

THE GOOD AMERICAN LEGISLATOR: SOME LEGAL PROCESS PERSPECTIVES AND POSSIBILITIES

*Robert F. Blomquist**

Compared to the role of individual judges in the American legal system, the role of individual legislators is under-theorized. Legal writings about legislators (individually and in the aggregate) fall into seven general categories: (1) discussions of legislative intent in the interpretation of statutes, (2) examinations of the qualification and election of legislative representatives (including ballot access issues, regulation of political parties and their selection of candidates, and financing election campaigns), (3) corruption (by bribery or conflicts of interest) of a legislator, (4) immunities of a legislator, (5) lobbying of a legislator, (6) legislative leadership (such as the role of a speaker of the house, senate president or committee chair), and (7) the agency problem whereby a legislator may betray his or her constituent's interest by various means (such as self-dealing, advancing the interests of an undeserving faction, simple laziness, or, even political courage to advance the representative's personal conceptions of the public interest).¹ Yet, a recurring deficiency of the legal literature on individual legislators is a general lack of normative theory about the attributes of a "good" legislator.

In this Article, I intend to sketch some theoretical attributes of the good American legislator. To do this I will draw upon and extrapolate from the insights of the American legal process theory of law developed

* Professor of Law, Valparaiso University School of Law. B.S. University of Pennsylvania (Wharton School), 1973. J.D. Cornell University, 1977. My thanks go to colleagues who offered helpful comments of a previous draft that I presented to a Society of Legal Scholars (SLS) Conference at St. Catherine's College, Oxford University in September 2003. I am also grateful to the following individuals who offered useful comments: Daniel Farber, Philip Frickey, Alex Geisinger, Robert F. Williams and Geri Yonover.

1. See, e.g., WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 121-1098 (3d ed. 2001); WILLIAM D. POPKIN, *MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS* 183-1110 (3d ed. 2001).

after World War II by Professor Lon Fuller in his 1949 law review article, *The Case of the Speluncean Explorers*,² and by Professors Henry M. Hart, Jr. and Albert M. Sacks in their 1958 law casebook, *The Legal Process: Basic Problems in the Making and Application of Law*.³ Building on this foundation, in my normative project of defining the good American legislator, I will also extract themes from three recent groups of “new legal process” theorists who have written about legislation and statutory interpretation over the last two decades: “process formalists” such as Professor Daniel Farber, “process progressives” such as Professors Ronald Dworkin and Professor William N. Eskridge, Jr., and “process pragmatists” such as Judge Richard A. Posner. While I am aware of, and acknowledge, critiques of legal process theory by critical legal studies and public choice theorists, it is beyond the scope of this article to attempt to rebut these criticisms.⁴ I assume that most of the descriptive and normative features of legal process theory are edifying and, therefore, helpful and pragmatic in delineating how a good American legislator should function.

Despite numerous legislative bodies in the world and in the United States (indeed, there are *thousands* of legislatures if one tallies up all the county boards and city councils and special district government entities in the country), my focus in this article will be on a hypothetical member of the Congress of the United States, consisting, of course, of two bodies—the House of Representatives and the Senate—and, a hypothetical member of a state legislative body in the fifty American states (with every state but Nebraska—which has a unicameral legislature—having two houses). Given the etymology of the word, *legislator*, which means a “proposer of law”—what the *Oxford English Dictionary* notes is “properly two words” derived from the Latin *lex* (law) and *lator*, used as an agent-noun to “bear, carry, bring.”⁵ I am interested in theorizing on what craft-characteristics and personal virtues epitomize a worthy state legislator or national legislator from the perspective of *the laws that are proposed by the legislator* and not the

2. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949).

3. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATIONS OF LAW* (tent. ed. 1958) (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) [hereinafter HART & SACKS]. Permission granted from Foundation Press for extensive reference to this book, obtained November 29, 2004.

4. See ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986) (providing an explanation and overview of the critical legal studies movement); Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1399 (1996) (explaining public choice theory criticisms of legal process).

5. 8 OXFORD ENGLISH DICTIONARY 810 (2d ed 1989).

political gamesmanship that, by necessity, comes with the job. While the legal and the political unavoidably coalesce for a legislator, I want to emphasize the legal. My undertaking here is exploratory, tentative and succinct. My purpose, inspired by the extensive legal process literature that has tended to concentrate on judicial processes, is to offer some first thoughts on the importance of the “good” individual legislator in the healthy function of the American legal system as a whole.

I shall proceed as follows. In Part I of the Article, I will discuss the original legal process jurisprudence of the 1940s and 1950s, and will attempt to tease out of this body of thought concepts that bear on defining the good American legislator.⁶ In Part II, I turn, successively, to the three offshoots of the original legal process material, written over the last twenty years: process formalists, process progressives and process pragmatists. I do this in order to uncover insights that might further our understanding of the good American legislator.⁷ In Part III, I offer some speculative musings on extending the good American legislator project into the future.⁸

I. FOUNDATIONAL LEGAL PROCESS THEORY AND THE GOOD AMERICAN LEGISLATOR

During the 1950s, Professors Henry M. Hart, Jr. and Albert M. Sacks of Harvard Law School picked up the intellectual threads that had been spun by their Harvard colleague, Professor Lon L. Fuller, in his seminal 1949 article, *The Case of the Speluncean Explorers*⁹, and weaved it, along with their own ideas, into the magisterial casebook entitled *The Legal Process: Basic Problems in the Making and Application of Law*.¹⁰ “Hart and Sacks’ intellectual starting point was the interconnectedness of human beings, and the usefulness of law in helping us coexist peacefully together.”¹¹ By obvious implication, therefore, the concept of a good American legislator, a democratic representative interested in proposing and helping to fashion useful American laws, was part of the Hart and Sacks vision of peaceful coexistence.

6. See *infra* notes 9-207 and accompanying text.

7. See *infra* notes 208-67 and accompanying text.

8. See *infra* notes 268-309 and accompanying text.

9. See Fuller, *supra* note 2.

10. See HART & SACKS, *supra* note 3.

11. William N. Eskridge, Jr., *Interpretation of Statutes*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 200, 203 (Dennis Patterson ed., 1996).

A. *The Nature and Function of Law*

In chapter one of *The Legal Process*, Hart and Sacks theorize that human conflict in the satisfaction of human wants is an inescapable feature of human interdependence.¹² In resolving this inherent and systematic conflict, they contend that “affirmative and knowledgeable cooperation” through law, is necessary.¹³ Moreover, they observe that, in recognition of their fundamental interdependence with others, “people form themselves into groups for the protection and advancement of their common interests, or they accept membership in groups formed by others.”¹⁴ These groups establish “regular working,” that is, “*institutionalized*, procedures for the settlement of questions of group concern.”¹⁵ Continuing their social theory, Hart and Sacks note that since “different procedures and personnel of different qualifications invariably prove to be appropriate for deciding different kinds of questions,”¹⁶ it follows “that every modern society differentiates among social questions, accepting one mode of decision for one kind and other modes for others—*e.g.*, courts for ‘judicial’ decisions and legislatures for ‘legislative’ decisions.”¹⁷ They argue that implicit in America’s system of legal procedures is a bedrock principle, that of “institutional settlement.”¹⁸ This principle states that decisions which result from established “regularized and peaceable methods of decision . . . ought to

12. According to Hart and Sacks:

[Americans] have a great variety of wants, ranging from the common urge to secure the simple necessities of physical existence to the most subtle of desires to achieve some sense of oneness with the universe. The more basic wants are clearly apprehended and relatively fixed. Others often are only dimly felt, and are subject to change by many complex processes both of external suggestion and of internal reflection. But whatever for the time being each individual’s wants may be, human life is an unceasing process of fixing upon those on which time and effort are to be expended, and trying to satisfy them.

HART & SACKS, *supra* note 3, at 1.

13. *Id.* at 2-3.

14. *Id.* at 2.

15. *Id.* at 3.

16. *Id.* at 4.

17. *Id.* at 360. In this regard, Hart and Sacks make a useful distinction in chapter three of their book, between adjudicative facts and legislative facts:

For many purposes it is useful to distinguish between *adjudicative* facts — namely, facts relevant in deciding whether a given general proposition is or is not applicable to a particular situation (that is, facts ordinarily, though not always, about what happened in the particular case) — and *legislative facts* — namely, facts relevant in deciding what general propositions should be recognized as authoritative (that is, facts, ordinarily, although not always, about what generally happens in a class of cases).

Id.

