

# COMPARING FEDERAL COURTS “PARADIGMS”

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In a recent article, Professor Michael Wells attacks what I had characterized as “the Hart and Wechsler paradigm” for analysis of Federal Courts issues.<sup>1</sup> To summarize crudely, Wells claims that the Hart & Wechsler paradigm, which we agree reflects the still dominant approach to Federal Courts scholarship, is descriptively impoverished and normatively inadequate, and he offers a “pragmatic” alternative. Wells’s article raises important issues for those who teach and write about Federal Courts law. His essay also calls attention to questions about the notion of examining legal issues by reference to a “paradigm” that are equally pertinent to other subject matters. A brief response, addressed to some of these issues, therefore seems warranted.

## I. BACKGROUND

In an article entitled *Reflections on the Hart and Wechsler Paradigm*,<sup>2</sup> I maintained that Henry Hart and Herbert Wechsler had established the reigning Federal Courts “paradigm”<sup>3</sup> and attempted to identify its central elements. In the loose sense in which I used the term—reflecting an admittedly vulgar adaptation of Thomas Kuhn’s concept of a scientific “paradigm”<sup>4</sup>—a paradigm is a set of assumptions that defines a series of problems

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1. Michael Wells, *Busting the Hart & Wechsler Paradigm*, 11 Const. Comm. 557 (1994).

2. 47 Vand. L. Rev. 953 (1994).

3. The central work in which they did so was of course Henry M. Hart, Jr. & Herbert Wechsler, eds., *The Federal Courts and the Federal System* (Foundation, 1953), but I read that book in light of Hart’s and Wechsler’s other writings. The Hart & Wechsler casebook has gone through two subsequent editions. The second edition, published in 1973, was edited by Paul Bator, Paul Mishkin, David Shapiro, and Herbert Wechsler. The third and current edition, which came out in 1988, was edited by Paul Bator, Daniel Meltzer, and David Shapiro. For an insightful assessment of the casebook’s evolution, see Akhil Reed Amar, *Law Story*, 102 Harv. L. Rev. 688 (1989).

4. See Thomas S. Kuhn, *The Structure of Scientific Revolutions* (U. of Chicago Press, 2d ed. 1970).

worth solving and a framework within which to seek answers.<sup>5</sup> So conceived, the Hart & Wechsler paradigm has two main elements. The first defines the field of study. As framed by Hart & Wechsler, Federal Courts issues characteristically involve the appropriate allocation of power to decide legal questions authoritatively.<sup>6</sup> For example, which tribunals should have what authority to decide which questions, and subject to what standard of review?<sup>7</sup>

The second aspect of the Hart & Wechsler paradigm, I argued, consists of a set of largely methodological assumptions—associated generally with the Legal Process school—about how questions such as these should be answered. For present purposes, the most basic of these assumptions is what I termed “the antipositivist principle”:<sup>8</sup>

“[W]e should understand the ‘law’ bearing on allocations of institutional responsibility as a rich, fluid, and evolving set of norms for effective governance and dispute resolution, not as a positivist system of fixed and determinate rules . . . . [L]egal interpretation should be purposive, not rigid or mechanical, and the variety of sources of law to which a legal interpreter can appeal includes principles and policies as well as canonical texts.”

Given the fluidity implied by the antipositivist principle, judges and lawyers need interpretive guidance. “The principle of structural interpretation” and “the principle of the rule of law” respond to this demand. The principle of structural interpretation provides that “[i]n disputes about the proper allocation of decision-making authority, the principles and policies underlying federalism and the separation of powers deserve special weight.”<sup>9</sup> The principle of the rule of law implies that “courts have irreducible functions”<sup>10</sup> and “requires the availability of judicial remedies sufficient to vindicate fundamental legal principles.”<sup>11</sup> Two further principles, “the principle of reasoned elaboration”<sup>12</sup> and “the neutrality principle,”<sup>13</sup> indicate generally that courts should strive to give reasoned justifications for their decisions.<sup>14</sup> As

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5. See *id.* at 23-51.

6. See Fallon, 47 Vand. L. Rev. at 962-63 (cited in note 1).

7. See Amar, 102 Harv. L. Rev. at 691 (cited in note 3).

8. Fallon, 47 Vand. L. Rev. at 965 (cited in note 2).

9. *Id.* at 965.

10. *Id.* at 966.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

Wells correctly points out, the conjunction of the latter two principles implies an ideal of legal "coherence" or "integrity."<sup>15</sup> The final methodological assumption of the Hart & Wechsler paradigm, the "principle of institutional settlement," recognizes "the claim to legitimacy of thoughtful, deliberative, unbiased decisions by government officials who are reasonably empowered to make such decisions."

