extensive approach to the preceding Court term. Indeed, the Forewords' increasing length is one function of the authors' efforts. As the Forewords became more highly regarded, scholars might have been inclined to write more; they may have felt that they had to measure up to the standards set by their predecessors.<sup>13</sup>

9. For a table listing the Forewords and other information relied on in this essay, see Appendix B.

10. Conclusions about stylistic changes can be only tentative at best; such changes may have wholly insignificant causes.

11. Of the first ten Forewords, five were less than ten pages long; eight were less than 15 pages; nine were less than 20 pages. The longest Foreword of this period, Hart's, was 41 pages; the shortest, Howe's, was five pages. In contrast, the shortest Foreword of the second group of ten was 17 pages; the longest was 53 pages. In the third decade of Forewords, the shortest was 22 pages and the longest was 73 pages. In the fourth decade of Forewords, the shortest was 57 pages and the longest was 101 pages. The first two Forewords of the fifth decade have been 72 and 102 pages long.

12. See Roger C. Cramton, "The Most Remarkable Institution": *The American Law Review*, 36 J. Legal Ed. 1, 6 n.24 (1986) (statistical sampling of three prestigious law reviews found major articles' average length increased from 25 to over 40 pages over time).

13. A similar phenomenon may be seen in the Oliver Wendell Holmes Lectureship at Harvard. See J. Skelly Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 Harv. L. Rev. 769, 769 n.2 (1971): "It is Professor Bickel himself who refers to the offer of the Holmes Lectureship as a 'call'— not inappropriately, since many of the past Holmes Lectures have attained an almost religious authority in the legal community." The increasing size of the Forewords is also due in part to the change from legal process critiques to substantive critiques: the latter generally involve the description of a model by which to judge the Court's work and then an application of the model to the

The significance of the Review's project can also be seen through citations to Forewords, including the degree to which Foreword writers cite previous Forewords. Such citations may reflect an author's belief that the previous Forewords were significant enough to be considered as authority, and, we suggest, increasingly significant as authorities. They also identify the Forewords as an intellectual project.

The first citation to a Foreword in a subsequent Foreword occurred in 1955.<sup>14</sup> Thereafter, Foreword writers have often cited the work that preceded theirs. Indeed, the authors begin to treat the Forewords as an institution unto itself. Griswold's 1959 Foreword uses Hart's Foreword and Judge Arnold's reply as a springboard. In 1964, Kurland's Foreword's first sentence refers to "[t]hese annual chronicles of the work of the Supreme Court of the United States, of which this is the sixteenth."<sup>15</sup> Kalven's 1972 Foreword refers to "this annual task."<sup>16</sup> By 1973, Tribe takes up Gunther's 1972 Foreword with the phrase, "[l]ast year in these pages."<sup>17</sup> By referring to "the task of Foreword-writing," Tribe is also the first such author to describe Forewords as a unique genre.<sup>18</sup> Finally, Karst recognizes Forewords as an institution with his comment about ideas offered "in these pages."<sup>19</sup> Notably, the first Forewords did not treat them as a distinctive form of scholarship with a project of their own.

Another aspect of the Forewords' growing importance may be seen in the degree to which Forewords are cited by other scholars. Such citations reveal some Forewords to be among the "classics of legal scholarship."<sup>20</sup> One study found that among the fifty most-cited law review articles, five were Forewords; the most-cited law review article in the entire study was Gunther's 1972 Foreword.<sup>21</sup>

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various decisions—all of which require a significant number of pages. See text accompanying note 90 *infra*.

14. Robert Braucher, *The Supreme Court, 1954 Term, Foreword*, 69 *Harv. L. Rev.* 120, 123 n.9 (1955). Hereafter Forewords are cited by author's name only. Full citations are in Appendix A.

15. Kurland at 143.

16. Kalven at 4.

17. Tribe at 1.

18. *Id.* at 14.

19. Karst at 40.

20. Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 *Cal. L. Rev.* 1540, 1540 (1985).

21. *Id.* at 1549-51. Gunther's Foreword was the most cited law review article, being cited 600 times; Cox's first Foreword, in 1966, was the seventh most frequently cited article, with 250 citations; Michelman's 1969 Foreword, his first, was cited 230 times and was the tenth most cited article; Black's 1967 Foreword was the twelfth most cited article, with 225 citations; Hart's Foreword was cited 156 times and was the thirtieth most cited article;

The Forewords' prestige is also reflected in generalizations made about its authors and about the Forewords themselves. John Hart Ely writes that whoever writes the most recent Foreword is the "hottest" constitutional theorist in the country" at the time,<sup>22</sup> and though Ely's specific references were designed to express his respect for scholars he was then criticizing, his comment plainly reflects the profession's general view. In 1971, Judge Skelly Wright felt that the legal process Forewords of the 1950s and 1960s were such a strong influence and force to be reckoned with that he placed them within "the scholarly tradition"—a unique "mode of scholarly criticism"—and felt the need to criticize the view of the Supreme Court's limited role they espoused.<sup>23</sup> A 1985 study of the most-cited law review articles noted that

[o]ne area of omission in *Shepard's Law Review Citations* which it was necessary to rectify involved the annual Forewords to the Supreme Court issue of the *Harvard Law Review*. Although this is a prestigious series which often presents important scholarship, *Shepard's* lumps it together with notes, comments, book reviews and the like. . . .<sup>24</sup>

The decision of the study's author to make methodological adaptations to include the Forewords, and the laudatory comments he addressed to this series, are strong indicators of their significance.

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and Monaghan's Foreword was cited 140 times and was the forty-third most cited article. Because of the methodological idiosyncracies of this study—the data base includes only Forewords published after the mid-1960s, with one exception (Hart's 1959 Foreword)—it is quite likely that other Forewords not in the database, especially Bickel's 1960 Foreword, should properly be considered as belonging on any such list. (Robert C. Berring includes Bickel's 1960 Foreword on his list of the greatest American law review articles. *Id.* at 1545-46 n.33 (citing Robert C. Berring, ed., *Great American Law Reviews* (Legal Classics Library, 1984)).)

22. John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different From Legislatures*, 77 Va. L. Rev. 833, 842 n. 18 (1991) ("Lest you suppose I have chosen some obscure eccentric to make my point, [Chemerinsky is] presumptively the . . . 'hottest' constitutional theorist"). Ely of course exaggerates this phenomenon. First, "hot" connotes recognition of early talent, not a laurel at the end of one's career. Yet, when they wrote their second Forewords, neither Cox nor Freund could be considered a hot scholar. And, conversely, Tigar, who wrote his 1970 Foreword just three years out of law school, could hardly have been considered a hot constitutional law theorist that early in his career. Further, some scholars who have not written Forewords surely ought to be considered among the hottest theorists. Although identifying such scholars may be difficult, see note 29 *infra*, we believe that Catharine MacKinnon and Cass Sunstein, for example, would be among the hottest constitutional theorists of the present generation (unless people who make substantial contributions over an extended period cannot be described as ever being "hot").

23. Wright, 84 Harv. L. Rev. at 770 (cited in note 13).

24. Shapiro, 73 Cal. L. Rev. at 1546 (cited in note 20).

## II. STRUCTURE

Next we identify some structural features of the Forewords which, we argue, have some bearing on the nature of the questions addressed and answers offered by the Forewords. Although, as that formulation suggests, there can be no sharp division between structure and substance, our primary interest lies in identifying the intellectual project of the Forewords taken as a group. The structural features we identify provide some constraints on the intellectual project itself.

1. *Elite status*: Not surprisingly, most of the authors of the Forewords have been associated with the nation's elite law schools.<sup>25</sup> The first Foreword written by someone not closely associated with Harvard itself was either Bickel's of 1961 or Pollak's of 1963.<sup>26</sup> Tigar, writing the 1970 Foreword, was the first author not teaching at one of the elite law schools,<sup>27</sup> and of the forty-three authors only seven were not teaching at elite law schools when they wrote the Forewords.<sup>28</sup>

There are a number of reasons for the concentration of authors at elite law schools.<sup>29</sup> First, there is the usual "home court advantage": those who teach at an institution generally have favored access to "their" school's law review. Twenty-one of the Forewords have been written by scholars teaching at Harvard.<sup>30</sup>

25. We follow the conventional designation of Chicago, Columbia, Harvard, Stanford (in the modern era), and Yale as the elite law schools.

26. The classification is inexact because, although Bickel taught at Yale, he was closely associated with the "Harvard" school of scholarship associated with his mentor Felix Frankfurter. Pollak was the first author who did not teach at Harvard *and* did not have a law degree from Harvard.

27. When Tigar wrote the Foreword he was an untenured professor at the law school of the University of California-Los Angeles. After practicing law for some years, he returned to teaching at the University of Texas.

28. Mishkin (Pennsylvania), Tigar, Monaghan (Boston University), Karst (UCLA), Sager (New York University), Chemerinsky (University of Southern California), and West (University of Maryland). (When Bell's Foreword was published in 1985, he had completed his service as Dean at the University of Oregon Law School and was in the process of returning to Harvard, where he had been a professor from 1971 to 1980. We think it appropriate to count Bell as a Harvard professor in our analysis.)

29. We note one difficulty in relying solely on the published Forewords as the basis for some of the analysis. There may well be scholars who declined invitations to write Forewords, and they might be different in revealing ways from the scholars who did write. We considered developing a list of scholars who "ought" to have written Forewords but did not, and writing them to find out whether they had declined an invitation. In the end, we decided not to pursue that course. Coming up with an appropriate list would be quite difficult, and drafting a letter that would not touch on some obvious sensitivities that the recipients (and nonrecipients) might have would be even more so.

30. Two points of qualification are necessary here. We have included Robert McCloskey as a Harvard teacher, though he was in the Government Department and not the Law School. In addition, there is something of a "start up" effect. For the first decade Harvard teachers wrote all but one of the Forewords (the exception is Fairman). That

Second, and not unrelated, there is the “Matthew effect”:<sup>31</sup> those invited to write Forewords must be known to the editors of the *Harvard Law Review*; they will inevitably be differentially aware of scholars at Harvard who could be considered as potential authors of Forewords, and the nature of elite education suggests that they will be differentially aware of similar scholars at other elite schools.