18. *Id.* at 4.

be accepted as binding upon the whole society unless and until they are duly changed.”¹⁹ One of the corollaries of the principle of institutional settlement that Hart and Sacks posit has particular relevance to the concept of the good legislator:

[T]he principle of institutional settlement operates not merely as a principle of necessity but as a principle of justice. This means attention to the constant improvement of all of the procedures which depend upon the principle in the effort to assure that they yield decisions which are not merely preferable to the chaos of no decision but are calculated as well . . . to advance the larger purposes of society.²⁰

A legislator, acting as a cog in the overall legal system, is an official who must be particularly sensitive to demands for “generalized decision[s] as to how similar [social] problems are to be handled in the future.”²¹ In addition, as Hart and Sacks point out, a state legislator should be cognizant that he and his colleagues in the state legislature act “against the background of the common law, assumed to govern unless changed by [state] legislation,”²² just as a federal legislator should be aware that she and her colleagues in Congress build “upon legal relationships established by the states, altering or supplanting them only so far as necessary for . . . special purpose.”²³ Yet, they warn that individual legislators, acting in concert in an “unthinking” and “unscientific” way, could over-react to social problems.²⁴ For example, they might choose to vote in favor of criminalizing conduct like refusing to accept, pursuant to a contract, fresh fruit and produce in interstate commerce, when other, more nuanced and appropriate mechanisms of social ordering (like licensing, civil fines, and statutory contract rights) would be better legal tools under the circumstances.²⁵ Conversely, Hart and Sacks discuss the worthy examples of individual federal legislators leading up to the passage of the Perishable Agricultural Commodities

19. *Id.*

20. *Id.* at 6 (emphasis added).

21. *Id.* at 8.

22. *Id.* at 23 (citation omitted).

23. *Id.* (citation omitted). Yet, a federal legislator, by virtue of the Supremacy Clause of the Constitution, U.S. CONST. art. VI, § 2, must be further cognizant of (1) “the [d]omain of [e]xclusive [f]ederal [c]ompetence” — by virtue of matters that are specifically prohibited to the states — such as negotiating foreign treaties and making war, for example, and (2) the “[d]omain of [c]oncurrent [s]tate and [f]ederal [l]egislative [c]ompetence” that a federal legislator must keep abreast of and, if necessary, decide to occupy by exclusively federal laws. HART & SACKS, *supra* note 3, at 171-72.

24. *Id.* at 35.

25. *Id.* at 35-37.

Act of 1930²⁶—like Senator Borah of Idaho—who nimbly, adroitly, and persistently made changes in an antecedent bill that had not become law²⁷ by doing “a great deal of knowledgeable legislative spade work among the various groups interested in the measure.”²⁸ Indeed, Hart and Sacks portray the individual legislative efforts of Senator Borah as being emblematic of “one of the major features of American legislation—the extent to which the Legislature acts as a ratifying agency giving effect to agreements arrived at outside the legislature.”²⁹

A conscientious legislator, too, in the Hart and Sacks tradition, should care about: the constitutionality of legislation that he is considering;³⁰ the impact of legislation in creating the need for a bureaucracy (entailing both budgetary and organizational issues) to carry out its purposes;³¹ the advisability of trying “to strike a happy medium between definiteness and indefiniteness” in the crafting of legislative commands within a statute;³² the need to appreciate the different “kinds of people to whom the directions” of a legislative command are directed—such as private persons, on the one hand, and government officials, on the other hand;³³ and, the complex, practical differences (with particular social advantages and disadvantages) in fashioning statutory language³⁴ between rules,³⁵ standards,³⁶ principles, and

26. *Id.* at 23-39.

27. *Id.* at 36-39.

28. *Id.* at 39.

29. *Id.*

30. *See, e.g., id.* at 40 (discussing debate between Senators Borah and Wheeler over constitutionality of a bill that was to become the Perishable Agricultural Commodities Act of 1930).

31. *See, e.g., id.* (discussing concerns by some members of Congress that the bill which became the Perishable Agricultural Commodities Act of 1930 “would create a huge federal bureaucracy.”). Indeed, legislators “never can foresee all the questions” that arise from the enactment of a statute, and “one of the most basic questions of legislative policy and craftsmanship [is] . . . how far the enacting authority ought to try to anticipate all the questions and proliferate details.” *Id.* at 127.

32. *Id.* at 117.

33. *Id.* at 118-19.

34. *Id.* at 138. “General directions for the future may be of all degrees of definiteness and indefiniteness, depending upon what is possible and expedient. There is an element of arbitrariness in any attempt to classify the directions according to their specificity. But there may be utility also.” *Id.*

35. As Hart and Sacks explain:

The most precise form of authoritative general direction may conveniently be called a *rule*, although the term is often used much more broadly to signify a legal proposition of any kind. In the narrow and technical sense in which the term is here used, a rule may be defined as a legal direction which requires for its application nothing more than a determination of the happening or non-happening of physical or mental events — that is, determination of *fact*. An example would be [a] fifty-mile-an-hour speed statute

When a legal proposition functions successfully as a rule without the necessity of

policies.³⁷ Yet, according to Hart and Sacks, a legislator must balance

further elaboration, it needs . . . to be emphasized that some rather remarkable things have happened. The kind of situation bringing the rule into play has been accurately foreseen, and public policy with respect to it fully determined in advance. The rule has been successfully communicated to one or another of its addressees, and the addressee has properly identified the facts calling for its application. If the rule was complied with by the primary addressee, he has not only recognized its content and applicability but has shown a willingness to comply with it. If the rule was enforced by a judicial tribunal, its claim to acceptance as law has been officially confirmed under the most testing of all circumstances — in the light of the perspective of application to a concrete situation.

Id. at 139.

36. Hart and Sacks contend that:

Many legal arrangements cannot feasibly be cast in the form of a rule And often another form is deliberately chosen as preferable. Thus, a state may give over the effort to fix any single definite maximum speed on its highways, and return to the idea of the common law that no person should drive “at an unreasonable rate of speed.” This provision is of the type commonly known as a *standard*.

Unlike a rule, the application of a standard requires something more than a determination merely of the happening or non-happening of physical events. It requires a comparison of the quality or tendency of what happened in the particular instance with what is believed to be the quality or tendency of happenings in like situations. A standard may be defined broadly as a legal direction which can be applied only by making, in addition to a finding of what happened or is happening in the particular situation, a qualitative appraisal of those happenings in terms of their probable consequences, moral justification, or other aspect of general human experience.

Id. at 140.

37. As Hart and Sacks explain:

The great bulk of legal arrangements which speak directly to ordinary private citizens, telling them what they can, may, or must do, or not do, and what happens if they act differently, are in the form of rules, inchoate or perfected, and standards. So also are many of the arrangements which speak in the first instance to officials. But these two forms are far from comprising the whole framework of legal arrangements in an organized society. Notably to be contrasted with rules and standards are principles and policies.

Principles and policies are closely related, and for many purposes need not be distinguished from each other. A *policy* is simply a statement of objective. *E.g.*, full employment, the promotion of the practice and procedure of collective bargaining, national security, conservation of natural resources, etc. . . . A *principle* also describes a result to be achieved. But it differs in that it asserts that the result *ought* to be achieved and includes, either expressly or by reference to well-understood bodies of thought, a statement of *the reasons why* it should be achieved. *E.g.*, *pacta sunt servanda* — agreements should be observed; no person should be unjustly enriched; etc. . . .

Policies usually have reasons behind them, but they are likely to be less closely thought out and justified. At least in the extremes and for some purposes, there seems to be a significant difference between a mere statement of objective, which may be a matter of unreasoned preference, and a statement that a certain objective ought to be sought or a certain course of action followed, which necessarily involves a rationale founded on human experience of why this is so.

Principles and policies, like rules and standards, are general directive propositions, or elements of them. But unlike rules and standards they are not expressed in terms of the happening or non-happening of physical or mental events or of qualitative appraisals of such happenings drawn from human experience. They are on a much higher level of

her desire for perfect rational order and consistency in lawmaking against the paralysis which would occur if she “sought to develop an articulated and avowedly governing body of subsidiary principles and policies and implementing rules and standards” which would inform her how to vote on particular bills.³⁸ A good legislator, in facing personal doubt and uncertainty about the wisdom of voting in favor of a particular statutory rule or standard to be implemented by agency officials might, for example, deftly support expansive powers of administrative and judicial review along with extensive statutory “arrangements which prescribe the procedure to be followed [by the agency officials] in exercising the power; the information which must be secured; the people whose views must be listened to; the findings and justifications of the decision which must be made . . . [and other] formal requisites of action which must be observed.”³⁹ In general, Hart and Sacks suggest that an individual legislator be aware of the traditions of her legislative body;⁴⁰ be conversant in budgetary and tax matters needed for the “primary, first-line responsibility” of funding and maintaining government and quasi-governmental institutions necessary for the flourishing of the state;⁴¹ be of the mind to intermittently intervene in changing or modifying key judicial decisions, when necessary, while being willing to engage in “trouble-shooting” in private social arrangements when called for, giving due deference to private parties, courts, and administrative agencies as the “primary, front-line” source of laws.⁴²

abstraction, and obviously involve a vastly larger postponement of decision. A policy leaves to the addressee the entire job of figuring out how the stated objective is to be achieved, save only as the policy may be limited by rules and standards which mark the outer bounds of permissible choice. A principle gives the addressee only the additional help of a reason for what he is to try to do.