In my earlier article, I attributed these interpretive principles to the first edition of the Hart & Wechsler casebook, read in light of the equally famed Legal Process materials published only a few years later by Henry Hart and Albert Sacks.<sup>16</sup> But I also claimed that the Hart & Wechsler paradigm continues to define the subject matter of Federal Courts as a field of academic inquiry and, more importantly, that its Legal Process methodological assumptions<sup>17</sup> tend to be shared by most contemporary scholars working in the area. Wells accepts the characterization of contemporary Federal Courts teaching and writing as predominantly occurring within the Hart & Wechsler paradigm or imbued with Legal Process assumptions. The principal interest of his article lies in its criticisms of modern scholarship, not in his historical interpretations, and I wish to respond in the same terms.

## II. "JURISDICTIONAL POLICY" AND SUBSTANTIVE REASONING

Wells argues that Hart & Wechsler's Legal Process paradigm fails to provide an accurate or predictively useful account either of Federal Courts doctrine or of judicial decisionmaking.<sup>18</sup> In his view, the law is rife with contradictory principles and irreconcilable decisions. This "incoherence" results, he thinks, because judges frequently decide cases with the aim of promoting substantive goals, such as achieving broader or narrower interpretations or more or less efficacious enforcement of substantive federal rights. On his reading, the reigning approach excludes such "substantive" factors from consideration and assumes that

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15. See Wells, 11 Const. Comm. at 560 (cited in note 1).

16. Henry M. Hart, Jr. and Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Cambridge, Mass., Tentative ed. 1958). The Hart and Sacks materials as edited by Professors William N. Eskridge, Jr. and Philip P. Frickey, were recently published by Foundation Press in 1994.

17. The Hart & Wechsler paradigm for the resolution of Federal Courts issues could fairly be termed a "Legal Process paradigm." See Fallon, 47 Vand. L. Rev. at 969-70 (cited in note 2).

18. See Wells, 11 Const. Comm. at 558 (cited in note 1).

decisionmaking is based exclusively on “jurisdictional policy,”<sup>19</sup> a category in which he puts such values as respect for federalism and the separation of powers, “finality,” “uniformity,” and “avoidance of unnecessary constitutional decisions.”<sup>20</sup>

Although Wells’s characterization of the Hart & Wechsler paradigm generally observes the principle of interpretive charity, his distinction between “substantive” and “jurisdictional” policy is crabbed and misleading. No sensible partisan of the Hart & Wechsler paradigm thinks that “jurisdictional policy” could be as innocent of substantive concerns as he maintains that the paradigm demands. On the contrary, the richness of the Legal Process approach resides in its sensitivity to the subtle interactions of and overlap between substantive and procedural interests in jurisdictional decisions.<sup>21</sup> Consider some of the most basic Federal Courts issues, as framed by the “canon” that Hart & Wechsler helped to promote.<sup>22</sup> As established by *Martin v. Hunter’s Lessee*,<sup>23</sup> Supreme Court review of state court judgments exists partly to ensure against state court nullification of federal rights. Habeas corpus jurisdiction serves a similar purpose, as does federal “protective jurisdiction”—a concept that Hart & Wechsler helped to launch.<sup>24</sup>

Several of Wells’s own examples make the point equally clearly. The question whether there should be “citizen” standing to enforce the Establishment Clause is essentially one about what rights people do or ought to have.<sup>25</sup> It is impossible to decide without reference to substance. No element of the Hart & Wechsler paradigm suggests otherwise. Should there be a federal cause of action for damages to redress constitutional violations committed by federal officials? The efficacy of constitutional enforcement is directly at stake; no sensible person would suggest the contrary. Some will view heightened enforcement as more or less important in comparison with other concerns, such as worries about vexatious litigation, the chilling of officials acting in

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19. *Id.* at 564.

20. *Id.*

21. See Vincent A. Wellman, *Dworkin and the Legal Process Tradition: The Legacy of Hart & Sacks*, 29 *Ariz. L. Rev.* 413 (1987) (emphasizing the Legal Process principle that interpretation should be purposive and should be sensitive to considerations of principle and policy immanent in the entire body of law and the surrounding legal culture).

22. See Judith Resnik, *Rereading “The Federal Courts:” Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 *Vand. L. Rev.* 1021, 1036 (1994).

23. 14 U.S. 304 (1816).

24. See Fallon, 47 *Vand. L. Rev.* at 973-74 & n. 86 (cited in note 2).

25. See William Fletcher, *The Structure of Standing*, 98 *Yale L.J.* 221 (1988).

reasonable good faith, and proper deference to Congress's law-making prerogatives. But what Wells calls "substance" is clearly a part of the mix.