These explanations describe a causal arrow running from the elite school to selection by the editors: “Because these people teach at elite schools, they are candidates for authorship of a Foreword.” Perhaps, though, the causal arrow runs the other way: “If a person has an interesting mind, he or she will be more likely to teach at an elite school, and will—independently of the ‘school’ effect—be more likely to be invited to write a Foreword.” Some such mechanism might well be at work to some extent. Elite schools have reached that status in part because they attract and select faculty members who have interesting minds at a somewhat higher rate than non-elite schools, and then provide them with an environment of intellectual and material resources that allows that effect to be amplified. Still, we note two qualifications. First, the rate of elite authorship seems somewhat high even taking this causal mechanism into account.<sup>32</sup> Second, if the causal mechanism is that having an interesting mind leads one both to be invited to write a Foreword and to be on the faculty of an elite law school, we might expect that authors who taught at non-elite schools when they wrote the Forewords would eventually join the faculties of elite schools. Yet, of the seven authors from non-elite schools, only one (Monaghan) has as yet moved to an elite school after writing the Foreword.<sup>33</sup>

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may be because the prestige of the Foreword was not fully established for several years, and because there may have been a backlog of Harvard professors who, for local political reasons, “had” to be asked to write a Foreword before any outsider was invited. Twelve of the last thirty-two Forewords have been written by Harvard professors, which seems still high enough to warrant invoking the “home court advantage” as a possible explanation.

31. See Matthew 13:12 (“For whosoever hath, to him shall be given, and he shall have more abundance”).

32. Confirming this judgment would require an enumeration of scholars who have made important contributions to the field but who have not yet written a Foreword. We refrain from such an enumeration, not only for the reason alluded to supra note 29, but also because the list we would produce would be no less subjective than the more general evaluation we offer in the text.

33. Of course, the number of such authors is so small that the fact that they have not been as mobile as this causal model suggests might be entirely accounted for by idiosyncratic factors.

2. *Publication schedule:* Producing the Foreword places some constraints on who can be invited to write one. Nominally, at least, the Foreword is supposed to make interesting comments on decisions by the Supreme Court in the term that ends in June or July. Many of the Court's most interesting decisions are handed down near the end of the term, and the Foreword must appear in early November. This places severe time constraints on the author of the Foreword. From the perspective of the editors selecting an author in the late winter, perhaps the most important consideration is that the author *must* turn the Foreword in on time. Here too the Matthew effect operates, in two ways. One of the best predictors of timeliness is that the potential author has a record of productivity. An alternative is that the editors know that the potential author has in hand, or is well along in the process of developing, an analytic framework into which whatever the Court does in June or July can be inserted. This, however, leads to another structural point about the Forewords.

3. *Disappointment:* In the physical sciences people receive Nobel Prizes for having one really good idea.<sup>34</sup> Legal scholarship is not that different. People become prominent because early in their careers they articulate a distinctive and important idea. The remainder of their careers are, ordinarily, devoted to living off that idea—applying it to new areas, coming up with minor variants, responding to criticisms, and the like.<sup>35</sup> The constraints of the selection process and of time mean that Forewords are systematically likely to be disappointing, in the sense that they are likely to be less interesting than the most interesting work their authors have previously written. The people who are chosen to write them will already have had, and will already have distributed widely, the one really good idea of their careers. The Foreword is likely to be a replay of that idea in the context of the Supreme Court's most recent cases.<sup>36</sup> It is thus likely to seem

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34. Part of what makes Albert Einstein so celebrated is that he had three really good ideas and received the Nobel Prize for the least important of them.

35. This is roughly the equivalent in scholarship to the more general phenomenon of regression to the mean: After a particularly good (or bad) performance of some task, the actor is likely to regress to the mean of his or her performance in general, and perform worse (or better) than the initial performance.

36. Alternatively, the author might disregard the Supreme Court's decisions (Sager's Foreword, for example, has nothing to do with the Supreme Court's decisions in the immediately preceding term), or tack something about the Supreme Court's work on to an analysis that has little to do with that work. For a comment on this phenomenon, see Mark Tushnet, *Red, White and Blue: A Critical Analysis of Constitutional Law* 167-68 (Harv. U. Press, 1988). These strategies run the risk that the author's Foreword will simply and obviously be a mere vehicle for replaying the author's only good idea—or, even worse, a new but not-as-good idea.



like a set piece of the sort performing artists have in their repertoires. Audiences can find set pieces interesting, though their criteria for evaluation tend to involve how well the performer executed a familiar piece rather than how new and striking the performance was.

The tendency toward disappointing performance can be overcome. Of course, the author might simply do an unusually good job of what led him or her to be selected in the first place, though the time constraints make this unlikely. Or, the editors might, almost by chance, catch an author just at the point when he or she is having the second really good idea of his or her career.<sup>37</sup>

4. *Criticism*: Forewords are structurally inclined to be critical of the Court's performance. It is much easier to say why the Court got some points wrong than to say that, all things considered, the Court actually did a pretty good job last year.<sup>38</sup> An author could write a defense of the Court's work by enumerating criticisms that have been made of that work and then showing why those criticisms were erroneous. Yet, the fact that the Foreword deals with the Court's most recent term means that there will have been relatively little informed criticism of the decisions of that term. To write a defense against criticism, the author would have to invent the criticisms and then refute them. This, though not impossible, is quite awkward.<sup>39</sup>

5. *Age structure*: Eleven authors were teaching for less than ten years when they wrote, and ten were teaching for more than twenty. Forewords are thus typically produced by people who have been teaching for ten to twenty years, and who, therefore, received their legal training about fifteen to twenty-five years earlier. Many educators believe that intellectual "formations" are relatively firmly set in the earliest years of education,<sup>40</sup> and that appears to be true of approaches people have to questions of legal analysis. In general, then, there is likely to be a substantial lag of about a generation between the issues that oc-

37. Cover's Foreword may be a dramatic, and isolated, example.

38. To say that Forewords are structurally critical, however, is not to say what the grounds of criticism are. We argue below that the grounds have changed in interesting ways, from criticism of the Court for failing to behave as a constitutional court should to criticism of the Court for coming out the wrong way.

39. For a recent defense of a Supreme Court decision that has been widely criticized, which took the author two years to get into a form he found minimally acceptable, see Mark Tushnet, *The Rhetoric of Free Exercise Discourse*, 1993 B.Y.U. L. Rev. 117.

40. See, e.g., Jerome S. Bruner, *A Study of Thinking* (Wiley, 1956); Jerome S. Bruner, et. al, *Studies in Cognitive Growth* (Wiley, 1966).

copy the Supreme Court's attention and those that engage the authors of Forewords.<sup>41</sup>

6. *Positivism and lag*: The lag can be offset by several factors. First, the Foreword is supposed to be concerned with the Supreme Court's recent work. That work, though, is itself subject to a number of pressures related to questions of "lag." If scholars in their second decade are in some sense one generation behind, the Justices of the Supreme Court may be two or more generations behind, and, depending on the rate of turnover on the Court, may fall increasingly behind.<sup>42</sup> At the same time, however, the Justices necessarily face contemporary social issues; though they have some control over their docket, it would be extraordinary if some substantive issue of contemporary importance stayed away from the Court for an extended period.<sup>43</sup> They could, of course, approach these contemporary questions with a mind-set determined a generation or two earlier. Yet, the

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41. Before turning to the consequences of lag, we note a number of apparently special cases, most of which fall in the category of "firsts." If the modal author of a Foreword is a teacher at an elite law school in the profession for over a decade, who are the "deviants"? (a) *Time*: Eleven authors have written before completing ten years of teaching. Two occurred in the early years of the Forewords, and probably should be set aside (Howe, Sacks). The others are Bickel, Pollak, Michelman, Tigar, Tribe, Brest, Minow, Chemerinsky, West, and Sullivan. It cannot be an accident that Tigar was selected at the outset of his teaching career, at the height of the protests against the Vietnam War, and just after he had been denied a clerkship with William Brennan because of Justice Brennan's concern about the political implications for him and the Court of choosing a prominently radical law clerk. For a discussion of the controversy, see Nat Hentoff, *Profiles: The Constitutionalist*, *New Yorker*, Mar. 12, 1990, at 45-70. Minow was the first woman chosen to write a Foreword; the two other women also have written Forewords relatively early in their academic careers. (Because the issue comes up in conversations about the Forewords, we note that Bell, the first and as yet only African-American chosen to write a Foreword, fits within the modal category of authors at elite schools in the second decade of their teaching careers. We have no information on whether the editors of the *Law Review* thought of Bell as a special case; we would not.) (b) *Dual authors*: Three scholars have written two Forewords (Freund, Cox, and Michelman). In 1974 Freund was the country's most respected scholar of constitutional law, and wrote a foreword devoted to Watergate and *United States v. Nixon*; we take the choice to have been a political statement by the editors. Like Freund, Cox wrote his second Foreword after 35 years in teaching, the latest point of any author; we take his selection to be recognition of his stature near his retirement. (c) *Conservatives*: Of the Forewords' authors in recent years, only Easterbrook and Epstein are prominent conservatives. The paucity of conservative authors may be an indication of the operation of the lag we have identified, and may change in the future.

42. Justices have sometimes explained that they find it useful to have recent law graduates serve as law clerks for only one or two years so that the Justices can keep in touch with developments in the law schools.

43. This assertion must be qualified by the important observation that justiciability doctrines may systematically keep some issues out of court. Notably, that was true of the central developments of the national security state in the Cold War era. For a general discussion, see Harold Hongju Koh, *The National Security Constitution* (Yale U. Press, 1990), especially 146-48.

Justices also are political actors, in the sense that they seek contemporary political influence on and approval from constituencies they find important.<sup>44</sup> If they use their older ways of thinking to deal with contemporary issues, the Justices are less likely to have contemporary political influence. How these pressures work out in practice may vary, but it seems a fair description of a great deal of the Supreme Court's history, and particularly of the past half-century, that the Court is best understood as responding to contemporary issues in contemporary terms.<sup>45</sup>

Scholars face a different set of pressures. The mere fact that the Foreword deals with the Supreme Court provides some force against the effects of lag.<sup>46</sup> Scholars formed a generation earlier can, of course, apply the mind-set developed during that generation to the Court's work, and indeed, as we argue below, that is the characteristic form of the Foreword. But, as the formative generation recedes, applying its criteria is likely to seem increasingly old-fashioned, and may contribute to the systematic disappointment mentioned above.

Second, to the extent that the Foreword is designed to illuminate questions of interest to people engaged in the practice of constitutional law, it must deal with contemporary issues in relatively contemporary terms. Third, and related to this, is what Felix Cohen called "the normative power of the actual."<sup>47</sup> For present purposes, that is a variant of Chief Justice Hughes's statement that the Constitution is what the judges say it is. What the Supreme Court does is what scholarship about constitutional law must address.

In selecting authors of Forewords, then, the editors of the *Law Review* are likely to be sensitive to the positivist impulses of law and therefore of legal scholarship, and may to some degree try, perhaps unconsciously, to offset the effects of the lag. Of course, because the editors are themselves being taught by people whose formation typically occurred a generation earlier, it is unrealistic to expect that the lag will be substantially countered by the editors' latent positivism.