Id. at 141-42.

38. *Id.* at 153.

39. *Id.* at 153-54.

40. *Id.* at 157.

41. *Id.* at 164.

42. *Id.* Hart and Sacks describe this general legislative attitude as “discretion.” *Id.* at 165. “For a legislature is in session only intermittently. The number of problems within its authority vastly exceed the number with which in any one session it has time to grapple. A choice of the matters deemed most urgent must, therefore, be made.” *Id.* Moreover, in the exercise of this discretion, legislators do the following:

[L]egislators make two very distinct types of changes in the law governing private activity. The first type consists simply of changes in the grounds of decision that courts are directed to employ — of changes in other words, in the content of self-applying regulatory arrangements. The second consists of innovations in techniques of control going beyond the mere reformulation of grounds of decision.

Id.

B. Lawmaking and the Political Process

In chapter four of *The Legal Process*, Hart and Sacks hint at how an individual state legislator in America must be aware of the interplay of initiatives and referenda as legal devices of direct popular lawmaking that often interact with a state legislature in making new laws.⁴³ Furthermore, in this part of their book, Hart and Sacks discuss the concepts of legislative reapportionment and election procedure that are relevant for both state and federal legislators to be aware of in navigating their individual efforts at re-election.⁴⁴

At the end of chapter four, in a concluding “Note on the Relation Between the Voters’ Choice and the Determination of Public Policy By the Legislature,” Hart and Sacks make a number of significant points on what American voters can expect from their elected legislators.⁴⁵ First, reflecting on the American constitutional conception “that approximate equality in voting population ought to be taken as the overriding norm of fairness in legislative districting,”⁴⁶ the authors intellectually anchored this notion to the philosophical presupposition of “the legislature as the embodiment of the public will which ought . . . to reflect accurately the various attitudes and interests that people have.”⁴⁷ Hart and Sacks suggest that this constitutes a “basic misconception of the nature of the lawmaking process[.]”⁴⁸ Asking a series of rhetorical questions to follow up this point, they assert:

Are good statutes simply a reflection of what people already think? Compare the notion . . . that the people can make good laws by simply voting initiative petitions up or down. The legislature is an instrument, is it not, for arriving at general consensus and not an automatic Gallup poll for recording a consensus already arrived at?⁴⁹

43. *Id.* at 649-70. While a federal legislator is not subject to a national referendum or initiative to challenge his legislative work product, since the federal Constitution, unlike the constitutions of the several states, lacks any procedure for initiative or referendum, a federal legislator representing a state with an initiative or referendum procedure set forth in the state constitution should probably be concerned about direct popular lawmaking.

44. *Id.* at 670-86.

45. *Id.* at 687-91.

46. *Id.* at 687.

47. *Id.* In this regard, Hart and Sacks observe, “[c]ompare the traditional conception of French public law that the legislature is an ‘emanation’ from the people, and, indeed *the legal equivalent of the people themselves*. ‘The law (*loi*) is the general will, expressed either by the majority of citizens or a majority of their representatives.’” *Id.* (emphasis added) (citing FR. CONST. art VI).

48. *Id.*

49. *Id.*

A second observation Hart and Sacks make on voter preference and legislator lawmaking is that in the American system of legislative voting, where the executive is independently elected to a fixed term of office and individual legislators are, likewise, independently elected to fixed terms of office, “majorities are more likely to be shifting ones than in the parliamentary systems.”⁵⁰ Therefore:

The summoning of a majority for legislative action—whether it be a continuing majority to support a government, a more or less stable majority to try to execute a party program, or a constantly shifting majority to enact a series of bills—*calls necessarily for accommodation of conflicting views. The ways in which the effort at accommodation proceeds is of the essence of the legislative process.*⁵¹

Third, in legislative elections, each voter may only vote for one candidate.⁵² Since the successful candidate will identify himself with a particular measure, “the vote for him will to a degree be a vote for or against these measures.”⁵³ However, “the significance of the vote in this respect is necessarily severely limited”⁵⁴ for at least three reasons. First, “the legislator, no matter how fully he has adumbrated his views as a candidate, can seldom be sure that the majority or plurality of the voters who elected him represent also a majority or plurality of opinion for or against any particular measure.”⁵⁵ Secondly, “the voter can at most only express an opinion for or against the general policy of a proposed measure. [However, t]he practicalities of a campaign debar any meaningful discussion of the details of legislative proposals, even when these are of crucial importance and it is foreseeable that they are important.”⁵⁶ Finally, a legislator who is affiliated with one of the two

50. *Id.* at 688.

51. *Id.* (emphasis added).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* As Hart and Sacks further elaborate:

In the case of major issues which dominated the campaign, this may not be true. But in the case of most of the issues upon which the legislator must vote it will necessarily be true. All that any voter could do in the ballot box was to express a judgment on the totality of a candidate’s views and personal qualities — thumbs up or thumbs down. Personal qualities and not specific views at all may have determined the outcome of the election. But even if it be assumed that views were controlling, if the issues were many, as they ordinarily are, the number of possible combinations that could have yielded a favorable vote is so great as to make it either difficult or impossible to determine what the vote was on any particular issue.

Id. at 688-89.

56. *Id.* at 689. Moreover:

major American political parties must accommodate his views on particular issues to the party program or platform which “must be designed to secure approval and support from a majority of the electorate as a whole for the government in power.”⁵⁷ Thus, “there must be negotiation and accommodation of interests and desires among the representatives of many groups, economic, social, and geographical.”⁵⁸ In concluding their thoughts on lawmaking and the political process in chapter three of *The Legal Process*, Hart and Sacks offer a series of incisive and powerful questions about the relationship between the electorate and each voter’s individual legislator in the making of law:

In relation to how many . . . proposals [for legislative enactment] can useful guidance from the last election be counted upon?

In relation to how many would the details of bills and the final question of enactment *vel non* be better left to ministerial decision in fulfillment of previous commitments to the electorate?

In relation to how many is there genuine value in investigation, committee hearing and consultation, and floor debate by legislators who remain relatively free to vote yes or vote no?

On balance, how significantly can an election function as a first step in

The voter is even more clearly excluded from judgment with respect to those matters which emerge as important only in the course of legislative consideration and debate. *What positions must be yielded in order to muster the necessary majority to pass the bill? What positions ought to be yielded because in the testing crucible of the legislative process they have been exposed as unsound? At what point do changes in detail call for a change of view about the underlying policy of the bill?* Upon all such questions the voter in the end must trust the judgment of the representative. So also must he do this with respect to social problems arising after the election, which were not discussed in the campaign at all.

Id. (emphasis added).

57. *Id.*

58. *Id.* Interestingly:

In this process of hammering out a comprehensive legislative program, the constituents of an independent legislator have the advantage, if it is an advantage, of being represented by a free lance, able to throw his weight one way or another as the expediences seem to suggest. But this advantage is gained at the cost of any opportunity to judge in advance, or give direction to, the alignments which the representative makes.

A prime function of political parties is to furnish the voters this opportunity. The platform of a political party presents them with a pre-election plan of group action, including a preview of the accommodations of position among the various sub-groups which are deemed necessary to effectuate it.

Id.

the formation of public policy? Are not the people inescapably dependent upon the good faith and judgment with which, after due deliberation and due attention to current opinion in the constituency, their representatives act? Is not the election, then, significant chiefly as an after check, to encourage the exercise of good faith and judgment and discourage abuses?⁵⁹

C. *Legislators and the Legislative Process*

In chapter five of their book, Professors Hart and Sacks create a treasure trove of material which, when carefully sifted, is relevant to the responsibilities and roles of the good American legislator.⁶⁰ Chapter five consists of five major sections: (1) an introduction on the function of a legislature; (2) a discussion of codification and the revision of decisional law; (3) an appraisal of distinctively legislative techniques to control private conduct; (4) a review of some special problems of enforcement; and (5) a proposed but incomplete discussion of legislative investigations and other non-enactment functions.⁶¹ Of particular interest to the topic of the good American legislator are materials in chapter five which take a synoptical look at how an individual legislator fits into the institutional structure of a modern legislature, and which discuss a legislator's toolbox for controlling private conduct.⁶²

1. A Synoptical Look at How An Individual Legislator Fits Into the Institutional Structure of a Modern Legislature.

In the first section of their chapter on the legislative process, coupled with a brief prefatory note, Hart and Sacks pose two overarching questions which an individual legislator might well be interested in answering concerning concrete issues that could conceivably come to his attention. The first big question is: “[u]nder what circumstances is it *wise* for the legislature to seek to solve an admitted problem by formal enactment?”⁶³ The second mega-question is: “[b]y *what criteria*, if any, may we conclude that a particular

59. *Id.* at 691.