Similar blends of substance and procedure occur with respect to issues involving federalism. And again, far from obscuring the resulting complexity, the Hart & Wechsler paradigm invites painstaking attention to the layered complexity that marks the intersection of diverse influences. When, if ever, should federal courts enjoin pending state proceedings? If authority exists, it exists under 42 U.S.C. § 1983, because a Reconstruction Congress thought that state courts could not always be trusted to enforce the federal Constitution. Is it wrong for Congress to make a substantive judgment such as this? Clearly not. In the words of Paul Bator, article III contemplates that the scope of federal jurisdiction should reflect political judgments made by Congress from time to time.<sup>26</sup> Can contemporary federal courts implement section 1983 without weighing the extent to which state courts and agencies are likely to provide fair and sympathetic fora for the vindication of federal rights? Although others might disagree, I do not think so. The relevant historical materials are conflicted; policy factors deserve attention.<sup>27</sup> Moreover, within the realm of policy, if a federal court is not likely to construe constitutional rights more broadly or enforce them more efficaciously, there is no good reason to allow a federal injunction. Yet if a federal court is indeed more likely to do so, questions arise not only about the costs of disrupting state proceedings, but about whether broad interpretations of constitutional rights are good or bad, correct or incorrect. Recall the frequency with which federal injunctions thwarted state implementation of regulatory legislation during the *Lochner* era—a recollection that undoubtedly influenced the relative friendliness of the original Hart & Wechsler casebook to adjudication by state courts and even administrative agencies.<sup>28</sup>

I can think of only two reasons why Wells might imagine that Hart & Wechsler's Legal Process paradigm wholly excludes what he calls "substantive" considerations. One involves the paradigm's implicit assumption that substantive concerns, although often relevant, are frequently entangled with other elements and that the substance that matters most may be long-term and ag-

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26. See Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 *Vill. L. Rev.* 1030, 1030-31 (1981-82).

27. See Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 *Va. L. Rev.* 1141 (1988).

28. See Fallon, 47 *Vand. L. Rev.* at 974-74 & n. 86 (cited in note 2).

gregate rather than short-term and specific. For example, in the case in which an injunction is sought against state proceedings, the constitutional claim may be valid or frivolous, and the state tribunal may appear receptive to or biased against federal rights. But the jurisdictional rule must be defined with the generality of cases in mind. Within the Hart & Wechsler paradigm, substance matters, but it does not typically collapse into a ruling on the substantive claims of a particular case, devoid of broader concerns about sensible, rule-based allocations of jurisdiction.<sup>29</sup>

A second possible explanation for Wells's mistaken view that the Hart & Wechsler paradigm rigidly excludes "substantive" considerations arises from the traditional intellectual opposition between "realism" and "formalism." Wells's is largely a realist critique, and it may be natural to assume that the target must therefore be formalist. But to equate Hart & Wechsler's Legal Process paradigm with formalism is demonstrably mistaken. On the contrary, the Legal Process School reflected an effort to absorb the realist critique of formalism while maintaining a meaningful conception of the rule of law.<sup>30</sup> In the open-ended sense in which I used the term, which Wells purports to accept, the Hart & Wechsler paradigm rejects a deductive model of legal reasoning and instead exalts reasonableness, purposive reasoning, and reason-giving as the characteristic elements of the judicial process. What I characterized as "the anti-positivist principle," which Wells agrees is a central element of the prevailing approach, could hardly be clearer on this point.

### III. DESCRIPTION, PREDICTION, AND THE POINT OF THE PARADIGM

Wells's insistence that the Hart & Wechsler paradigm excludes considerations of "substance" forms only a part of his argument that the paradigm is descriptively inadequate. According to him, Federal Courts law is conflict-ridden and "incoherent."<sup>31</sup> For example, the Supreme Court sometimes portrays constitutional adjudication as permissible only insofar as strictly necessary to resolve a concrete dispute between adverse individuals; in other cases, the Court waives or qualifies traditional requirements of justiciability and treats the declaration of constitutional

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29. See *id.* at 973-75. There may be some complete or partial exceptions, such as a case presenting a question of standing to enforce a particular constitutional provision.

30. See, for example, William N. Eskridge, Jr. & Philip P. Frickey, *The Making of The Legal Process*, 107 *Harv. L. Rev.* 2031 (1994).

31. See Wells, 11 *Const. Comm.* at 561 (cited in note 1).

norms as an essential judicial function. Similarly, some decisions rest on the premise that state courts should be presumed as fair and competent as federal courts in enforcing federal rights, while others assume the superiority of federal courts. In Wells's view, disparities such as these indicate that judges cannot really be attempting to engage in reasoned elaboration or to decide cases on a consistently principled basis. It follows, he reasons, that a paradigm including a "principle of reasoned elaboration" and a "neutrality principle" cannot be descriptively accurate.