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44. For an elaborate discussion framed in general terms, see Martin Shapiro, *Courts: A Comparative and Political Analysis* (U. of Chi. Press, 1981).

45. The largest exception to the historical generalization is the Court in the mid-1930s. Depending on how long the time-span one wants to impose, however, that might be treated as an aberration or as an example of a relatively brief period—from 1933 to 1937—when the Court got out of line.

46. Although, as we point out, see text accompanying note 98 *infra*, recent Forewords have tended not to deal with the major cases of the Supreme Court Term.

47. Cited in Mishkin at 71.

## III. INTELLECTUAL HISTORY

We turn finally to the most interesting aspects of the Forewords, the intellectual agendas they pursue. Taken as a whole, the Foreword project has its own story.<sup>48</sup> The legal process fifties and sixties Forewords are displaced by the predominantly substantive Forewords written thereafter. An abbreviated intellectual history of the Forewords might argue that legal process theory dominated until 1963; that the first cracks in legal process hegemony appeared in Kurland's 1964 Foreword; that Black's 1967 Foreword took a substantially different direction away from the legal process work that preceded him; that legal process vestiges remained in the Forewords, notably in Henkin's (1968), Gunther's (1972), Monaghan's (1975), and in Cox's second Foreword (1980); that Michelman's 1969 Foreword set the new standard for Forewords, offering a substantive model by which to judge the Court's work; that this substantive model approach has continued; and that several post-Michelman Forewords have returned to process type questions, albeit without that theory's heavy-handed criticism or motivating force. We look first at the characteristic features of the legal process Forewords, offer a criticism of standard descriptions of that jurisprudential approach, and then explore the nature of the substantive Forewords of the 1970s and 1980s.

## A. THE LEGAL PROCESS FOREWORDS

The legal process movement has been described in great detail by many other scholars.<sup>49</sup> Legal process theory followed one line of descent from American legal realism. The legal realists attacked the formalism they believed characterized American legal thought, along two lines. The first was a skeptical challenge to claims that legal doctrines, rules, standards, and principles were sufficiently precise and systematic to satisfy the demand that we live under a government of law and not of men and women. The second was the suggestion that formalistic legal doctrine should be replaced by functional analyses, sensitive to the realities of how complex institutions—in the private and public

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48. But see Martin Shapiro, *Fathers and Sons: The Court, The Commentators, and the Search for Values*, in Vincent Blasi, ed., *The Burger Court: The Counter-Revolution That Wasn't* 218 (Yale U. Press, 1983) ("It is undoubtedly wrong to confuse what the Supreme Court does with what the commentators say about what it does"). Shapiro nonetheless accepts the view that different generations on the court are influenced by different generations of scholars, and vice versa. See *id.* at 227.

49. See, e.g., Gary Peller, *Neutral Principles in the 1950s*, 21 U. Mich. J.L. Ref. 561 (1988).

sectors—operated. This second attack on formalism drew on the increasingly prestigious social sciences like sociology and economics, and sought to replace formalism with policy science. According to the prevailing view, legal process theory descended from the policy science branch of legal realism. By attending to the differences careful empirical studies revealed about law-making institutions, legal process theory could domesticate the more skeptical claims of legal realism by insisting that, when decisions were properly allocated to their most suitable institutions, the grounds for skepticism would disappear.

The Forewords of the 1950s and 1960s are, in addition to Weschler's "Neutral Principles" lecture, canonical legal process jurisprudence. The chief contribution of legal process to constitutional theory was an account of judicial review in a democratic society. Under this view, Supreme Court justices must be circumspect when considering the constitutionality of legislation because they, unlike members of Congress, are unelected and only indirectly accountable to a democratic majority. Legal process theory attempted to reconcile law-making in the modern administrative state with democratic self-governance. Because law-making was distributed among legislatures, administrative agencies, and courts, legal process theory found its reconciliation in role definitions. These definitions were tied to the expertise and mechanics of the different institutions: administrative agencies could become familiar with the details of the industries they regulated, while courts brought a generalized concern for fair procedures to questions of administrative law-making, for example. Administrative agencies, like legislatures, could examine the overall impact of alternative policies, while courts, confined to the adjudication of cases, would better understand how those policies worked in particular instances. Yet, these role definitions always were placed against a backdrop where majorities could assert control, however unwisely, through legislation. By defining democracy as simple majority rule, though, legal process theory made constitutional review problematic. This fear, nurtured by the repudiation of *Lochner*, led to theories that limited judicial review.

The Forewords of this period reflect the main tenets of legal process theory. Bickel's Foreword expressed an explicit fear of judicial review.<sup>50</sup> The legal process theory of institutional competence makes numerous appearances in the legal process Fore-

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50. Bickel at 47 ("judicial review is at least potentially a deviant institution in a democratic society").

words.<sup>51</sup> The judicial function, legal process theorists believed, was uniquely suited for reasoned elaboration of principles. The focus on reasoned elaboration was often paired with an examination of the technical ability or craftsmanship of the Court's opinions. According to legal process scholars, when in the course of reviewing a statute's constitutionality a judicial body did not adhere to its given institutional role, or its work product did not meet standards of craftsmanship or principled adjudication, that court was in jeopardy of acting without legitimacy or moral authority. These notions appear recurrently in the legal process Forewords.<sup>52</sup> This did not mean an entirely mechanistic ap-

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51. Jaffe at 114; Freund at 89; Braucher at 126; Hart at 110; Griswold at 93; Bickel at 50, 75; McCloskey at 67, 70; Kurland at 144-45, 175; Mishkin at 65; Henkin at 83, 92; Kalven at 3; Gunther at 14; Tribe at 15; Monaghan at 19, 23, 28, 28-29; Brest at 54.

52. Jaffe at 111 (concerned with Court's "professional performance"); Freund at 90 (decision based on undeveloped facts), 91 (Court should have used a conditional decree); Sacks at 97, 98, 99 (good explanation for the reasons for the decision), 100 (summary opinions mean the reasons are not set out fully); Braucher at 121, 125 (reasons for decision were not fully persuasive); Brown at 80 (inadequate record on which to base judgment); Hart at 96 ("what matters about Supreme Court opinions is not their quantity but their quality"), 121 ("Court . . . should measure up to certain minimum standards of craftsmanship and intellectual responsibility"), 101 (inadequately reasoned opinions); Kurland at 144-45 (absence of workmanlike product; the absence of the right quality), 145, 169 ("not unreasonable to hope for workmanlike quality"), 169 (failure to provide guidance for later litigation); Mishkin at 60-61 (reasoned elaboration); Cox at 95, 98; Henkin at 64, 65, 90, 92 (court shows "impatience with the processes, the difficulties, the constraints of principled decision"); Gunther at 4 (quality of opinions, their lucidity), 5 (demands of judicial craftsmanship), 19 (cases provide doubt that new equal protection analysis rests on a carefully considered, fully elaborated rationale), 20 ("Is a reasoned articulation of this new mood possible?"), 20 (Court "can achieve a craftsmanlike conjunction of continuity and change"); Monaghan at 27 (departure from the norm of principled adjudication); Cox at 9, 10, 24, 26, 27, 31, 73; Freund, at 96 (need to "strengthen the moral authority of the Court"); Sacks at 97 ("impart as much moral force . . . as possible"), 98 (created the impression of moving "slowly and deliberately"); Braucher at 120 (no praise for "judicial statesmanship"), 123 (concerned with public acceptance of desegregation orders and wants to conserve the moral force of the Court's decisions); Brown at 77 (respect for and authority of Court depends on whether its procedures are thought open and fair; summary judgments give a bad appearance), 82 (Court pays "a disproportionate price in public regard when it defeats counsel's reasonable expectation of a hearing"); Hart at 101 ("threatens to undermine the professional respect of first-rate lawyers for the incumbent Justices of the Court, and this at the very time when the Court as an institution and the Justices who sit on it are especially in need of the bar's confidence and support"), 125 (prestige of the Court); Bickel at 48 (Court's prestige can generate consent); McCloskey at 67 (Court's authority depends on the public's confidence in its moral sanction); Pollak at 63 (Court should husband the judicial authority already taxed heavily, scarce ammunition); Kurland at 158 (Court's methods of avoiding the question "have demonstrated an imagination that certainly taxes the credulity of the average student of the Court's work"); Mishkin at 67 (concern about public support for the Court); Cox at 94 (Court's enactments on civil rights "may command less public acceptance than legislative enactments"), 98 (the power to command consent comes "from the continuing force of the rule of law—from the belief that the major influence in judicial decisions is not fiat but principles which bind the judges as well as the litigants and apply consistently yester-

proach to law, however. Legal realist sophistication also appears in the legal process Forewords.<sup>53</sup>

Nevertheless, the legal process Forewords were also characteristically fascinated with details of the judicial process. These Forewords are often deeply interested in the number of opinions or the number of writs of certiorari<sup>54</sup> or the number of summary opinions, especially those disposed of before argument.<sup>55</sup> The nonpareil of this category is, of course, Henry Hart's 1959 Foreword, "The Time Chart of the Justices." Hart began with assumptions about the length of a Supreme Court term and the number of cases the Court handled and then drew conclusions about how much time a Justice could spend on his various tasks. The gradations get smaller and smaller in Hart's analysis. He concluded, for example, that there were 1,532 hours in each Justice's working year,<sup>56</sup> and that 116 of these hours would be spent on decisions simultaneously granting certiorari and reversing the judgement below.<sup>57</sup> The primary point Hart was trying to make was quintessential legal process jurisprudence: that the court did not have the time to handle so many cases if it was to meet standards of judicial craftsmanship and reasoned elaboration, and that the Court should thus stay its hand and be less eager to solve the world's problems.

The Forewords also reflect other commonly noted aspects of legal process theory. Several Forewords praise universality and generality and deprecate particularity.<sup>58</sup> A related concern is the

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day, today, and tomorrow"); Henkin at 64 (if the line drawn "is not rational, the law and the legal process become less rational and lose the confidence of those they serve").

53. Jaffe at 113 (criticizes "cold conceptualism" or a "retreat to labels"); Braucher at 120 ("cases cannot be decided without making law, so the decision of cases must affect the management of public affairs"); Griswold at 94 ("judges do make law"); Pollak at 67 ("Citation of these isolated examples serves as a reminder of what the whole course of American constitutional history regularly confirms: to characterize constitutional limitations as inflexible imperatives is an unproductive form of judicial activity"), 68 (neither of these approaches offer much help because there is no meaning to be taken from the words establishment or free exercise without an appraisal of public education).