60. *Id.* at 693-1007.

61. *Id.* Because their book was always a work-in-progress, Hart and Sacks left bracketed certain sections for later revision. For example, they never completed section five of chapter five dealing with legislative investigations and other non-enactment functions. *See id.* at 1007.

62. *Id.* at 693-1007.

63. *Id.* at 693 (emphasis added).

enactment is *sound* or *unsound*?”⁶⁴ The authors, in offering a preliminary analysis of these large inquiries focus our attention on the institutional potential of a legislative body—what they refer to as “the overall potential of the legislature as an operating institution” entailing “the total work it must perform and the organizational structure and procedures through which it performs that work.”⁶⁵ In addition, they make a number of exploratory points about how a good legislator might judge a proposed legislative measure as being good or bad.⁶⁶ Some of these inchoate observations include the following:

[T]o what extent the legislature should in any given case seek to *elaborate* the statute, leaving a minimum of decision to the future, and to what extent it should leave the elaboration of the statute to other institutions (*e.g.*, private persons, prosecutors, courts, and administrative agencies)?⁶⁷

Consider whether the legislature has selected the *best technique of enforcement* from among those available.⁶⁸

Consider whether a given statute seeks to control conduct *beyond the limits of effective legal action*.⁶⁹

Consider whether the best criterion of sound legislation is *the test of whether it is the product of a sound process of enactment*.⁷⁰

64. *Id.* (emphasis added).

65. *Id.*

66. *Id.* at 694-95.

67. *Id.* at 694 (emphasis added). “Here we have the fundamental issue of the use of general versus the use of specific language in statutes.” *Id.*

68. *Id.* (emphasis added). “Can a body of dependable knowledge be built up concerning the workings of various types of sanctions?” *Id.* at 694-95.

69. *Id.* at 695 (emphasis added). “Is it possible to indicate at least in general terms, the outer bounds of *wise and effective* legal control?” *Id.* (emphasis added).

70. *Id.* (emphasis added). Hart and Sacks elaborate on this point as follows:

All will probably agree that procedure is a relevant consideration. There is less agreement about the elements of a sound process.

There is general agreement that the legislative process should strive to achieve certain qualities. Thus, it ought to be an *informed process*, in the sense that key decisions are not made until relevant information has been acquired. It ought to be a *deliberative process*, in the sense that key decisions are not made until there has been a full interchange of views and arguments among those making the decisions. And it ought to be an *efficient process*, in the sense that all legislative proposals ought to be disposed of in the time available, with more significant ones receiving proportionately more time. Note that the needs of efficiency may interfere with the ideals of information and deliberation.

Id.

To what extent should the legislative process be a *rational process*, whereby policy judgments and factual information become the basis of *carefully reasoned solutions*; and to what extent ought the process rather to reflect the *relative strengths of the pressures of competing interest groups*?⁷¹

To what extent should the [individual] *legislator feel responsibility to initiate legislation on his own*; and to what extent is his function rather to *review proposals made by others*?⁷²

Ought the legislative process to be so constructed that the views of a *majority can easily be translated into law*; or is it desirable that there be means *whereby a minority can obstruct action* on matters upon which it feels especially strongly, at least until the majority becomes equally impassioned?⁷³

After these intriguing introductory queries, Hart and Sacks articulate a central organizing principle for understanding the business of an American legislature.⁷⁴ They boldly contend, in this regard, that “[i]f, as is true of every legislature in the United States, the size of [the legislative] workload is such that no individual legislator can possibly obtain an understanding of each bill that must be disposed of, then the ideals of an informed and deliberative process take on a new meaning.”⁷⁵ Related to this key principle, the authors highlight an issue which is critical to the conception of a legal system consisting of multiple legal processes, meshing with one another and helping to contribute to a whole which is greater than the sum of its individual parts: “the great problem of the appropriate division of responsibility between courts and [the] legislature in the *creative development of law*.”⁷⁶

In introducing the “[m]ajor [t]asks”⁷⁷ of an American state or federal legislative body—and by implication, the matters that a serious legislator should care about—Hart and Sacks discuss five major legislative functions: (a) organizing, supervising and improving the

71. *Id.* (emphasis added).

72. *Id.* (emphasis added). “Bearing on this is the identification of persons and groups from whom legislative proposals can be expected.” *Id.*

73. *Id.* (emphasis added).

74. *Id.* at 696.

75. *Id.* “We can better appraise, for example, the need for delegating legislative functions through a committee system and for legislating virtually by common consent. We can better understand the potentialities and limitations of floor debate and the problems of legislative leadership.” *Id.*

76. *Id.* at 697 (emphasis added).

77. *Id.*

entire governmental structure and procedures of government,⁷⁸ (b) managing the public purse (a task that should be on the “top” of a legislator’s commitment of her “time and energy”),⁷⁹ (c) promulgation, review, and modification of general laws affecting private individuals and institutions⁸⁰ (such as regulation by government administrative officials, “new, self-applying statutes” and grants or entitlements to government services and benefits as well as general responsibility for updating and improving legal doctrine);⁸¹ (d) consideration of private

78. *Id.* The authors point out, in this regard, that where constitutional law “leaves off in the assignment of official powers, the legislature must move in and complete the job, either by making the assignments itself or by delegating the authority to do so to some other agency.” *Id.* Moreover, “[t]he job is never complete” and “[a]s government encounters new problems and needs, additional or at least new units must be constructed.” *Id.* Writing from the perspective of the late 1950s, the authors suggest that a “dramatic . . . example is the establishment of the National Aeronautics and Space Agency [Administration (NASA)].” *Id.* An early twenty-first century example would be the Department of Homeland Security formed by Congress in the aftermath of the September 11th terrorist attacks. Government housekeeping is part of the legislative function since “[t]here must be provision for the hiring of personnel and fixing of salaries, the building or purchase of buildings in which to house them, the acquisition of an endless variety of supplies” and other such tedious matters. *Id.* at 698. If some of these matters are delegated to administrative officials of the executive branch of government, the “legislature must discharge its ultimate responsibilities by setting standards for the administrator[s] to follow” and also be concerned about checking and balancing the power delegated to other officials. *Id.*

79. *Id.* at 698.

Prime responsibility for public finance rests with the legislature, on the side both of revenue and expenditure. Taxes must be authorized by statute, and public borrowing also. In the usual constitutional provision that no money shall be paid out of the public treasury except in pursuance of an appropriation authorized by law fixes legislative responsibility for expenditures. *The discharge of this function requires periodic scrutiny of the whole range of governmental activity and judgment upon its justification and extent.*

Id. (emphasis added).

80. *Id.* The authors argue:

This area of responsibility involves the formulation of techniques of control which only the legislature can initiate or authorize. It covers every kind of social problem, small or large, with respect to which a change is *proposed* which cannot be accomplished by the characteristic judicial method of elaborating and announcing reasoned grounds of decision.

Id. Thus, these distinctive legislative techniques of social control “include such regulatory techniques as the self-applying law to be enforced by criminal sanctions as well as all the varieties of administered regulation, such as licensing. They also encompass many non-regulatory measures, including the provision of governmental services.” *Id.* The authors asked the reader to “consider” federal as well as state “legislative effort that must go into the provision of education, roads and highways, protective services, and the like.” *Id.*

81. *Id.* at 699-700, 703-04. Legislative responsibility for legal doctrine is twofold, entailing, first, codification of particular aspects of unwritten, judge-made law in conjunction with “periodic general revision of statutory law” already on the books (amounting “merely to an improvement in the mechanical organization of statutory sections, paragraphs, and clauses, or . . . the thoughtful and creative revision of the [statutory] law in light of experience”), *id.* at 699, and second, “repair and

and special legislation to deal with isolated problems, measures of local application or other relatively trivial concerns;⁸² and (e) various non-enactment jobs like investigations, confirmations of executive nominees for public offices, impeachment proceedings and matters of legislative housekeeping (such as revising chamber rules of procedure).⁸³ In addition, Hart and Sacks leaven the description of the institutional responsibilities of a modern American legislature with perceptive insights on how these tasks might impact and overlap with the challenges facing an individual legislator.⁸⁴ For instance, the authors observe the hard reality that, as arduous as the challenges may be, a legislator must work hard “to secure nomination and election and to keep political fences in order in the interim between campaigns.”⁸⁵ A legislator must master the delicate complexities of acting as an “intermediary between constituents and the numerous branches of the executive department with which she has to deal.”⁸⁶ Additionally, a legislator must decide how ambitious she wants to be in pursuing the tasks of codification and law revision, and how content she is “to rely on committees and staffs of experts and technicians.”⁸⁷

modification of legal doctrine” as elaborated by the courts or agencies, on the one hand, or outmoded statutes on the other. *Id.* at 699-700.