#### A. THE NATURE OF THE HART & WECHSLER PARADIGM

If the central principles of the Hart & Wechsler paradigm could be falsified by doctrinal conflict between competing values, Wells would indeed be correct that it is descriptively deficient. In fact, however, Wells's criticisms rest on a misunderstanding about what the Hart & Wechsler paradigm, as I portrayed it, either is or is for.

In the first place, I am doubtful that the Hart & Wechsler paradigm, in the sense in which I have used the term, is either purely descriptive or purely normative. It is more nearly "interpretive," to use Ronald Dworkin's term,<sup>32</sup> in its combination of descriptive and normative elements.<sup>33</sup> Somewhat more precisely, the Hart & Wechsler paradigm models some of the analytical norms that help to constitute existing legal practice. But those norms, as so reflected in practice, are frequently amorphous, ambiguous, and conflicted. In this situation, the Hart & Wechsler paradigm attempts to identify the norms that most deserve respect or merit extension into the future. Henry Hart, in particular, was eloquent on this point.<sup>34</sup>

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32. See Ronald Dworkin, *Law's Empire* 45-113 (Belknap Press, 1986).

33. Although it might appear anachronistic to impute Dworkin's approach to Hart & Wechsler, the affinities between Dworkin and the Legal Process school are sufficiently strong that Professor Wellman has characterized Dworkin's theory as a "legacy" of the Legal Process tradition. See Wellman, 29 *Ariz. L. Rev.* 413 (cited in note 21).

34. See, for example, Henry M. Hart, Jr., *Holmes's Positivism—An Addendum*, 64 *Harv. L. Rev.* 929, 930 (1951) (arguing that "[l]aw as it is in a continuous process of becoming" and that, since morality has a part in influencing what the law becomes, it is a part of what law already is); Henry M. Hart, Jr., *Thomas Reed Powell*, 69 *Harv. L. Rev.* 804, 804 (1956) ("you could not think straight about the law unless you thought about its purposes and took sides on hard questions about which purposes should be furthered and which not"); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 *Harv. L. Rev.* 1362 (1953) (distinguishing between misguided decisions of the Supreme Court and the body of principle that reflects the moral heritage of the political order and constitutes its more fundamental and enduring law).

Conceived in this way, the Hart & Wechsler paradigm makes descriptive claims: it purports to reflect the legal reasoning of our constitutional order, not that of some utopia. But the paradigm does not pretend to be descriptive or predictive in the way that Wells sometimes assumes. Rather than being a set of claims about the nature of existing doctrine or an algorithm for predicting how cases will be decided, the methodological assumptions of the Hart & Wechsler paradigm are largely internal to and constitutive of legal reasoning about Federal Courts issues. To put the point slightly differently, the Hart & Wechsler paradigm reflects an insider's largely internalized standards of what is sayable and unsayable, relevant and irrelevant, persuasive and unpersuasive in legal arguments about Federal Courts issues.<sup>35</sup> The paradigm also captures ideals of judicial decision-making. Within this account, coherence or principled consistency is an internal, constitutive ideal: judges and lawyers seek uniting and controlling principles and develop distinctions, as they must, to explain why some cases and fact situations are governed by one principle, some by another.

If this account is correct, Wells is right to insist that the Hart & Wechsler paradigm makes at least an implicit claim that its principles exercise motivational influence over lawyers and judges. Moreover, good legal reasons, as defined by the paradigm, should provide at least some bases (though frequently indeterminate ones) on which to predict the outcomes of authoritative decisionmaking. But the paradigm's principal descriptive reference points involve norms of argument and reasoning, not doctrinal patterns.

## B. THE BASIS FOR CRITICISM

Understood to reflect a partly idealized interpretation of some of the constitutive norms and ideals of legal argument, the Hart & Wechsler paradigm remains subject to attack on descriptive grounds. For example, a behaviorist might deny that reasons are ever effective causes of action and attempt to develop a theory based on stimulus and response. Or, accepting that reasons are sometimes psychologically effective, someone might deny that the particular assumptions and ideals embodied in the Hart

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35. This characterization is informed not only by Ronald Dworkin's *Law's Empire* (cited in note 32), but also by H.L.A. Hart's distinction between "internal" and "external" perspectives on rules. See H.L.A. Hart, *The Concept of Law* 86-88 (Oxford U. Press, 2d ed. 1994).

& Wechsler paradigm are in fact characteristic of legal reasoning about Federal Courts issues.