54. Jaffe at 108; Griswold at 85.

55. Sacks at 99, 103.

56. Hart at 92.

57. *Id.* at 88.

58. Jaffe at 113 ("cool, comprehensive, lawyerlike" arguments as compared with "opinions ring[ing] with a personal tone of charge and countercharge, of points scored, of passion, predilection and horrid prophecy"); Brown at 82 (look to remote matters to avoid being swayed by passion or predilections); Hart at 125 (reason is the life of law and not just votes), 99 ("be a voice of reason, charged with the creative function of discerning afresh and of articulating and developing impersonal and durable principles of constitutional law"); Griswold at 91 ("Intellectual disinterestedness in a judge is a pearl of very great price, achieved only by continual care and striving").

separation of law and politics,<sup>59</sup> with the latter deprecated as well.<sup>60</sup> These characteristics of legal process theory are part of the standard account. As we will show, however, the Forewords suggest that part of that account needs modification. In the standard account, legal process theory separated procedure and substance to incorporate realist sophistication about law and politics yet harness the disquieting implications of legal realist skepticism.<sup>61</sup> Substantive concerns about what the law ought to be were different from concerns about whether the proper institution was handling an issue; substantive concerns were, under this view, the purview of legislatures, not courts.<sup>62</sup>

Gary Peller's influential description of the legal process movement, "*Neutral Principles* in the 1950's," offers the most extensive and explicit description of this attempt to separate process and substance concerns. In a section in his article entitled "The Central Distinction Between Process and Substance," Peller describes legal process philosophy as follows:

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59. Hart at 124 (without time for ample study and reflection, judges are more likely to turn to general predilections than a lawyerlike examination of the issues), 124-25 (Justices' voting records easily pigeonholed by sociologists and political scientists), 124 ("positions tend to jell before . . . intensive study"); Kurland at 145, citing Bickel ("Court's product has shown an increasing incidence of the sweeping dogmatic statement"), 169 ("substitution of 'hallowed catchword and formula' in place of reasons"), 170 ("rhetoric may be helpful advocacy, emotionally appealing, even entertaining, but without more it does not solve problems").

60. In addition to the citations in the previous footnote, which explicitly deprecate politics, Bickel's Foreword, taken as a whole, achieves the same result: by urging the Court to avoid legitimating on principle decisions made by a legislature, he implicitly sets up an oppositional structure between legislation, expediency and policy—all negatives—and judicial activity, prudence, and principles.

61. Gary Peller, 21 U. Mich. J.L. Ref. at 566-72, 588-90 (cited in note 49).

62. See, e.g., G. Edward White, *The American Judicial Tradition* 315 (Oxford U. Press, 1976) ("The identification of law as a process and of appellate judging as an intellectual effort to keep the process in smooth working order focused discussion of judicial decision-making on reasons rather than on results. Reasons, in fact, subsumed results; process subsumed substance"); Richard Davies Parker, *The Past of Constitutional Theory—And Its Future*, 42 Oh. St. L. J. 223, 227 (1981) ("[academics like Weschler, Bickel, Hart, Griswold, and Gunther] claimed that judicial review is also less 'anomalous' in a representative democracy if judges act only on 'process' issues having to do with perfection of representative democracy itself, avoiding interference in the political resolution of more controversial 'substantive' matters"); Morton J. Horowitz, *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* 253 (Oxford U. Press, 1992) ("The Transformation of American Law") ("post-war academic thought sought to repress politics by devoting its energies to form instead of substance and to technical accomplishment at the expense of social or political insight"), 255 ("Among the most significant contributions [of post-war writings on democratic theory] were efforts to elaborate a process-oriented theory of democracy free of any substantive commitments to particular values such as equality"). See also G. Edward White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 Sw. L.J. 819, 829 (1986) ("attention to the civil rights of minorities had not come through democratic processes, but through the recognition of the substantive validity of minority claims").



Wechsler's work should be seen as part of the intellectual project undertaken by the first generation of post-War scholars—including Felix Frankfurter, Henry Hart, Alexander Bickel, Lon Fuller, Albert Sacks, and Harry Wellington—who together constructed the “legal process” approach to law, changing the focus for critical evaluation from the substance to the process of decision making.<sup>63</sup>

The legal process scholars believed, Peller argues, that “ultimate questions of legal legitimacy depend[ed] on a vision of process divorced from substance and thereby protected from the corrosion of realist critique.”<sup>64</sup>

The Forewords of this era indicate something slightly different. Legal process scholars writing legal process Forewords were quite aware of substantive justifications for the Court's decisions, and, more important, used such substantive rationales in their own treatments of the Court's work.<sup>65</sup> Albert M. Sacks, whose casebook with Henry Hart on *The Legal Process* was the central legal process work, offered strong substantive defenses of *Brown v. Board of Education*: “The outstanding feature of the decision lies in the triumph of a principle—a principle which the Court must have found to be so fundamental, so insistent that it could be neither denied nor compromised. The principle can be easily stated: the constitution requires equal treatment, regardless of race.”<sup>66</sup> Sacks also turned the legal process limitation of judicial competence and insularity on its head so that it became a positive factor leading to the Court's substantively correct decision in this case: “The nine members of the Court could only have concluded that these propositions represented deeply held beliefs, not only of themselves, but, broadly speaking of the country as a whole. . . . The Court [is] a politically sheltered institution whose function is to seek to reflect the sober second thought of the

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63. Peller, 21 U.Mich. J.L. Ref. at 566-67 (cited in note 49).

64. Id. at 589.

65. Peller may have avoided this insight, in part, by addressing his comments about the Foreword project to only a few of those written in the late fifties and early sixties. Id. at 570-71. Morton Horwitz, however, notes that “[o]ne is surprised to learn how late it was that legal academics actually sought to defend the *Brown* decision,” citing an article by Pollak published in 1959. Horwitz, *The Transformation of American Law* at 340 n.71 (cited in note 62). Horwitz then notes that “[n]ot until Archibald Cox's Foreword in 1966, *Constitutional Adjudication and the Promotion of Human Rights*, 80 Harv. L. Rev. 91 (1966), did a defense of the Warren Court appear in [the Forewords to the Harvard Law Review].” Id. at 342 n.137. Horwitz's contention is contradicted by Fairman's 1956 Foreword's defense of *Brown*. Moreover, Sacks's 1954 Foreword also defended *Brown*. Further, Sutherland's 1957 Foreword defended the Warren Court's protection of the civil liberties of suspected communists.

66. Sacks at 96.

community.”<sup>67</sup> Finally, Griswold’s 1959 Foreword, which is otherwise very legal process in approach, and indeed largely defends Hart’s scathing Foreword, also contained a substantive component: “there must be occasions when judgment is so nicely balanced that it is finally resolved by a sense of ultimate values.”<sup>68</sup>

These materials indicate that the standard version of legal process theory should be modified. Although legal process theorists in fact invoked substantive concerns in defending the Court, substance operated as something of an outside force, overriding the otherwise controlling legal process concerns. In this way, substance did not become part of a theoretically integrated account of law. Substance mattered, but legal process theorists had no reasoned elaboration, so to speak, of its role. And, because reasoned elaboration defined the range of acceptable accounts for legal process theorists, their inability to offer such an elaboration of the role of substance meant that it would be a permanently marginalized element of their accounts of law. The standard account of legal process theory may be misleading to the extent that it denies that legal process theorists articulated substantive concerns, but it accurately describes the deeper structure of legal process theory.

## B. SUBSTANTIVE FOREWORDS

A hegemony begins to crack when its adherents see that their theory has become less relevant to the real world or when outsiders are bold enough to challenge it by blazing a new trail. As William Eskridge and Gary Peller put it, “[a]lthough legal process theory in the 1950s had developed in part to avoid lawtalk about substantive results, progressive process scholars in

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67. *Id.* Charles Fairman’s 1955 Term Foreword also contains a surprisingly substantive defense of *Brown*:

Fundamental law must be intimately concerned with ultimate spiritual values. When the Court is called upon to apply the broad constitutional promises of liberty and equal protection, it takes account of the moral sentiment of the American nation. To set quixotic or visionary standards would be an abuse of power; to enforce nothing better than a laggard conscience would stultify the historic responsibility of our highest court of justice.

Fairman at 92. (Fairman may not be located unequivocally within the legal process camp, but he is closely enough linked to legal process scholars to raise questions about the characterization of the legal process Forewords. The bulk of his Foreword’s defense of the Segregation Cases does battle on legal process turf; unlike Black or Chemerinsky, Fairman accepted the validity of such critiques in general but simply denied their validity with respect to *Brown*. See, e.g., Fairman at 84-85 (accepting as a valid critique but denying its particular applicability in this case of the legal process institutional argument that the Supreme Court was acting outside its purview in *Brown*)).

68. Griswold at 93.

the 1970s, such as Charles Black, Owen Fiss, John Hart Ely, and Frank Michelman, found it impossible to remain true to legal process' purposivism without keeping one eye on substance."<sup>69</sup> Legal process theory was replaced by substantive approaches to constitutional law, in which the "legitimacy of law rests upon its normative content and not its procedural pedigree."<sup>70</sup>

A more complete version of the standard account of the rise of normative legal theory includes references to the political changes occurring in the 1960s, to which legal process theory seemed insensitive at best.<sup>71</sup> In addition, adherents of substantive accounts of constitutional law could maintain their connection to the legal realist tradition by invoking the skeptical strand of legal realism, taking that skepticism to rest on normative criticisms of the legal status quo.<sup>72</sup>

The first crack in the legal process Foreword era, in McCloskey's 1962 Foreword, was introduced but quickly patched up. McCloskey seemed at first to accept and condone the Warren Court:

[A]n institution of such vitality and of such historic antecedents [as the Supreme Court] will never be entirely cribbed and confined by any prescriptions we write for it. When the men who hold these lofty commissions see an evil that they believe imperatively calls for redress, they will on occasion strike out, with little regard for consistency or caution.<sup>73</sup>

But he backtracked within the same paragraph:

[A] price is paid for each judicial venture into uncharted and unchartable seas, whether or not an analogue can be found in past or present judicial behavior. Each such venture tarnishes a little more the idea that the judicial process and the legislative process are distinguishable, and this idea, as has been said, is indispensable to judicial review.<sup>74</sup>

The first major foreshadowing of the shift to come, however, appeared in Kurland's 1964 Foreword. Kurland's piece differed

69. William N. Eskridge, Jr. and Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 Mich. L. Rev. 707, 724 (1991).

70. *Id.* at 746.

71. See, e.g., Mark Tushnet, *Post-Realist Legal Scholarship*, 1980 Wis. L. Rev. 1383. Another part of the account is that the policy scientific strands in legal realism were picked up most prominently in the legal academy by law-and-economics.