82. *Id.* at 701. Indeed:

Among the responsibilities assumed by most legislatures is that of decision about a vast mass of particular matters, embodied in special acts of various kinds. In many states, legislatures continue to dispose of great numbers of individual claims against the state government by private acts. Various kinds of public benefits are dispersed by the same method. Some legislatures, also, are heavily preoccupied with measures of purely local application, involving decisions which in other states are delegated to political subdivisions.

Id. The individual who aspires to be a good legislator should take careful note of the costs and benefits of becoming too heavily involved in these relatively unimportant matters. Hart and Sacks observe, in this regard:

One of the major planks in almost every program of reform of legislative processes is the elimination of these trivia by appropriate delegation to courts and executive and administrative agencies. But meanwhile the pressure of these obligations limits sharply the time and energy available for larger problems.

Id. (emphasis added).

83. *Id.* at 701-02.

84. *Id.*

85. *Id.* at 702.

86. *Id.* (“How to make this job [of being an intermediary] manageable, and to do it both helpfully and without improper interference with executive activities, is one of the foremost problems confronting legislators.”).

87. *Id.* at 699.

2. A Legislator's Toolbox for Controlling Private Conduct

What methods, what procedures, what incentives and disincentives can the good legislator deploy in achieving the worthy public goals of educational achievement, environmental protection, economic security and the like that she seeks for her constituents? Hart and Sacks provide a panoply of insights and comments in describing the legislator's toolkit, which consists of five major kinds of tools and multiple specialized instruments of social control within those groupings. The five major kinds of tools consist of: (a) private autonomy with government taking a hands-off approach; (b) governmental regulation; (c) direct coercion; (d) government inducement; and (e) direct government involvement.⁸⁸

a. Private Autonomy and the Method of Government Hands-off⁸⁹

Incorporating their extensive discussion earlier in *The Legal Process* on the importance of "autonomous private ordering" to a healthy legal order,⁹⁰ the authors point out that this *laissez-faire* technique of governmental non-control is, actually, a tool "open to a

88. *See id.* at 844-63.

89. *Id.* at 845.

90. *Id.* In earlier chapters of their book, Hart and Sacks portray what they call "[t]he [i]nterplay of [p]rivate and [o]fficial [p]rocedures for [d]ecision." *Id.* at 6. They address this issue at the beginning of their work:

The procedures of decision of questions of group concern which are most readily thought of as institutionalized, or regularized, are those which are manned by *officials* — that is, by individuals designated to act and acting, formally and avowedly, in behalf of the society. Among these are the procedures of public prosecution, of judicial decision, of legislative enactment, of executive and administrative action, and the like — together with the procedure of public education in which . . . the voter acts in an essentially official capacity. . . .

Not every question of group concern, however, can be decided by officials, and certainly not every such question in the first instance. Every society necessarily assigns many kinds of questions to private decision, and then backs up the private decision, if it has been duly made, when and if it is challenged before officials. Thus, private persons are empowered by observance of a prescribed procedure, to oblige themselves to carry out certain contractual undertakings, and, if dispute arises, to settle their differences for themselves. So may a host of other matters be settled which are immediately of private, but potentially of public, concern. In a genuine sense, these procedures of private decision, too, become institutionalized. An understanding of how they work is vital to an understanding of the institutional system as a whole.

Id. at 6-7. *See also id.* at 9-10 (discussing, by way of introduction, two classic Hart and Sacks "problems" that illustrate how private ordering interacts with public expectations and values); *id.* at 183-339 (discussing, in general, the role of private ordering and some of its problems and, more specifically, private ordering arrangements of "primary activity" and "remedial activity."); *id.* at 132-33 (detailing principles and methods of autonomous private ordering).

legislature.”⁹¹ Moreover, they contend that “it will often happen, when the status quo” governing a particular public policy issue “is one of control, that the legislature is the only institution empowered to remove the control”⁹²—as, for example, de-regulating a particular problem like entry and rates of trucking firms in interstate or intrastate commerce.

b. The Method of Governmental Regulation⁹³

Hart and Sacks divide the legislative technique of governmental regulation into two subdivisions: (1) self-applying regulation, and (2) individualized regulation.⁹⁴ They observe that while there are certain advantages to self-applying regulation—such as decentralized control and low enforcement expenditures—“severe limitations” exist in the “looseness” of its nature.⁹⁵ The authors offer an apt illustration of these limitations: “If society is really in earnest about having its doctors competent . . . it is hardly likely to trust to a general definition of competence, coupled with a prohibition against practicing medicine unless you can satisfy it, to be applied by the would-be doctors themselves, subject only to an aftercheck.”⁹⁶ Thus, “[i]n this and many other situations, what is felt to be needed is an individualized, case-by-case application by officials.”⁹⁷ The authors articulate five specific types of individualized regulatory tools.

(1) *Prerequisites*. This technique is, at its heart, “a prior check” that “tells people to have some kind of dealings with an official before going ahead to do what they want to do.”⁹⁸ Thus, “[t]he effect of satisfying the preliminary requirement may be to create a liberty to follow a proposed course of action, or to confer a power to effectuate a proposed transaction, or both.”⁹⁹

Prerequisites help achieve “preventative justice” for a number of reasons.¹⁰⁰ First, such a technique—as, for example, registering an automobile for a fee—may help ensure the collection of revenue up

91. *Id.* at 845.

92. *Id.*

93. *Id.*

94. *Id.* at 846.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 847.

99. *Id.* (“Prerequisites always have a self-applying aspect. ‘Do not do this kind of thing without a license, or you will be subject to a penalty.’ ‘If you want to accomplish this kind of legal result, you must first get official approval, or you will encounter the sanction of nullity.’”).

100. *Id.* at 848.

front, without the need to result to cumbersome collection procedures.¹⁰¹ Second, revocation of a license allows the possibility of “an additional and often uniquely effective sanction for violation.”¹⁰² Third, an advance need for official approval fosters the ability to “scrutinize proposed transactions or activities in advance, in order to see whether they should be authorized.”¹⁰³ Fourth, “[a]dvance permission is useful, too, to prevent things from being done which would be hard to undo, if they turned out to be undesirable,” like constructing a pier in a harbor, or erecting a multi-story office building in a mixed commercial-residential part of town.¹⁰⁴ Fifth, the tool of prerequisites helps the government, when it decides that it is socially appropriate and necessary, to protect scarce resources (such as preserving the water quality of a lake by requiring permits to discharge pollutants), or to encourage coordinated, efficient economic infrastructure (such as deciding to create quasi-monopolistic public utilities under private ownership).¹⁰⁵

Hart and Sacks provide a useful suggestion to the good American legislator in conducting what they described as “a systematic review of the state and federal statute books designed to weed out the prior checks which are unjustifiable and to simplify and expedite the administration of the others.”¹⁰⁶

(2) *Postrequisites*. Another special tool of individualized regulation is the use of postrequisites, which offer the advantage of relieving individuals and associations of obtaining advance official approval.¹⁰⁷ A “postrequisite is a requirement that [someone], *after rather than before doing a certain act*, file a report, or do something else calling for official attention, as a condition of validity of the primary act.”¹⁰⁸

The effect of a postrequisite “may be to validate an attempted exercise of a legal power.”¹⁰⁹ Alternatively, “it may be to relieve the actor from the consequences of what otherwise would be a breach of duty—in effect creating after the event a liberty.”¹¹⁰ Recording statutes for real estate transactions and reporting requirements for certain

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 849.

105. *Id.*

106. *Id.* at 850.

107. *Id.*

108. *Id.* (emphasis added).