Wells's argument appears to be different. He seems to accept that Hart & Wechsler's Legal Process assumptions and ideals provide reasons bearing on the resolution of Federal Courts issues, but maintains that they are weaker reasons than the paradigm assumes,<sup>36</sup> and he asserts that a more descriptively accurate paradigm would identify what the other, more powerful reasons are.<sup>37</sup> This is surely a plausible view. It is entirely imaginable, for example, that lawyers and especially judges might retain forms of argument suggesting that coherence and reasoned justification are animating, even constitutive ideals, while understanding perfectly well that departure from those ideals was in fact accepted within the profession as normal and appropriate in at least some cases.<sup>38</sup>

If I have characterized Wells's position correctly, however, there is less to his descriptive critique than meets the eye. In the first place, as I have suggested already, he seems to acknowledge that the Hart & Wechsler paradigm furnishes the best available starting point for constructing a better theory. He agrees that the methodological principles of the Hart & Wechsler approach have some action-guiding or motivating force; the challenge, in his view, is not to abandon the assumptions of the Hart & Wechsler model but to supplement them, and to identify the relative action-motivating force of different factors.

Second, again as I have indicated, the Hart & Wechsler model, appropriately understood, excludes far fewer "substantive" considerations than Wells suggests. Once substance enters the picture, it of course becomes predictable that judges and Justices who have an expansive conception of the Establishment Clause, for example, will favor a broader law of standing to present Establishment Clause challenges than will those with a narrower conception. It also becomes possible for anyone who works within the Hart & Wechsler paradigm to take such considerations into account when prediction is her purpose. In short, the Hart & Wechsler paradigm by no means thwarts "realist"

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36. See Wells, 11 Const. Comm. at 569-70 (cited in note 1).

37. See *id.* at 580-85.

38. Compare Frederick Schauer, *Rules and the Rule of Law*, 14 Harv. J.L. & Pub. Pol. 645, 674-79 (1991) (developing a theory of "presumptive positivism" according to which judges characteristically do and should follow established legal rules and conventions unless to do so would conflict egregiously with a value or policy of supervening importance).

prediction of the kind that Wells thinks so important.<sup>39</sup> On the contrary, I would guess that nearly any of the able people that Wells associates with the paradigm are quite adept at predicting judicial outcomes.

### C. THE POINT

I should return briefly, however, to what I take to be the central point of my disagreement with Wells. Although anyone can of course employ the Hart & Wechsler paradigm in predicting how a court will decide a particular case, the paradigm's principal function is not to predict outcomes, but to suggest, invoke, and elucidate some of the norms that help to constitute legal argument about Federal Courts issues in a legal culture in which argument and disagreement are characteristic phenomena. The Hart & Wechsler paradigm also serves an important pedagogical function of imbuing students with some constitutive conventions of legal argument.

Whether this type of "descriptive" reference is the best one for the study of Federal Courts issues, or indeed of any legal subject matter, is a deep, interesting, and important question. Certainly anyone with a critical agenda might wish to broaden the framework, to attempt to describe a systematic relationship between Federal Courts doctrine and, for example, the class interests or characteristic biases of dominant groups.<sup>40</sup> In the article of mine that Wells criticizes most directly, I was careful to claim no more than that Hart & Wechsler's Legal Process approach provides "one view of the cathedral"<sup>41</sup>—by no means a unique perspective, but one capable of generating genuine insights. Based on at least a partial misunderstanding of what the Hart & Wechsler paradigm is or is for, Wells's criticisms do not respond

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39. A paradigm that purported to justify everything would of course explain nothing, and I do not mean to deny the existence of important Federal Courts cases in which a relatively crude purpose of reaching a particular substantive outcome on the facts presented appears to have played a crucial role. See, for example, *Michigan v. Long*, 463 U.S. 1032 (1983); *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59 (1978). Nor would I deny that judges and Justices have frequently displayed more concern to frame particular doctrines in accord with their substantive views than to achieve principled consistency among decided cases or doctrinal categories. I therefore do not mean to contend that Wells's descriptive critique draws no blood—only that, because he misunderstands the Hart & Wechsler paradigm, he draws less blood than he seems to think.

40. Compare Resnik, 47 Vand. L. Rev. at 1021-22, 1033-47 (cited in note 22) (developing themes of exclusion of groups and perspectives in history, doctrine, and practice).

41. Fallon, 47 Vand. L. Rev. at 972 (cited in note 2), quoting Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972).

directly to this claim or provide clear answers to the questions that lie behind it.

#### IV. CONTRASTING NORMATIVE VISIONS

The gist of Wells's normative critique is that the Hart & Wechsler paradigm overvalues federalism, the separation of powers, the rule of law, and principled consistency, "coherence," or "integrity."<sup>42</sup> These values possess only limited force, he thinks, which should sometimes give way to other concerns. To evaluate this criticism again requires understanding the Hart & Wechsler paradigm from the inside.