72. The standard account of the transition from legal process theory to substantive theories may arise because its authors may be seeking to define their own efforts by painting their predecessors as naively or cynically distant from the substance of decisions.

73. McCloskey at 69-70.

74. *Id.* at 70.

in several significant ways from the Forewords that preceded it. Kurland grappled with the Supreme Court's equal protection revolution. Though most of his essay still offered the standard legal process critiques, he could not simply apply them if his Foreword was to be relevant to the Court's work.

The most notable difference, however, is that Kurland explicitly expressed self-doubt about legal process theory:

The Court will continue to play the role of the omniscient and strive toward omnipotence. And the law reviews will continue to play the game of evaluating the Court's work in light of the fictions of the law, legal reasoning, and legal history rather than deal with the realities of politics and statesmanship.<sup>75</sup>

In this passage Kurland noted the irrelevancy of legal process scholarship about the Supreme Court. Kurland's self-doubt stands in stark contrast to Hart's Foreword, which was so confident about its theory that Hart could claim that the entire Court, with all its law clerks, was bested by a difficult case.<sup>76</sup> When written, Kurland's Foreword might have seemed to have an ironic tone, its self-deprecation designed to demonstrate the superiority of the legal process approach to the Court's substantive one. In retrospect, though, it seems more simply descriptive than ironic, an acknowledgement that the terrain on which discussion had to occur had changed.

Perhaps the legal process viewpoint lost its hold, in addition, because its adherents found themselves unable to justify *Brown* within the framework of their theory. This failure may have confounded the next generation of scholars, themselves political liberals as were the legal process theorists. Such scholars could not reconcile the "last great attempt at a grand synthesis of law in all its institutional manifestations"<sup>77</sup> with their views on the justice of that case. This inner struggle appears in Cox's first Foreword, in 1966. Within the scope of five pages, Cox moved back and forth, criticizing, then praising, then criticizing the Warren Court. The first round of criticism is legal process theory, expressing concern about the limitations on judicial capacity, public acceptance, extraordinary constitutional stresses, and rational adjudication.<sup>78</sup> Then Cox praised the Warren Court: "It is hard to know just how much weight to attribute to the want of systematic rationalization. . . . There is danger, too, as Lord Radcliffe warns

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75. Kurland at 175.

76. Hart at 121.

77. Peller, 21 U. Mich. J. L. Ref. at 568 (cited in note 49).

78. Cox at 94-95.

us, that the intellectual fascination of the lawyer's art may divert us from the human goals of the enterprise."<sup>79</sup> Bound as he was to his generation of scholarship, Cox returned to criticism:

Yet when all this is said, ability to rationalize a constitutional judgment in terms of principles referable to accepted sources of law is an essential, major element of constitutional adjudication. It is one of the ultimate sources of the power of the Court—including the power to gain acceptance for the occasional great leaps forward which lack such justification.<sup>80</sup>

Black's Foreword in the following year came close to announcing the demise of legal process theory by explicitly rejecting its tenets. Black argued that courts are not less institutionally qualified than legislatures to deal with constitutional questions.<sup>81</sup> He argued against a passive, cautious judiciary when questions arise with respect to confrontations between state laws and the federal constitution.<sup>82</sup> He also argued in favor of meting out substantive justice instead of worrying about the niceties of legal process: "[w]e ought not be deciding which branch or organ of government is most nicely suited to dealing with th[e] problem [of racism]; we ought to be using every governmental power to its fullest extent, straining every resource we have to deal with it."<sup>83</sup>

Black also denied the validity of the legal process exultation of universality and generality, with an explicit rebuttal as well as through his use of language. Black cited Justice Field's opinion in *Ho Ah Kow v. Nunan*: "[w]e cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men."<sup>84</sup> By claiming that judges should understand the particularized effects of the administration of an otherwise neutral law, as was involved in that case, Black rejected the view of judges as supposedly neutral observers. Likewise, Black's language was itself passionate. In a denunciation of racism early in his Foreword, Black wrote, "Strong words? I wish they were stronger."<sup>85</sup> He continued this thought later: "Passion has its dangers; so has lack of passion, and so has

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79. *Id.* at 97.

80. *Id.* at 98.

81. Black at 103.

82. *Id.* at 104.

83. *Id.* at 105.

84. *Id.* at 71.

85. *Id.* at 70.

the insidious desire to be thought unimpassioned. I deeply believe in what I have written.”<sup>86</sup>

Attacks on legal process positions appear regularly in subsequent Forewords. Tigar’s 1970 Foreword criticized the small world of Supreme Court justices. He provided a particularized account of the world in which Supreme Court opinions actually operate as a way of deconstructing the professed goals of objectivity and universality. This critique is summed up by Tigar’s comment that the court’s treatment of the criminal process is marked by abstraction.<sup>87</sup> Kalven’s 1971 Foreword noted that the “Court in the recent cases has shown itself comfortable with the almost non-judicial nature of the issues and with the special data brought to bear on them.”<sup>88</sup> In 1984, Bell wrote that “only the privileged have the option of demanding that ideas be novel, that principles be neutral, and that solutions to our problems conform to their notions of fairness and equality.”<sup>89</sup> Chemerinsky’s 1988 Foreword took the Rehnquist Court to task for what Chemerinsky believed was its cynical, unprincipled, and merely political application of the rhetoric of legal process theory.

The Foreword project did more than criticize legal process theory. The project replaced that theory with substantive (or normative) theories. Michelman’s 1969 Foreword, appropriating John Rawls’s *Theory of Justice* as a theory of the equal protection clause, redefined the project. Under this substantive style of Foreword, an author generally offers a theory or model external to constitutional doctrine. This model, like Michelman’s, is often interdisciplinary, incorporating ideas from philosophy, political science, or economics. These substantive, non-doctrinal models provide the criteria by which the author evaluates the Supreme Court’s opinions. The cases and doctrine discussed in these Forewords typically show no more than that the theory has some descriptive accuracy, if that. The substantive theories appear as ends in themselves.<sup>90</sup>

Legal process did not, however, disappear.<sup>91</sup> Well after Michelman’s 1969 Foreword, legal process strands continued to

86. *Id.* at 109.

87. Tigar at 28.

88. Kalven at 11.

89. Bell at 82-83.

90. The substantive models may also provide a means to measure whether the Court’s decisions were correct, although even this concern plays a subsidiary role.

91. One explanation for this phenomenon may be that the Warren Court did not really begin in 1954, with *Brown v. Board of Education*. See Horwitz, *The Transformation of American Law* at 252-53 (cited in note 62). Thus, it makes sense that the legal

appear.<sup>92</sup> Gunther and Monaghan wrote Forewords, in 1972 and 1975, respectively, that were almost completely legal process in outlook. Each of Cox's and Freund's second Forewords fit within that tradition, even though they were published after substantive Forewords were the rule. Ely's Foreword provides the most successful integration of process and substantive theories, arguing that the substantive concerns that led many to reject legal process theory actually can be accommodated in a properly formulated process theory: Representation-reinforcing review, according to Ely, will yield the desired substantive results, including *Brown*, without requiring a commitment to controversial substantive theories.<sup>93</sup>

Yet, these more recent Forewords share a deep structural similarity to the legal process Forewords. Originating from legal realism, and attempting to provide a theoretical basis for the political defense of the New Deal's legislative programs against a reactionary Supreme Court, legal process theory incorporated a deep commitment to democratic self-governance, no matter how distorted that commitment became in the elitist hands of the authors of some of the 1950s Forewords. In abandoning legal process theory for substantive theories, the recent Forewords recreate the awkward relation to democratic self-governance that the legal process Forewords had to *Brown*. Their authors are of course committed democrats, but they have no theoretical basis for explaining why their substantive concerns ought not always override contrary conclusions produced by the processes of democratic self-governance. So, the commitment to democracy is an "add-on" in many recent Forewords, as the commitment to *Brown* was an add-on to the earlier ones.<sup>94</sup>

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process school would still appear strong in Forewords published several years after *Brown*.

92. See, e.g., *Kalven* at 3.

93. The process or ontology of law is a subject taken up by a number of recent Forewords. Process, albeit not doctrinaire legal process, concerns appear in Fiss's and Chayes's Forewords, which look at structural reform or public law litigation, and in both Calabresi's and Sullivan's Forewords. Forewords considering law's ontology also appear in recent Forewords. Cover's 1983 Foreword, "*Nomos* and Narrative," provides an example of this phenomenon. Michelman's second Foreword, which deals with republicanism, also fits within this category, as does West's. These recent Forewords do not criticize the Court as did the legal process Forewords, but still share an interest in operational aspects of the law or legal system.

94. No recent Foreword author has been so committed a post-modernist as to deny the proposition that a theoretically integrated account of law is possible. And, if one were to take that position as to his or her own work, we would wonder what basis there would be for criticizing the legal process Forewords as awkward pastiches.

## C. THE FOREWORDS' AUDIENCES

At the same time the Forewords were undergoing a shift from legal process exercises to substantive critiques, their authors' image of their audience appears to have changed as well. The change from legal process to substantive Forewords also represents a change in what Foreword writers talk about and to whom they think they are talking.

The shift in Forewords from legal process to substantive in nature involves, first, a decline in the role played by doctrine.<sup>95</sup> Doctrine in modern, substantive Forewords like Michelman's and Cover's served the primary purpose of justifying the substantive model. In contrast, Cox's second Foreword or Freund's Foreword, when not expressing legal process concerns, are completely doctrinal: the doctrine is an end, not simply a means of further analysis.<sup>96</sup> Of course, this change in the Forewords is part of a general shift in legal scholarship.<sup>97</sup>

One measure of the shift away from doctrinal analysis in the Forewords is the degree to which these articles treat or even cite important cases from the preceding term. With the shift to substantive modelling in the Forewords, authors are less likely to mention cases that do not relate to their model.<sup>98</sup> Authors now

95. Since 1985 the Law Review's Supreme Court edition has included a legal scholar's case comment on one major decision of the Supreme Court. These comments resemble the early Forewords, and perhaps should be considered as their direct descendants, with the articles now called Forewords being collateral descendants.