109. *Id.*

110. *Id.*

businesses—like hazardous chemical production reports—are illustrations of regulatory postrequisites.¹¹¹

(3) *Individualized Dissolution and Readjustment of Legal Relations.* “Closely related to the prerequisite . . . are those arrangements which authorize important alterations in a preexisting legal status or position but require an individualized approval as a condition of it.”¹¹² Prominent examples of this legislative tool include statutes requiring judicial approval before divorces are granted, aliens are naturalized as American citizens, or the debts of individuals or businesses are discharged or modified by way of bankruptcy.¹¹³

As a matter of public policy, this legislative tool should be reserved for serious changes in existing social arrangements where “the interests of other individuals are so seriously affected as to require a formal hearing and determination.”¹¹⁴ This technique is also appropriate to address “dispensations from general law” when a genuine hardship or fundamental public reason justifies the exceptional treatment.¹¹⁵ Zoning variance laws or statutes providing for exceptions for certain environmental regulations are examples of this regulatory tool. Of course, one needs to be aware that “[s]uch dispensations . . . are rare in the American legal system” because of “dangers of unfair preference, as well as the difficulties of [evenhanded] administration.”¹¹⁶

(4) *Individual Directions.* A legislative tool that allows scrutiny of compliance with various laws by individuals or firms consists of delegating authority to a public official to supervise and, if needed, sanction members of the regulated community.¹¹⁷ Such a legislative approach can be as simple as empowering a police officer to stop speeding automobiles and issue traffic tickets, or as complicated as ceding discretionary authority to an administrative agency to issue cease and desist orders for violations of consumer protection laws or labor laws. Use of the technique of individual directions, however, should usually be accompanied by careful directions of fair procedures of notice, hearing and judicial review.¹¹⁸

(5) *Exactions.* “An exaction is a requirement of rendering a described, affirmative performance to the government, in money,

111. *Id.*

112. *Id.* at 851.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 851-53.

118. *Id.* at 852.

services, or property.”¹¹⁹ Although “highly exceptional in American law,”¹²⁰ the technique is “of the highest importance in the few situations in which it is used.”¹²¹ Taxation, military conscription, jury duty and the obligation to give testimony are all significant exactions.¹²²

c. The Method of Direct Coercion¹²³

On occasion, a legislator may conclude that techniques of direct coercion are called for in enforcing the law. Examples of this approach include official confiscation and destruction of private property deemed to be dangerous to public health, prohibiting certain classes of aliens from entering the country, and deporting certain aliens for various reasons.¹²⁴

d. The Method of Inducement¹²⁵

As Hart and Sacks opine, “in pursuit of the ultimate goal of maximizing the satisfactions of valid human wants, the law finds many a tool besides force that suits its purpose.”¹²⁶ Hart and Sacks focused on three specific methods of inducement: persuasion, rewards, and government contracts.

(1) *Persuasion*. “At the opposite extreme from direction coercion are the seemingly gentle processes of persuasion and appeal to public opinion.”¹²⁷ The good legislator not only will vote for legislative proposals that authorize programs by administrative officials which rely on persuasive features—such as information brochures, television and radio public service announcements, and the like—but will also seek his own ways to communicate with constituents and urge public-spirited behavior.

(2) *Pecuniary or Other Rewards*. Hart and Sacks point out: “[a]s in the government of a family so in that of society, a reward may be more effective than either persuasion or command in inducing desired conduct.”¹²⁸ Drawing upon American history to illustrate instances of

119. *Id.* at 853.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 854.

125. *Id.* at 855.

126. *Id.*

127. *Id.*

128. *Id.*

enlightened federal legislative rewards which helped to achieve the purposes of expanding the Nation and stabilizing the economy, the authors observed:

The United States could scarcely have populated the Great West by telling people they were under a duty to settle there. But the promise of a homestead proved effective. Grants of mining patents have similarly encouraged prospecting for minerals on the public lands. Farmers are notoriously recalcitrant when any outsider tries to tell them how to farm. Whether the United States would have constitutional power to compel farmers to adopt better practices for conservation of the soil is highly doubtful, but no such undertaking would have been practicable in any case. The device of subsidy paid upon condition of an agreement to observed stipulated practice, however, has been accepted and has been measurably successful. In recent years the subsidy has been employed in a wide variety of other fields, and has come to loom as a more and more formidable instrument of government policy.¹²⁹

(3) *Bilateral Government Contracts*. In structuring programs by legislation, the good legislator should be aware that government contracts can serve as vital tools of “governmental housekeeping” as well as “instruments of conscious control of primary private activity.”¹³⁰ Thus, the government can often “secure results more readily by contract than [it] could [obtain] by regulation,” due to the obligor’s personal agreement to meet negotiated contract terms such as prevailing wages, fair and equitable hiring practices, and non-discriminatory employment practices.¹³¹ Moreover, “[t]he government contract, as a device for controlling private conduct, has its own distinctive sanction of the withholding of payment, or of future agreement,” which “lends itself readily to individualization in the light of the particular circumstances of each contractor.”¹³²

e. The Method of Direct Government Action¹³³

Hart and Sacks, drawing, in part, on Hart’s experience as a

129. *Id.* at 855-56. Hart and Sacks contend, in this regard, that “[i]n substance, the patent and copyright laws proceed upon the same principle” by rewarding creative persons with “a specially declared duty of other people, for a limited period of time, not to appropriate without permission the results of [a] writing or invention.” *Id.* at 856.

130. *Id.*

131. *Id.*

132. *Id.* at 857.

133. *Id.*

government lawyer during the New Deal,¹³⁴ articulate another option available to legislators who contemplate the sound crafting of government programs. “In lieu of telling private persons what to do — by regulation, direct coercion, or attempted inducement of desired conduct — the government has always the alternative of *doing the thing itself*.”¹³⁵ Therefore, a legislator may decide that government should, for example, “build the bridge, run the postal service or school system, conduct the research, or own and operate the atomic pile.”¹³⁶ Accordingly, “[i]nstead of trying to create the conditions under which the people can help themselves, in other words, it may provide them with direct assistance.”¹³⁷

The authors discuss, in considerable detail, eight specific techniques of direct government action which, in theory, “may be used in aid of private ordering as well as displacement of it” such that “properly used, are means of enhancing the practical abilities of some people and restricting those of others in such a way as to make for a fairer and more effective interplay of abilities among the members of the society generally.”¹³⁸ These eight specific techniques of direct government action consist of the following: (1) *public education*,¹³⁹ (2) *information and publicity*,¹⁴⁰ (3) *research services*,¹⁴¹ (4) *protective services*,¹⁴² (5) *public works*,¹⁴³ (6) *donations*,¹⁴⁴ (7) *governmental*

134. See e.g., *id.* at lxxviii (discussing Hart’s government experience).

135. *Id.* at 857 (emphasis added).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 858. Hart and Sacks opine that “[p]erhaps the most telling example of a socially useful government service is public education. Here the government adds directly to the stock of society’s principal resource: the socially beneficial abilities of human beings.” *Id.* Educational services provided by the government run “from the cradle to the grave” including “nursery schools through kindergartens, elementary and secondary schools, trade schools, colleges and universities, to extension services” and public libraries. *Id.*

140. *Id.* Examples of governmentally-provided information and publicity include the decennial national census-taking, weather business data and crop forecasts. *Id.* at 858-59.

141. *Id.* at 859.

142. *Id.* According to Hart and Sacks:

The government offers protection to people against a great variety of hazards, both natural and man made. These include most conspicuously the service of national defense and the domestic service of police protection. These include also protection against the natural forces of fire, flood, drought and storm. They include the protection of plants and animals against pests and disease. They include manifold forms of protection of human beings against the occurrence of accident or disease and against its consequences. Hospital services of various kinds seem properly to be included in this category.

Id. at 859-60.

143. *Id.* at 860.

assurance,¹⁴⁵ and (8) *governmental enterprises*.¹⁴⁶

D. Miscellaneous Wisdom for the Good Legislator

Throughout *The Legal Process*, Professors Hart and Sacks make comments and observations that are instructive for the good legislator. These miscellaneous points can be usefully grouped into four categories: (1) private ordering perspectives for legislators, (2) legislative interactions with courts, (3) legislative interplay with administrative agencies, and (4) the responsibility of the legislature in the interpretation of statutes.

1. Private Ordering Perspectives for Legislators

A perspicacious legislator should know that, in the overall architecture of the American legal system, private decisionmakers—often assisted by their lawyers—form the foundation.¹⁴⁷ In the great bulk of lawmaking in America, “private decisionmakers are in the saddle and the courts play a supplementing, facilitating role. The legislature and executive and administration officials are in the far background.”¹⁴⁸ Yet, as Hart and Sacks warn, private decisionmakers, crafting laws that will govern their business affairs, must constantly “worry lest [they] precipitate a decision by the courts or by the legislature which will take away [their] present freedom of choice and establish for the future less favorable terms for such arrangements which are mandatory and inflexible.”¹⁴⁹ From the standpoint of a legislator, however, what is past

144. *Id.* (“Examples of donations are disaster relief, poor relief, the soldier’s bonus, and pensions and veteran’s benefits whenever these are made available after the private performance being recognized was rendered.”).

145. *Id.* at 860-61. Examples of governmental assurance provided by Hart and Sacks include money and currency, government bonds, social security laws, governmental guarantees of loans, and governmental certifications of various kinds (such as commodity grades of grain and meat). *Id.* at 861.

146. *Id.* at 862-63. A prominent example of a government enterprise is the Tennessee Valley Authority (TVA). *Id.* at 862.