##### A. LAW AND REASON

Within the Hart & Wechsler paradigm, the value of principled consistency or coherence is closely, almost conceptually related to a theory of law and the judicial role. That implicit theory, which I have described as "antipositivist," recognizes a profound judicial role in an organic process of lawmaking. Within this theory, however, a judge may not use her office simply to legislate her own preferences. The judge possesses moral warrant to speak in the name of the law precisely insofar as she is able to relate her decision to the relevant body of authoritative texts, principles, and policies in ways countenanced by the conventions of legal argument. To act lawfully, she must address herself to authoritative texts, policies, and principles; she must reason with and about them in a conscientious effort to distill or elaborate the rule or principle to be applied; and she must justify her exercise of power by providing a reasoned account of the connection between relevant legal materials and the disposition that she reaches.

This, of course, is an ideal that sometimes is honored only in the breach. It is subject to question on the ground that it is at bottom a somewhat conservative ideal, which links the law of today to texts propounded and principles established in the past. It is, finally, an ideal whose attractiveness resides at least partly in the positivistic alternative it rejects, according to which the law is what some official—which might be a judge—says that it is, regardless of her reasons for so saying.

Wells's critical claim, if I grasp it, stands in stark contrast, and it reduces to this: it would be normatively preferable for Supreme Court Justices, at least, to be authorized by law to de-

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42. See Wells, 11 Const. Comm. at 576 (cited in note 1).

cide individual cases without obligation to provide reasoned, principled justifications. The Court, in his preferred model, is a lawgiver, and subject to no more legal restraints than Hobbes's *Leviathan*.<sup>43</sup>

The costs of Wells's alternative, which inversely reflect the virtues of the Hart & Wechsler approach, are relatively obvious and need not be belabored. They include potential loss of democratic legitimacy (if, for example, the Court arbitrarily and without reasoned explanation were to defy Congress); demoralization to those who attempt to make reasoned sense of ostensibly controlling legal materials and expect to see them applied fairly and nondiscriminatorily; and unfairness to those whose rights or interests are sacrificed on unprincipled bases.

The last of these considerations—unfairness to litigants—obviously troubles Wells himself. When he faces this implication, near the end of his article, his first line of response is that no palpable unfairness will result; his claims extend only to jurisdictional holdings, which are less clear and important in their consequences than decisions on the merits.<sup>44</sup> As he recognizes, however, he has blocked this retreat by his own relentless argument that jurisdictional decisions are commonly driven by a desire to affect substantive outcomes and that their substantive implications are large.<sup>45</sup>

With the costs of rejecting principle readily apparent, Wells's preference for his normatively "realist" theory ultimately rests, as it must, on an appeal to consequences.<sup>46</sup> His theory, he suggests, would permit the attainment of desirable results and the drawing of useful distinctions that the Hart & Wechsler paradigm precludes. Unfortunately, however, his argument is both overstated and unclear.

## B. PRINCIPLED AND UNPRINCIPLED DISTINCTIONS

The problem begins with Wells's characterization of the Hart & Wechsler paradigm, which once again is stingy and inapt. Equating the Hart & Wechsler paradigm with the most wooden

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43. I discuss the constraints that Wells thinks are imposed by philosophical pragmatism below.

44. See Wells, 11 *Const. Comm.* at 583-85 (cited in note 1).

45. See *id.* at 585.

46. Interestingly, Wells sometimes appears equivocal about promising the usual pragmatic vindication of the pragmatic method—a higher proportion of results that "work." Ever the realist, he seems to anticipate a continuation of ideological warfare among judges and Justices of differing political views producing a good deal of "incoherence." See *id.* at 583.

formalism, Wells sometimes writes as if those operating within it could draw no distinctions at all. To take just one example, he argues that it would be possible under his preferred approach, but impliedly not under the Hart & Wechsler paradigm, to justify broad standing to enforce the Establishment Clause, “while denying [standing] for claims brought to enforce other constitutional provisions that create no personal constitutional rights.”<sup>47</sup> In fact, however, the Hart & Wechsler paradigm by no means precludes all distinctions—only unprincipled ones. And the distinction between constitutional provisions that create personal rights and those that do not happens to be entirely principled. It could easily be drawn within the Hart & Wechsler paradigm, and in fact has been urged as crucial for standing law by other scholars in prominent articles,<sup>48</sup> most if not all of which lie well within the Legal Process tradition.

### C. UNPRINCIPLED DECISIONS AND INCOHERENCE

After the permissibility of principled distinctions is clarified, a part of Wells’s normative critique of course remains: he asserts that desirable consequences could justify genuinely unprincipled jurisdictional decisions, even if the result is “incoherence.”<sup>49</sup> But what he means by this claim is never made clear. In the strong sense, “incoherence” implies unintelligibility<sup>50</sup>—a body of law so garbled as to be incomprehensible. Law that was incoherent in this sense could not be followed; according to one view, “incoherent law” is an oxymoron, as nonsensical a notion as a “round square.”<sup>51</sup> Wells obviously has a weaker sense of “incoherence” in mind—possibly incoherence as “lacking orderly continuity” or “inconsistent.”<sup>52</sup> To the extent that either implies the absence of rationally discernible standards, however, incoherence seems self-evidently inefficient, demoralizing, and unjust.