96. Obviously there are generational differences at work here.

97. This Essay itself exemplifies this shift. Judge Posner documented this shift in the 100th anniversary issue of the *Harvard Law Review*. Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 Harv. L. Rev. 761 (1987). An even more striking example of this shift appeared in a recent symposium on the "crisis" in legal scholarship. The two scholars given the task of defending traditional doctrinal analysis in law reviews both admit that this type of scholarship is their least favorite. Steven D. Smith, *In Defense of Traditional Legal Scholarship: A Comment on Schlegel, Weisberg, and Dan-Cohen*, 63 U. Colo. L. Rev. 627, 627 (1992) ("I will frankly confess at the outset that doctrinal analysis isn't something that I especially enjoy doing or reading"); David P. Bryden, *Scholarship About Scholarship*, 63 U. Colo. L. Rev. 641, 643 (1992) ("This said, let me add that my favorite types of scholarship are not directly helpful to practicing lawyers"). See also Cramton, 36 J. Legal Ed. at 10 (cited in note 12) ("Law faculty members, especially at the better schools, write primarily for other academics who approach the same subject matter using the same methods (whether economic, historical, or philosophical)"); Robert Post, *Legal Scholarship and the Practice of Law*, 63 U. Colo. L. Rev. 615, 620 (1992) (noting "the emergence within the past fifteen years of a form of legal scholarship that is self-consciously external to the practice of law and that takes its bearings instead from traditional academic pursuits").

98. To arrive at some view of what might be considered the most important Supreme Court decisions handed down over the time the Forewords have been published, from 1951 to 1992, we consulted two sources, one middlebrow (Elder Witt, *Guide to the U.S. Supreme Court* (Congressional Quarterly, 2d ed. 1990)), and one purposefully low brow (Robert J. Wagman, *The Supreme Court: A Citizen's Guide* 123-67 (Pharos Books,



view doctrine as a means and, unlike the legal process authors, not an end in and of itself.

The shift away from doctrine was largely foreseen by the legal process Foreword authors. Hart was explicitly opposed to a substantive style of critique: "Many even of the professional critics of the Court's work seem to have little more to say, in sub-

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1993)). To eliminate randomness in one source's choice of a "most important decision," only those cases where the two sources were in agreement were chosen. A comparison between these selected cases and the cases taken up in the Forewords of the year in which they were decided shows these trends: that legal process Forewords regularly cited or discussed the major cases of their period; that the subsequent, substantive Forewords are much more likely to ignore the major cases decided in their year, except when the case is of extraordinary importance, e.g. *Roe v. Wade*. Several examples are noteworthy: Black's 1967 Foreword did not mention *Loving v. Virginia*; Michelman's 1969 Foreword did not mention *Benton v. Maryland*, *Tinker v. Des Moines Independent Community School District*, or *Powell v. McCormack*; Tigar's 1970 Foreword did not mention *In re Winship* or *Williams v. Florida*; and Brest's 1976 Foreword did not mention *Gregg v. Georgia*, *Woodson v. North Carolina*, or *Craig v. Boren*. The following list tells which cases were listed by both sources and whether they were mentioned in that year's Foreword: *Youngstown Sheet and Tube Co. v. Sawyer* (1952) (theme of Freund's Foreword); *Brown v. Board I* (1954) (mentioned); *Brown v. Board II* (1955) (mentioned); *Roth v. U.S.* (1957) (mentioned); *Watkins v. U.S.* (1957) (mentioned); *Cooper v. Aaron* (1958) (not mentioned); *NAACP v. Alabama ex rel Patterson* (1958) (not mentioned); *Barneblatt v. United States* (1959) (mentioned); *Mapp v. Ohio* (1961) (mentioned); *Engel v. Vitale* (1962) (not mentioned); *Baker v. Carr* (1962) (theme of Foreword); *Gideon v. Wainwright* (1963) (not mentioned); *Heart of Atlanta Motel v. United States* (1964) (not mentioned); *New York Times v. Sullivan* (1964) (mentioned); *Escobedo v. Illinois* (1964) (mentioned); *Malloy v. Hogan* (1964) (mentioned); *Reynolds v. Sims* (1964) (mentioned); *Griswold v. Connecticut* (1965) (mentioned); *Miranda v. Arizona* (1966) (mentioned); *South Carolina v. Katzenbach* (1965) (mentioned); *Loving v. Virginia* (1967) (not mentioned); *Benton v. Maryland* (1969) (not mentioned); *Tinker v. Des Moines Independent Community School District* (1969) (not mentioned); *Powell v. McCormack* (1969) (not mentioned); *In re Winship* (1970) (not mentioned); *Williams v. Florida* (1970) (not mentioned); *New York Times v. United States* (1971) (mentioned); *Miller v. California* (1973) (mentioned); *Roe v. Wade* (1973) (mentioned); *Gregg v. Georgia* (1976) (not mentioned); *Woodson v. North Carolina* (1976) (not mentioned); *Craig v. Boren* (1976) (not mentioned); *Coker v. Georgia* (1977) (not mentioned); *University of California v. Bakke* (1978) (mentioned); *United Steelworkers of America v. Weber* (1979) (not mentioned); *Richmond Newspapers v. Virginia* (1980) (mentioned); *Chandler v. Florida* (1981) (not mentioned); *Board of Education, Island Trees Unions Free School District v. Pico* (1982) (not mentioned); *United States v. Leon* (1984) (not mentioned); *Garcia v. San Antonio Metropolitan Transit Authority* (1985) (not mentioned); *Tennessee v. Garner* (1984) (not mentioned); *Lockhart v. McCree* (1986) (not mentioned); *Ford v. Wainwright* (1986) (not mentioned); *Bowers v. Hardwick* (1986) (mentioned); *Texas v. Johnson* (1989) (mentioned). Of course, several caveats should be made. First, the decision to include a case in any list after the fact gives that author the twenty-twenty vision of hindsight. Moreover, Foreword authors need not discuss every case, for each Harvard Law Review Supreme Court issue contains a student note that serves this purpose, and the most recent issues have also included a case comment on a major decision of the preceding term. Indeed, several Foreword authors include this caveat in their essay. See Kurland at 176 ("This Foreword has not, by any means, considered all the work of the Court's 1963 Term"); Kalven at 6 ("The real information as to what the Court *did* during the Term will, as always, be left to the extended Note that follows"). Nevertheless, the trend is significant enough to indicate a distance from the Court's decisions.

stance, than that they do not like some of the results and yearn for ipse dixits their way instead of the Court's way."<sup>99</sup>

The change in the use of doctrine may be explained largely by considering who the Foreword authors are. Judge Posner's explanation for the move away from doctrine considers the nature of academic success and interest:

Another reason, which is purely internal to the enterprise of academic law, is the same one that led composers to write atonal music and that led English poets eventually to tire of the heroic couplet. When a technique is perfected, the most imaginative practitioners get restless. They want to be innovators rather than imitators, and this desire requires that they strike out in a new direction. . . . Because of this . . . in the 1960s a new type of legal scholarship began to emerge in the leading law schools—the conscious application of other disciplines, such as political and moral philosophy and economics, to traditional legal problems. . . . Although the classic works of traditional legal scholarship can still be read with profit and admiration, it is no longer easy for academic lawyers who want to be considered on the “cutting edge” of legal thought to imagine writing in the same vein.<sup>100</sup>

The shift away from doctrine may also be explained by changes in the Foreword writers' experience. One important change is between the pre-teaching experiences of the legal process Foreword authors and those of the substantive authors. The main difference is experience outside academe. Legal process Foreword authors spent an average of about eleven years outside academe, primarily practicing law.<sup>101</sup> In contrast, substantive Foreword writers spent an average of less than four years.<sup>102</sup> The one obvious significance about this difference is that the longer a Foreword writer spent practicing law, the more likely that author will be concerned with doctrinal analysis—the staple of professional lawyers. Martin Shapiro calls the legal process Foreword critics of the Warren Court “a generation of academic lawyers for

99. Hart at 125.

100. Posner, 100 *Harv. L. Rev.* at 771-73 (cited in note 97).

101. Jaffe 8, Freund 8, Howe 12, Sacks 4, Braucher 10, Fairman 0, Sutherland 20, Brown 15, Hart 2, Griswold 4, Bickel 5, McCloskey 10, Pollak 7, Kurland 6, Mishkin 0, Cox 8, Henkin 17, Gunther 3, Monaghan 5. The average cited in the text does not include Fairman, who entered teaching as a historian; it also excludes Freund's and Cox's second Forewords.

102. Black 4, Michelman 3, Tigar 3, Kalven 7, Tribe 2, Brest 4, Karst 5, Ely 5, Fiss 4, Sager 0, Chayes 6, Cover 0, Easterbrook 8, Bell 11, Minow 2, Chemerinsky 2, West 4, Calebresi 1, Sullivan 3. The average cited in the text does not count Michelman twice even though he wrote two Forewords.

whom the New Deal was a highly personal and often formative experience."<sup>103</sup> Again in contrast, a person whose career has been spent in the academy is likely to be more "academic." As David Bryden writes,

Several years ago, I interviewed a Supreme Court clerk who was interested in teaching. She had been the president of the Harvard Law Review. "When I'm done clerking," she asked, "should I practice law for a while before becoming a teacher?" I offered the standard advice, saying that a couple of years of practice, though not essential, would be helpful. "That's interesting," she replied. "Several of my friends on the Harvard faculty advised against it. They thought it would give me a taint." That's an extreme case, but there's no doubt that some scholars at elite institutions tend to disparage mundane practitioners' problems.<sup>104</sup>

The change to substantive Forewords may also be connected to the legal academy's shift to the political left. The legal process Forewords are now considered profoundly conservative.<sup>105</sup> If the substantive Foreword authors are indeed more politically liberal than their legal process predecessors, their decision to rely on substantive models rather than doctrinal analysis makes sense. Liberals who view law as an instrumental tool with which to remake society may find available doctrinal tools unsatisfactory. Or they may find that their take on doctrine is simply not treated as within the realm of the possible by the mainstream, conservative lawyers who tend to become judges. Therefore, such liberals posit substantive models (or new fantasy worlds) where their political ideology could come into being. Michelman's 1969 Foreword serves, again, as the best example to support this argument. Michelman wanted to have the Court recognize certain minimum standards in shelter and other goods. With insufficient doctrine to support such new rights, Michelman incorporated John Rawls's *Theory of Justice* into his argument, providing an end-run around existing doctrine. Fiss and Chayes speak about structural reform through public law litigation, because their normative goals for the world would be hampered by the institutional competence arguments prevalent in the legal process Forewords.

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103. Shapiro, *Fathers and Sons*, in *The Burger Court: The Counter-Revolution that Wasn't* at 218 (cited in note 48).