147. *Id.*

148. *Id.* at 183. *Cf. id.* at 286-87 (discussing “The Great Pyramid of Legal Order”).

149. *Id.* at 184. Hart and Sacks reproduce, in part, David F. Cavers, *Legal Education and Lawyer-Made Law*, 54 W. VA. L. REV. 177 (1952). *Id.* at 186-88. Cavers notes: “It is a fact that a great deal of the law under which all of us live and work in these United States is written, not by Congress and the state legislatures or by the courts and the administrative agencies, but by American lawyers, sitting in their offices” Cavers, *supra* at 178-79. Moreover, Cavers observes that “the laws that the lawyers write are not called statutes, regulations, and ordinances, or judgments, decrees and orders. We have labels for them such as contracts, deeds, mortgages, indentures, leases, wills, trusts, settlements, charters, by-laws, and scores of other terms” *Id.* at

is prologue; past private arrangements and experiences coupled with judicial review of these matters provide working hypotheses, subject to alteration by the legislature, of how “the power of decision *ought* to be allocated among the various agencies, both private and official, who might be given a share of it.”¹⁵⁰ But the good legislator should try to distinguish those cases where legal arrangements should “be left primarily to private decision rather than being taken over by some officially manned procedure of decision”—such as the terms of commercial leases¹⁵¹—from those cases which require some legislative intervention—such as the terms of a residential lease. Hart and Sacks provide a worthy set of considerations for the conscientious legislator in performing these social judgments:

Consider the following needs which every lawmaker has:

Ability to get information about the relevant social and economic and economic facts.

Ability to get information about the relevant attitudes of people affected by the arrangement.

Ability to tailor the substance of the arrangement to the needs of special situations, when they are presently known to exist, and to the needs of unforeseen future situations, as they arise; or, in the alternative, the ability to arrange for such tailoring.

Ability to get the arrangement accepted by those who will be subject to it, either by inducing in them a sense of participation and resulting willingness to abide by it, or otherwise.

A procedure adequate to accomplish these things.

In what kinds of situations are private lawmakers likely to be in a better situation in these respects than any of the various kinds of official lawmakers?¹⁵²

When a legislator arrives at the conclusion that some type of

179.

150. HART & SACKS, *supra* note 3. Hart and Sacks illustrate this point in Problem No. 5, “Airline Liability for Lost or Damaged Baggage,” drawing upon the experience of “Railroad Liability for Lost or Damaged Freight” in Problem No. 4. *See id.* at 209-40 (railroad liability), 240-65 (airline liability).

151. *Id.* at 189.

152. *Id.* at 208-09.

statutory prescription of private lawmaking is socially advisable, she should be aware that “the legislature may address itself not merely to the *terms* of the arrangement but to the *manner* in which such terms”¹⁵³ are communicated by one party to another—as exemplified by the late nineteenth century state legislation governing contracts between shippers and railroads.¹⁵⁴ Furthermore, statutory prescriptions of private ordering arrangements can focus on merely “foster[ing] and in some degree attempt[ing] to coerce the establishment of hosts of private governments,”¹⁵⁵ as in the case of statutes that mandate good faith collective bargaining between management and labor, in private industry, to arrive at terms and conditions of employment for workers.¹⁵⁶ In addition, a vigilant legislator will be mindful of the separate legal issue of settling disputes between private parties and whether or not any official review of the terms of the settlement should be legislatively required to be approved by a government official.¹⁵⁷ Closely related to this issue are two further considerations: (a) whether or not a private official, like an arbitrator, should be legislatively allowed to impose a non-judicial resolution of a dispute on the parties,¹⁵⁸ and (b) whether or not a private organization should be legislatively permitted to impose a non-judicial resolution of an organizational dispute affecting members according to the organization’s idiosyncratic internal rules and procedures.¹⁵⁹

2. Legislative Interaction With Courts

For Hart and Sacks, a central concern of a good legislator should be one of *institutional competence* in the making of law.¹⁶⁰ With this concern in mind, a legislator should constantly ask himself two overriding questions: (a) “[w]ith respect to this particular matter, is the legislature as an institution a more appropriate agency of settlement than

153. *Id.* at 234 (emphasis added).

154. *See id.* at 233-35 (collecting some examples of state statutes).

155. *Id.* at 275.

156. *See id.* at 273-75.

157. *See id.* at 287-304 (discussing Problem No. 7, “Private Release: The Case of the Non-Litigious Employees” and the issue of whether a federal minimum wage and overtime statute allowed private compromise, by way of settlement, of employee wage claims against their employer).

158. *See id.* at 305-30 (discussing Problem No. 8, “Private Arbitration: The Case of the Litigious Investor”).

159. *See id.* at 331-39 (discussing Problem No. 9, “Settlement of Internal Disputes by Private Groups: The Case of the Cantankerous Colonel”).

160. *Id.* at 341.

a court?”¹⁶¹; and (b) “[i]s it desirable that the law in this area should take the form of an enactment [by way of statute] than of unwritten [judicial] grounds of decision?”¹⁶² To help answer these questions, the authors suggest that a conscientious legislator be aware that a legislature, in molding statutes, “may introduce new techniques of control which are beyond the reach of innovation by the decisional process,” and that the decisional process of common law adjudication has shortcomings as well as merits.¹⁶³ Chief among the attributes of the judicial process of lawmaking is the authority of courts, as government organs of “a last-ditch place or resort [to contribute] to the good ordering of society by holding themselves out as agencies of correction of law which is unclear or unjust.”¹⁶⁴ Prominent among the weaknesses of deploying courts as lawmakers is that “[t]he basic function of courts is . . . the function of settling disputes.”¹⁶⁵ A court’s primary function is not “the development of a body of decisional law.”¹⁶⁶ The good legislator knows, therefore, that judicial decisions that make new law or modify existing law often provide a stimulus to more elaborate legislative or private arrangements.¹⁶⁷ In a related, but reciprocal way, he is also aware that a good judge, in searching for relevant public policy in a difficult case, might canvass existing statutory enactments touching on the relevant issues in the dispute as “premises of reasoning” even though the statutes are not directly on point.¹⁶⁸

The able legislator, however, realizes that it is a “[m]yth” that the legislature is “[a]ll-[c]ompetent” and [i]ndefatigable.”¹⁶⁹ Indeed, due to idiosyncratic historical processes, a legislature may choose not to enact statutory law in particular substantive areas like Congress’ deference to the federal courts in causes of action by the United States in its

161. *Id.*

162. *Id.* Moreover, the thorough legislator should be aware that a serious judge will constantly be asking herself a series of related questions of institutional competence:

How should [I as a member of the judiciary] conceive of [my] responsibility to keep this [particular] body of law alive and growing? When can [I] properly say, “the decisional law is settled, and any new development or change must come from the legislature?” When [am I] obliged to say this? When, on the other hand, do [I] abdicate responsibility if [I] do so?

Id.

163. *Id.* at 342.

164. *Id.* at 343.

165. *Id.*

166. *Id.*

167. *See id.* at 362-82 (discussing the decision in *Norway Plains Co. v. Boston & Maine R.R.*, 67 Mass. (1 Gray) 263 (1854) and the legislative and private response to that decision).

168. *Id.* at 467.

169. *Id.* at 522.

proprietary capacity against private persons.¹⁷⁰ Moreover, a legislature may be overwhelmed with pressing problems of an emergent nature; the insightful legislator, then, would encourage courts to deal with novel legal issues through deciding the cases on the merits as determined by the judiciary through reasoned elaboration of common law principles and, if available, general legislative policies.¹⁷¹ The properly humble legislator does not buy into the fantasy of legislative omnipotence, but embraces judges as sagacious partners in wise social ordering.¹⁷² This should be the case at least in situations appropriate for adjudication and subject to reasoned decision so that judicial discretion does not roam too far.¹⁷³

3. Legislative Interplay with Administrative Agencies

Hart and Sacks suggest that the good legislator, in considering whether or not to vote for a particular measure, should carefully weigh the merits of the proposal in her own mind and try to fathom how the executive branch of government may respond to a statutory scheme.¹⁷⁴ The authors, by implication, acknowledge that even a good legislator, however, lacks knowledge and expertise on a variety of legal and administrative particulars, and yet must try to make the best possible judgment she can about how a proposed statute will be implemented by the executive branch.¹⁷⁵

Hart and Sacks, however, hint that a worthy legislator needs to realize that a legislature—unlike an administrative agency or a court—is not “well equipped to function as an agency of front-line adjustment of private relationships” in a society.¹⁷⁶ Realizing this inherent institutional limitation, therefore, should spur a wise legislator to entrust administrative agencies with reasonable discretionary authority to creatively implement many statutory schemes.