Wells, then, must intend to invoke a still weaker sense of “incoherence,” perhaps as “not ‘mutually supporting’ ” or “ ‘not derivable from a set of principles which are completely [lexically]

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47. *Id.* at 584.

48. See, for example, Fletcher, 98 *Yale L.J.* at 223-24, 265-80 (cited in note 25); Lee Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 *Yale L.J.* 425 (1974).

49. See Wells, 11 *Const. Comm.* at 582 (cited in note 1).

50. See, for example, Joseph Raz, *The Relevance of Coherence*, 72 *B.U. L. Rev.* 273, 276 (1992).

51. See Lon Fuller, *The Morality of Law* (Yale U. Press, 2d ed. 1969).

52. See *Webster's Third New International Dictionary of the English Language* (3d ed. 1966).

ranked.’”<sup>53</sup> But this would be an artificially contrived sense of “incoherence,” suggesting that distinctions are almost inherently incoherent whenever legal or moral values are pluralistic and not susceptible of lexical ordering. Legal, moral, and linguistic experiences are all to the contrary.<sup>54</sup> When competing principles are involved, nothing is more familiar or more sensible than that distinctions should be drawn, such that one principle prevails in one type of case and another principle in the other. Sometimes courts may state the applicable principle too broadly. If so, it is the characteristic art of lawyers and successor courts, not to charge “incoherence,” but to discern patterns, to draw further distinctions, and to create the kind of order necessary for what we call “law.”

In any event, Wells never makes clear what sort of unprincipled or inconsistent decisionmaking he wants to justify. Does he mean, for example, that the Supreme Court should feel free to deny the existence of federal jurisdiction in any case involving rights that a majority of the Justices dislike? That the Court should assert jurisdiction not conferred by Congress if the Court thinks that federal jurisdiction would be desirable? I think this is the kind of case that Wells has in mind, but, again, I am not sure.

Assuming that this is the kind of decisionmaking Wells means to promote, I think it fair to say that his case is at best unproved. With the costs both evident and important, he fails to provide concrete examples of genuinely unprincipled decisions (that could not be reached within the Hart & Wechsler paradigm) that would do the great good necessary to offset the costs discussed above. He similarly fails to explain why his preferred jurisprudential model would not license the most revolting judicial arbitrariness.

Against this charge, Wells would undoubtedly invoke the philosophical theory that inspires his critique: pragmatism, with its ideal of decisionmaking that “works” and achieves satisfactory

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53. See Raz, 72 B.U. L. Rev. at 277, 286 (cited in note 50). Wells refers to this article in the somewhat opaque footnote in which he discusses possible meanings of “incoherence.” See Wells, 11 Const. Comm. at 577 n.81 (cited in note 1). At the end of that footnote, Wells suggests that legal doctrine is “incoherent” when it draws distinctions supported by “no good reason.” I leave this suggestion aside, however, since Wells purports to be defending “incoherent” decisionmaking, and he offers no arguments attempting to justify decisionmaking supported by “no good reason.”

54. Professor Raz’s article, from which the quoted formulations were drawn, talks much more about degrees of coherence, or about some principles or decisions being more or less coherent than others, than about incoherence. See Raz, 72 B.U. L. Rev. at, for example, 286, 293 (cited in note 50). Raz himself is a value pluralist, and he argues firmly that “value pluralism does not mean incoherence.” *Id.* at 310.

results. The pragmatic method, he seems to assume, would supply all requisite safeguards and discipline. Too often, however, "pragmatism" is an honorific title for wooliness masquerading alternately as profundity and common sense. Without fuller elaboration, "pragmatism" is not a helpful answer to any practical question.

Among other things, pragmatism as an unelaborated concept affords no answer to the fundamental Legal Process question of who should have what power to make authoritative judgments—pragmatic or otherwise—on behalf of the legal system. Wells would not, I assume, wish to entrust cops on the beat with the authority to do whatever they thought pragmatically best. Yet his article is curiously lacking in straightforward arguments concerning why *courts* should be entrusted with the power he would grant them. It is a familiar point that rules limiting judicial authority will have adverse consequences in cases in which, but for the rules, courts would do the "right" thing.<sup>55</sup> From the perspective of systemic design, however, it is equally familiar that there may still be good reasons not to vest courts with an unconstrained discretion—or, what amounts to the same thing, to vest them with the authority to do whatever is "right" in an all-things-considered sense in every case. Among other considerations, it may be fairer or more democratically legitimate to leave some decisions to other institutions. There may also be reason to doubt that courts are more likely than some other decisionmaker to be able to identify what indeed is "right."