104. Bryden, 63 U. Colo. L. Rev. at 642-43 (cited in note 97).

105. Peller, 21 U. Mich. J. L. Ref. at 566 (cited in note 49).

A final shift in personnel which may bear some relation to the transformation in the Forewords is the inclusion of outsiders within the legal academy and especially within the institution of Forewords.<sup>106</sup> The small, closed world of the legal process Forewords is best exemplified by Hart's stupid joke about virgin girls on the first page of his Foreword, which reflects the absence of any consciousness that such a joke might be of questionable taste. The Forewords have not been oblivious to changes in the demography of the legal academy. The three notable "firsts" brought a freshness into their Forewords. Minow urged the justices to apply a particularized analysis of differences by attempting to look at questions from the viewpoints of others. Bell employed fictional narratives to show liberals how what they cannot imagine might be true is more real than they might like to think.<sup>107</sup>

These transformations are reflected as well in the audience to whom the Foreword authors think they are talking. The legal process Foreword authors truly believed they were in a dialogue with the Supreme Court, in addition to other academics and the bar. In contrast, more modern, substantive Foreword writers speak, at least on the surface, primarily to other scholars.

Evidence that legal process scholars thought they had the Court's ear can be seen in the tone of their pieces. In a striking contrast to the substantive Forewords that follow, legal process Forewords were either very polite and deferential toward the Supreme Court or harshly critical. Jaffe's Foreword, the first in this series, offered a seeming apology for his essay by pointing out that it is in the nature of the Court's business to produce dissatisfaction, for it cannot please everyone:

[T]he Court is a symbol embodying a congeries of diverse and contradictory hopes: to the well-to-do, an ever present fortress against the attacks of the have-nots; to the poor and the despised, the hope for equality on earth; to the social reformer, an active participant in the reconstruction of society by law; to Charles Curtis, the self-elected torch of the best and most forward ideals of our society; and as if these glowing tasks were

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106. For a chart that portrays these differences, see Eskridge and Peller, 89 Mich. L. Rev. at 744 (cited in note 69).

107. Tigar, the first "young" Foreword author, who as a radical leader of the Free Speech Movement at Berkeley may properly be considered quite different from a typical straightlaced law professor in 1970, spoke in the parlance of his day, referring for example to a "nickel bag of the dread weed." Tigar at 12. Tigar also narrated his experiences in squalid and depressing courtrooms where justice is an empty concept.

not enough, to the lawyer *qua* professional, the ultimate practitioner of the arts and graces of the law.<sup>108</sup>

The second Foreword also feared “the risk of appearing ungrateful for a remarkable display of learning, eloquence, and independence of spirit” and noted that “[i]f this discussion has had in it a large share of doubts and dissonances, it is not because serene harmonies could not also be voiced, but simply because these are less absorbing.”<sup>109</sup> Griswold’s Foreword was an apology for the harsh critique of the Court that appeared in Hart’s previous Foreword. Without referring directly to Hart’s Foreword, Griswold noted that “many criticisms may be, like their authors, devoid of good taste,”<sup>110</sup> and that some criticism of the Court, like Georgia’s call for the impeachment of certain liberal justices, was “irresponsible and extravagant to an unfortunate extreme.”<sup>111</sup> Kurland speaks of the enormity of the task that burdens the Court: “Certainly it is easier to criticize the work of the Court than to perform it. Even Professor Wechsler did not offer an adequate replacement to the Brown opinion.”<sup>112</sup>

In contrast to the deference shown in these comments, other legal process Forewords were especially harsh in their critique. The standard legal process concerns were sometimes presented in a tone suggesting that the author could not believe that the Court was so incompetent. Judge Skelly Wright found that the tone of these Forewords involved “almost scurrilous disrespect”:<sup>113</sup>

[M]ost suggestive of their true orientation, these self-appointed scholastic mandarins almost always coat this technique of criticism with a haughty derision of the Court’s powers of analysis and reasoning—terming the Court, for example, an inept piano player who need not necessarily be shot but who surely ought to “take piano lessons.”<sup>114</sup>

The paragon of nastiness was Hart’s Foreword. Hart tried to modulate the stinging tone of his Foreword by claiming that he wrote “[r]egretfully and with deference.”<sup>115</sup> This attempt was overwhelmed by later remarks:

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108. Jaffe at 107.

109. Freund at 89, 97.

110. Griswold at 81, quoting Brewer, *Government by Injunctions*, 15 Nat’l Corp. Rep. 848, 849 (1898).

111. *Id.* at 82.

112. Kurland at 176.

113. Wright, 84 Harv. L. Rev. at 778 n.33 (cited in note 13).

114. *Id.* at 777-78.

115. Hart at 100.

Few of the Court's opinions, far too few, genuinely illumine the area of law with which they deal. Other opinions fail even by much more elementary standards. Issues are ducked which in good lawyering and good conscience ought not to be ducked. Technical mistakes are made which ought not to be made in decisions of the Supreme Court of the United States.<sup>116</sup>

Hart continued this pattern throughout his Foreword.<sup>117</sup> Both the deferential and the critical tone reveal that the authors thought they were speaking to the Court. They would shout in the Court's ear or couch their criticisms in polite, deferential sweet-nothings only if they believed the Court was listening.<sup>118</sup>

A parallel phenomenon is the degree to which the Forewords actually appeared to be seeking influence. The most notable examples are Sacks's and Fairman's defenses of *Brown v. Board of Education*. Fairman's defense, appearing a year after *Brown II*, took up a case decided two Terms earlier. He did this, he made clear, because the public had greeted the segregation decisions with outright disobedience. Sutherland's Foreword also took the form of an apology, for the Court's decisions protecting the right of suspected Communist-sympathizers. Noting that "the term is over, and heated comments are cooling,"<sup>119</sup> Sutherland argued in defense of the Court that its decisions really would not have much effect on the nation's ability to weed out Communists.

One reason the legal process Foreword authors may have thought someone was listening was that they had one of their own on the Court: Felix Frankfurter. Frankfurter was the intellectual progenitor for the early Forewords.<sup>120</sup> Moreover, Frankfurter actually did listen to what the *Law Review* was saying. His papers show a significant amount of correspondence between the

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116. *Id.*

117. *Id.* at 108 ("To explicate in short compass all that is wrong with this reasoning is not easy"); 110 ("this second interpretation is simply unbelievable . . . a transparently indefensible reading"; "five Caliphs of Washington").

118. The deferential writers of the 1950s may have been respectful and polite because of their respect for the institution of the Supreme Court. They were patriotic idealists who believed in the goodness of the United States and the Supreme Court. Or, they may have understood that even people in important public positions can have their feelings hurt by criticism of their public work. Even if this accounts for the deferential authors, it cannot account for the more stinging critiques offered by Hart and others. Indeed, the difference between these authors and substantive authors is that the latter group usually does not bother to critique the Court in such harsh terms or offer a deferential preface before any criticism.

119. Sutherland at 92.

120. See text accompanying notes 3-7 *supra*.

Justice and staff members of the *Review*. Frankfurter recommended authors the *Review* should publish, and gave advice about how to cite early cases. Frankfurter was of course a former Harvard Law professor, and he took his law clerks on the basis of advice from his friend and former coauthor, Henry Hart.<sup>121</sup> Indeed, in a letter to the then President of the *Review*, Richard Posner, Justice Frankfurter discussed his longstanding affection and respect for the *Law Review*: “[It] occupies a special place not only in my memory of my very happy active years as a student editor and my association with the successive Boards during my teaching years at Cambridge, but as a significant part of our legal system down to this day.”<sup>122</sup> Frankfurter’s departure from the Court in 1962 came at the same time that the first crack in the legal process Foreword occurred. By 1968 the separation of the Forewords from the Court was evident. In that year Henkin explicitly noted the distance between the Court and his Foreword: “[e]ven in a day when the law reviews are much cited but not often heeded, it may still serve a purpose to hold up to the Court a mirror that emphasizes its warts.”<sup>123</sup>

The shift in dialogue is, like many of the other shifts in the transformation, exemplified by Michelman. Like the other substantive Foreword authors, and unlike the legal process Foreword authors, Michelman did not bother with extended critiques or long, deferential passages prefacing his model. Instead, Michelman offers a substantive model which serves as an end in itself. This model is relevant only to other scholars, not to judges.<sup>124</sup> This need not be the case. But the judges and justices that are now in the U.S. judicial system, and those one could reasonably expect to enter the judicial system within the near future, are unlikely to rely explicitly on John Rawls’s *Theory of Justice* in their opinions.<sup>125</sup>

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121. Although Frankfurter was the first Justice to hire a black as a law clerk, he also declined Hart’s recommendation that he hire Ruth Bader Ginsburg.

122. Letter to Richard Posner, 30 June 1961, cited in Richard A. Cosgrove, *Our Lady the Common Law: An Anglo-American Legal Community, 1870-1930* 225 (New York U. Press, 1987). We thank Dan Ernst for bringing this to our attention.

123. Henkin at 63.

124. Meir Dan-Cohen, *Listeners and Eavesdroppers: Substantive Legal Theory and Its Audience*, 63 U. Colo. L. Rev. 569, 573 (“That judges, or any other public decisionmakers, should become practitioners of substantive legal theory is neither particularly likely nor clearly desirable”).

125. For a general discussion, see William W. Fisher III, *The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights*, in Michael J. Lacey and Knud Haakonssen, eds., *A Culture of Rights: The Bill of Rights in Philosophy, Politics, and Law—1791 and 1991* 266, 329-34, 342-48, 358-65 (Cambridge U. Press, 1991). The papers of Justice Thurgood Marshall contain only a few explicit references in

Despite the apparent lack of direct connection between the recent Forewords and the Supreme Court's work, the shift in the project may nonetheless shed light on the Court's history. Michelman's Foreword in 1969 defines a relatively sharp break. Before 1969 no author had received his law degree after the appointment of Earl Warren. After 1969, only six authors had received their law degrees before Warren's appointment.<sup>126</sup> Four of the six authors since 1987 received their law degrees after the appointment of Warren Burger,<sup>127</sup> though of course none did after the retirement of William Brennan.

These numbers bear on the relation between the Forewords and the periodization of the history of the Supreme Court. At present there are several contenders for periodization since 1937. One possibility links political inclinations and judicial activism or restraint: The New Deal Court from 1937 to the mid-1950s was a politically liberal Court committed to judicial restraint; the Warren Court was a politically liberal Court committed to judicial activism; the Burger and Rehnquist Courts have been politically conservative Courts committed on the level of theory to judicial restraint and on the level of practice to a surprising amount of judicial activism. A second possibility makes political inclination dispositive: a liberal Court from 1937 through Warren's tenure, a conservative one thereafter. A final possibility treats the period from 1937 as an undivided era, during which the Supreme Court has been a partner in the construction and maintenance of the peculiar United States version of the welfare state.<sup>128</sup>

The agenda of the New Deal Court had two elements. The primary one was the result of what Robert Jackson called "the struggle against judicial excess."<sup>129</sup> Its catch phrase was "judicial restraint versus judicial activism," and, in this element, the New

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correspondence between the Justices to scholarly articles. Justice John Paul Stevens suggested to Justice Harry Blackmun that he include a citation to Cass R. Sunstein, *Law and Administration after Chevron*, 90 Colum. L. Rev. 2071 (1990), in his dissenting opinion in *Rust v. Sullivan*, 497 U.S. 1002 (1991) (Blackmun to Stevens, Feb. 28, 1991, referring to Stevens letter of same date, Box 530, file 10). Justice Antonin Scalia insisted that Justice Marshall remove a citation to that same article as a condition for his joining Marshall's opinion in *Burns v. United States*, 501 U.S. 129 (1992), which Marshall did, thereby converting a dissenting opinion to an opinion for the Court (Scalia to Marshall, May 13, 1991, Box 538, file 6).