## V. HARD QUESTIONS

To deny the adequacy of Wells's answers is not to deny the validity of his questions. Most of us assume that judges do, and sometimes we think they should, exploit all possible room for legal maneuver—maybe even bend or stretch a bit—to reach what seem to them to be just or desirable outcomes in cases where the stakes are high. When, if ever, is this practice consistent with the defining principles of the Legal Process approach? Does the Hart & Wechsler paradigm permit sufficient flexibility of this kind? If not, should it be modified? Would the required modification amount to abandonment? Or should the paradigm's absolutist pretensions—if it indeed holds them—be relaxed to recognize that ideals may sometimes yield without ceasing to be ideals?

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55. See Frederick Schauer, *Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon Press, 1991).

It may be worth recalling that Wells is not the first to raise questions such as these or to deny that principle should control every legal decision. Alexander Bickel, for example, famously argued that the Supreme Court should be able to decline jurisdiction for reasons of prudence and expediency.<sup>56</sup> It is equally possible to imagine an argument that the Supreme Court should be authorized to ignore ordinary jurisdictional barriers in order to decide cases of exceptional national interest.<sup>57</sup> More generally, Frederick Schauer has argued that legal norms that are binding on courts in relatively ordinary cases might be viewed as subject to displacement in cases involving high moral or consequential stakes.

The questions raised by arguments that carefully circumscribe the class of cases in which “unprincipled” decisions should be allowed are both difficult and important.<sup>58</sup> Among the difficulties is whether it would indeed be unprincipled for the legal system to recognize legal rights and entitlements as being implicitly subject to a balancing calculus and thus capable of being outweighed by sufficiently compelling government interests—a matter that I cannot go into here. If the argument for exceptional rules in exceptional cases were cast in relatively narrow terms, I have suggested that there would be room for argument about whether the Hart & Wechsler paradigm should be viewed as unyielding—as requiring principled decisions regardless of the consequences—or should instead be regarded as identifying norms applicable to all but extraordinary cases.<sup>59</sup> Suggestively, Wells associates Professor Bickel, who held a view of the latter kind, with the Hart & Wechsler paradigm.<sup>60</sup> I am inclined to do so also.

As the breadth of association broadens, however, the question arises whether it is even useful to talk of a “Hart & Wechsler paradigm” in the very broad sense in which both Wells and I have used the term. This question bothers me increasingly.

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56. See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale U. Press, 2d ed, 1986).

57. See Schauer, 14 Harv. J.L. & Pub. Pol. at 674-79 (cited in note 38).

58. See generally Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 Ga. L. Rev. 343 (1993) (arguing that rights are reducible to interests and therefore subject to balancing). By any reasonable standard, however, a decision should count as unprincipled if not articulately justified by reference to defensible grounds for judicial decision.

59. Compare Bickel (cited in note 56) above with Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1 (1964).

60. See Wells, 11 Const. Comm. at 576-78 (cited in note 1).

## VI. THE VIRTUES OF A PRAGMATIC CRITIQUE

Despite my generally critical response, Wells's critique of the Hart & Wechsler paradigm, especially when conjoined with his effort to develop a pragmatic alternative, has one great virtue. His stance invites endless questions, challenges to stale assumptions, the puncturing of orthodoxy, and the search for better answers to old and new questions alike.

The Hart & Wechsler paradigm, as I have used the term, is more dynamic than Wells suggests.<sup>61</sup> Without some degree of dynamism, it could not have maintained the influence that Wells agrees with me in ascribing to it. Perhaps, however, more of the questions with which the Hart & Wechsler paradigm has rounded should be turned back on the paradigm itself. Perhaps its assumptions should be treated as more questionable or defeasible. Perhaps those working within the paradigm should attend more carefully to the voices of people who have regarded its characteristic analysis as mystified, insensitive, smug, apologetic, and obfuscatory.<sup>62</sup>

Wells's article, with its summons to a new pragmatism in Federal Courts analysis, is right to insist that methodological questions deserve to be addressed. Assumptions, posits, and stipulations easily become stultifying, and those who work within the Hart & Wechsler paradigm should rise to the challenges that Wells and the pragmatic paradigm put to us. I do not think that Hart & Wechsler's Legal Process paradigm bars us from doing so, but the prod to self-examination is valuable nonetheless.

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61. Law, as Henry Hart once put it, is always in a process of becoming, and what it ought to be—in our culture, at least—is a part of genuine legal debate. Hart, 64 *Harv. L. Rev.* at 930 (cited in note 34).

62. See Resnik, 47 *Vand. L. Rev.* at 1021-22, 1035-47 (cited in note 22).