126. Kalven, Gunther, Freund, Karst, Cox, and Chayes.

127. Minow, Chemerinsky, West, and Sullivan.

128. The Foreword of 1969 is significant if we choose either of the first two periodizations, because it confirms the phenomenon of lag: it shows that it is (at least) fifteen years into a period before authors whose legal consciousness was formed under a particular Court are in a position to write Forewords.

129. Robert H. Jackson, *The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics* vii (Alfred A. Knopf, 1941).



Deal Court and its acolytes were uncomfortable with the exercise of the power of judicial review. The secondary element, which grew increasingly important, was attention to the constituencies identified in footnote four of *Carolene Products*. Some aggressive judicial action on behalf of the politically powerless might be justified, though always uneasily. Even where judicial review was accepted, the questions about its appropriate exercise were framed in institutional terms: What reasons were there for believing that judicial action was preferable to legislative action in the area under consideration? In the next period the issue of judicial restraint versus judicial activism became less and less interesting, as the nation and constitutional scholars became comfortable with the exercises of judicial authority exemplified, for that generation, by *Brown v. Board of Education*. Questions of relative institutional competence were gradually replaced by purely substantive questions: Did the Supreme Court "get it right" in invalidating or refusing to invalidate some statute?

As we have argued, the Forewords trace this rhythm. Through 1962 they were concerned almost exclusively with questions of institutional competence, dealing with the relative abilities of courts and legislatures and the degree to which the Court's actions comported with what were taken to be the necessary characteristics of judicial as distinct from legislative action. From 1963 to 1975 the Forewords tended to give primary attention to the substantive correctness of the Court's decisions, though institutional questions never disappeared either as a primary theme in the Forewords (for example, in Monaghan's of 1975) or as a secondary theme in Forewords devoted primarily to questions of substantive correctness. Since 1976 most Forewords devote themselves to identifying the proper substantive position that they contend the Court should adopt, without noticing that a prior generation might have thought that there were some interesting institutional questions that might be addressed. Indeed, in the most recent Forewords the questions of institutional competence have become entirely invisible, the authors concerning themselves solely with questions of substantive justice.<sup>130</sup>

This last point suggests that perhaps the "single Court" periodization is the appropriate one. Otherwise, we might have expected that Forewords written fifteen years after the creation of

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130. Even Epstein's Foreword is almost completely substantive, primarily because of the author's hostility to any action by the government aside from the enforcement of common law rights; for him, what the prior generation would have called judicial activism is the second best solution to the problem of government activity.

the Burger Court would have set a different agenda from Forewords written under the influence of the Warren Court. They do not. Indeed, the most recent Forewords are, if anything, even more vigorous than earlier ones in their assertion that the only interesting questions are substantive and that the present Court has deviated from the path properly set by its predecessor in the direction of substantive justice. To that extent, then, we can find in the Forewords support for the proposition that the present Court is an extension of the Warren Court, in the sense that it takes the job of the Supreme Court to be arriving at the right answers to normative questions about social life, though of course it offers different answers than the Warren Court had. And, in this light, the Warren Court might best be seen as an extension of the New Deal Court, being an activist Court as part of the kind of activist government the United States has had since 1937.

#### CONCLUSION

The shift from process to substance, then, may be less significant than previous scholarship has suggested. The sense that there is such a difference may be the residue of the battles of the 1920s and 1930s, in which the legal realists prevailed without qualification. Legal realism turned out to be the legal theory of the United States welfare state. For a while, during the reign of legal process theory, it might have seemed that the dragons slain by the New Deal might rise again, and legal process theories had some bite. It turned out that we continue to live in the welfare state, and no one—not even conservatives—has developed an alternative legal theory that has even modest persuasive power. With the welfare state permanently entrenched (in its distinctive United States form), scholars who discuss the Supreme Court are likely to find that the only vocabulary they have is provided by the language of ordinary politics. That, we suggest, accounts more than anything else for the transformation of the Forewords' project.

## APPENDIX A

- 1950 Jaffe, Louis L. *Untitled*. 65 Harv. L. Rev. 107 (1951).
- 1951 Freund, Paul A. *The Year of the Steel Case*. 66 Harv. L. Rev. 89 (1952).
- 1952 Howe, Mark DeWolfe. *Political Theory and the Nature of Liberty*. 67 Harv. L. Rev. 91 (1953).
- 1953 Sacks, Albert M. *Untitled*. 68 Harv. L. Rev. 96 (1954).
- 1954 Braucher, Robert. *Untitled*. 69 Harv. L. Rev. 120 (1955).
- 1955 Fairman, Charles. *The Attack on the Segregation Cases*. 70 Harv. L. Rev. 83 (1956).
- 1956 Sutherland, Arthur E., Jr. *The Citizen's Immunities and Public Opinion*. 71 Harv. L. Rev. 85 (1957).
- 1957 Brown, Ernest J. *Process of Law*. 72 Harv. L. Rev. 77 (1958).
- 1958 Hart, Henry M., Jr. *The Time Chart of the Justices*. 73 Harv. L. Rev. 84 (1959).
- 1959 Griswold, Erwin N. *Of Time and Attitudes—Professor Hart and Judge Arnold*. 74 Harv. L. Rev. 81 (1960).
- 1960 Bickel, Alexander M. *The Passive Virtues*. 75 Harv. L. Rev. 40 (1961).
- 1961 McCloskey, Robert G. *The Reapportionment Case*. 76 Harv. L. Rev. 54 (1962).
- 1962 Pollak, Louis H. *Public Prayers in Public Schools*. 77 Harv. L. Rev. 62 (1963).
- 1963 Kurland, Philip B. "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government". 78 Harv. L. Rev. 143 (1964).
- 1964 Mishkin, Paul L. *The High Court, the Great Writ, and the Due Process of Time and Law*. 79 Harv. L. Rev. 56 (1965).
- 1965 Cox, Archibald. *Constitutional Adjudication and the Promotion of Human Rights*. 80 Harv. L. Rev. 91 (1966).
- 1966 Black, Charles L., Jr. "State Action," *Equal Protection, and California's Proposition 14*. 81 Harv. L. Rev. 69 (1967).
- 1967 Henkin, Louis. *On Drawing Lines*. 82 Harv. L. Rev. 63 (1968).
- 1968 Michelman, Frank I. *On Protecting the Poor Through the Fourteenth Amendment*. 83 Harv. L. Rev. 7 (1969).
- 1969 Tigar, Michael E. *Waiver of Constitutional Rights: Disquiet in the Citadel*. 84 Harv. L. Rev. 1 (1970).
- 1970 Kalven, Harry, Jr. *Even When a Nation is at War—*. 85 Harv. L. Rev. 3 (1971).
- 1971 Gunther, Gerald. *In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*. 86 Harv. L. Rev. 1 (1972).
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## APPENDIX B

Year	Name	Law school	Place of Teaching when Wrote, and Year of Entry into Teaching
1951	Louis Jaffe	Harvard 1928	Harvard, 1936
1952	Paul Freund	Harvard 1931	Harvard, 1939
1953	Mark Howe	Harvard 1933	Harvard, 1945
1954	Albert Sacks	Harvard 1948	Harvard, 1952
1955	Robert Braucher	Harvard 1939	Harvard, 1949
1956	Charles Fairman	SJD Harvard 1938	Stanford, (history), 1926
1957	Arthur Sutherland	Harvard 1925	Harvard, 1945
1958	Ernest Brown	Harvard 1931	Harvard, 1946
1959	Henry Hart	Harvard 1930	Harvard, 1932
1960	Erwin Griswold	Harvard 1928	Harvard, 1934
1961	Alexander Bickel	Harvard 1949	Yale, 1956
1962	Robert McCloskey	Ph.D. Harvard 1948	Harvard (political science), 1958
1963	Louis Pollak	Yale 1948	Yale, 1955
1964	Philip Kurland	Harvard 1944	Chicago, 1950
1965	Paul Mishkin	Columbia 1950	Pennsylvania, 1950
1966	Archibald Cox	Harvard 1937	Harvard, 1945
1967	Charles Black	Yale 1943	Yale, 1947
1968	Louis Henkin	Harvard 1940	Columbia, 1957
1969	Frank Michelman	Harvard 1960	Harvard, 1963
1970	Michael Tigar	California 1966	UCLA, 1969
1971	Harry Kalven	Chicago 1938	Chicago, 1945
1972	Gerald Gunther	Harvard 1953	Stanford, 1956
1973	Laurence Tribe	Harvard 1966	Harvard, 1968
1974	Paul Freund	Harvard 1931	Harvard, 1939
1975	Henry Monaghan	Yale 1958	Boston, 1963
1976	Paul Brest	Harvard 1965	Stanford, 1969
1977	Kenneth Karst	Harvard 1953	UCLA, 1958
1978	John Ely	Yale 1963	Harvard, 1968
1979	Owen Fiss	Harvard 1964	Yale, 1968
1980	Archibald Cox	Harvard 1937	Harvard, 1945
1981	Lawrence Sager	Columbia 1966	NYU, 1966
1982	Abram Chayes	Harvard 1949	Harvard, 1955
1983	Robert Cover	Columbia 1968	Yale, 1968
1984	Frank Easterbrook	Chicago 1973	Chicago, 1981
1985	Derrick Bell	Pittsburgh 1957	Oregon, 1968
1986	Frank Michelman	Harvard 1960	Harvard, 1963
1987	Martha Minow	Yale 1979	Harvard, 1981
1988	Richard Epstein	Yale 1968	Chicago, 1968
1989	Erwin Chemerinsky	Harvard 1978	USC, 1980

1990	Robin West	Maryland 1979	Maryland, 1983
1991	Guido Calabresi	Yale 1958	Yale, 1959
1992	Kathleen Sullivan	Harvard 1981	Harvard, 1984
1993	Morton Horwitz	Harvard 1967	Harvard, 1970