170. *Id.* at 522-24 (criticizing the U.S. Supreme Court’s abdication of lawmaking responsibility in *United States v. Standard Oil Co.*, 332 U.S. 301 (1947)).

171. *Id.* at 525.

172. *See id.* at 525-26.

173. *See id.* at 640-47 (discussing problems appropriate for adjudication).

174. *See id.* at 1040-41 (discussing hypothetical members of Congress considering the Taft-Hartley bill in 1947, and their interpretation of the President’s authority to resolve labor strikes involving the national interest).

175. *See id.*

176. *Id.* at 1042.

4. Legislative Responsibility For the Interpretation of Statutes

While chapter seven of *The Legal Process* is entitled “The Role of the Courts in the Interpretation of Statutes,”¹⁷⁷ numerous nuggets of wisdom exist in this material for informing the role of the conscientious legislator in the interpretation of statutes. Seven points in particular deserve some elaboration.

First, and foremost, in excerpting a nineteenth-century book on hermeneutics (exploring the fascinating case of a housekeeper saying to a domestic, “fetch some soupmeat”)¹⁷⁸ the authors drive home the point that “little or nothing is gained by attempting to speak with absolute clearness and endless specifications, but that human speech is the clearer, the less we endeavor to supply by words and specifications that interpretation which common sense must give to human words.”¹⁷⁹ Thus, the good legislator (in crafting the language of a bill in a committee mark-up proceeding, in offering amendments to a bill on the floor of a legislative body, in considering—in short—the clarity of the language being voted on) should think of the wise housekeeper’s fundamental simplicity in the use of words.

Second, continuing their themes of common sense and trust,¹⁸⁰ Hart

177. *See id.* at 1111-1380.

178. *Id.* at 1114 (quoting FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS 17-20 (2d ed. 1880)). According to the Victorian-era hermeneutics text, relied upon by Hart and Sacks, with enduring application to human affairs:

Common sense and good faith tell the domestic, that the housekeeper’s meaning was this: 1. He should go immediately, or as soon as his other occupations are finished; or if he be directed to do so in the evening, that he should go next day at the *usual* hour; 2. that the money handed him by the housekeeper is intended to pay for the meat thus ordered, and not as a present to him; 3. that he should buy such meat and of such part of the animal, as, to his knowledge, has commonly been used in the house he stays at, for making soups; 4. that he buy the best meat he can obtain, for a fair price; 5. that he go to that butcher who usually provides the family with whom the domestic resides, with meat, or to some convenient stall, and not to any unnecessarily distant place; 6. that he return the rest of the money; 7. that he bring home the meat in good faith, neither adding anything disagreeable nor injurious; 8. that he fetch the meat for the use of the family and not for himself. Suppose, on the other hand, the housekeeper, afraid of being misunderstood, had mentioned these eight specifications, she would not have obtained her object, if it were to exclude all *possibility* of misunderstanding. For, the various specifications would have required new ones. Where would be the end? We are constrained then, always, to leave a considerable part of our meaning to be found out by interpretation, which, in many cases must necessarily cause greater or less obscurity with regard to the exact meaning, which our words were intended to convey.

Id. (citation omitted).

179. *Id.* at 1115.

180. *See id.* (“However minutely we may define, somewhere we . . . must trust at last to common sense and good faith.”) (citation omitted).

and Sacks discredit the notion of a literal approach to statutory interpretation, while they urge the value of a half dozen pithy guidelines for interpreting linguistic commands found in the statutes. These guidelines are as follows:

Avoid linguistic naiveté.¹⁸¹

Meaning depends upon context.¹⁸²

An essential part of the context of every statute is its purpose.¹⁸³

The meaning of a statute is never plain unless it fits with some intelligible purpose.¹⁸⁴

The first task in the interpretation of any statute (or of any provision of a statute) is to determine what purpose ought to be attributed to it.¹⁸⁵

Deciding what purpose ought to be attributed to a statute is often difficult. But at least three things about it are always easy.¹⁸⁶

Third, the sagacious legislator needs to be aware that, despite his own enlightened theory of statutory interpretation and reasonable hopes that members of the judiciary will follow it, “[t]he hard truth of the matter,” in Hart and Sacks’ inimitable words, “is that American courts have no intelligible, generally accepted, and consistently applied theory

181. *Id.* at 1124 (“Avoid, in particular, the one-word, one-meaning fallacy. Words may have many different meanings. There are more ideas in the world to be expressed than there are words in any language in which to express them.”).

182. *Id.* (“The way in which you tell which of various possible meanings of a word is the right one is by reference to the context. [To verify this, look at the way any unabridged dictionary is made up.]”).

183. *Id.* (“Every statute must be conclusively presumed to be a purposive act. The idea of a statute without an intelligible purpose is foreign to the idea of law and inadmissible.”).

184. *Id.* (“Any judicial opinion . . . which finds a plain meaning in a statute without consideration of its purpose, condemns itself on its face. [Such] opinion[s] [are] linguistically, philosophically, legally and generally ignorant.”).

185. *Id.* at 1125 (“The principal problem in the development of a workable technique of interpretation is the formulation of accepted and acceptable criteria for the attribution of purpose.”).

186. *Id.* The three easy things, according to the authors, are:

(a) The statute ought always to be presumed to be the work of reasonable men pursuing reasonable purposes reasonably, unless the contrary is made unmistakably to appear. (b) The general words of a statute ought never to be read as directing an irrational pattern of particular applications. (c) What constitutes an irrational pattern of particular applications ought always to be judged in the light of the overriding and organizing purpose.

Id.

of statutory interpretation.”¹⁸⁷ The most that the good legislator can assume is that his theory of statutory interpretation “will have some foundation in experience and in the best practice of the wisest judges [and legislators], and that it will be well calculated to serve the ultimate purposes of law.”¹⁸⁸

Fourth, Hart and Sacks demonstrate that the wise legislator—who strives to extract insights from every quarter, from the past as well as the present—should be aware that musings about statutes, and how they should be construed, go back in time many centuries.¹⁸⁹ The authors incorporate a fascinating excerpt from William Blackstone’s *Commentaries* that counsels, “[t]he fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable.”¹⁹⁰ These Blackstonian “signs” are comprised of “the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law.”¹⁹¹ And, by perusing Blackstone, the good legislator understands that many of these insights about the legislative process and statutory construction are of an ancient vintage—harking back to the thoughts of the Roman lawyer Cicero, the interpretation of medieval Bolognian law, and the views of venerable commentators like Grotius.¹⁹² Blackstonian wisdom, moreover, suggests that a sober-minded legislator should hope for restrained judicial interpretation of the legislator’s handiwork because “law, without equity, though hard and disagreeable, is much more desirable for the public good, than equity without law; which would make every judge a legislator, and introduce most infinite confusion” because in the words of Professor Blackstone, “there would then be almost as many different rules of action laid down in our courts, as there are differences of capacity and sentiment in the human mind.”¹⁹³

Fifth, Hart and Sacks craft a mood of admiration for separation of powers values inherent in the American legal process by offering a proposed “[m]ood” for a court to “discharge [t]he function” of interpreting the respectful legislator’s work product.¹⁹⁴ The following aphorisms are offered by the authors:

187. *Id.* at 1169.

188. *Id.*

189. *Id.* at 1170.

190. *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *59-62).

191. *Id.* at 1170 (citation omitted).

192. *See id.* at 1170-71.

193. *Id.* at 1171 (citation omitted).

194. *Id.* at 1374.

[Courts should] [r]espect the position of the legislature as the chief policy-determining agency of the society, subject only to the limitations of the constitution under which it exercises its powers;

[Courts should] [r]espect the constitutional procedures for the enactment of bills;

[Courts should] [b]e mindful of the dependence of the legislature upon the good faith and good sense of the agencies of authoritative interpretation;

[Courts should] [b]e mindful of the nature of language and, in particular, of its special nature when used as a medium of giving authoritative general directions; and

[Courts should] [b]e mindful of the nature of law and of the fact that every statute is a part of the law and partakes of the qualities of law, particularly of the quality of striving for even-handed justice.¹⁹⁵

Sixth, Hart and Sacks remind the upstanding legislator that a critical feature of the legislative process, the judicial process—indeed, the entire legal process—is that there are limits on “[t]he [m]eaning [that] [w]ords [w]ill [b]ear.”¹⁹⁶ Thus, the good legislator in fashioning the words of a measure, in voting on words in a bill, in considering the words of a statute enacted into law should be mindful that “[t]he language belongs to the whole society and not to the legislature in office for the time being.”¹⁹⁷ Accordingly, a mature legislator needs to realize that while “[c]ourts on occasion can correct mistakes [in the words of a statute], by inserting or striking out a negative when it is completely clear from the context that a mistake has been made,” the judiciary “cannot permit the legislative process, and all the other processes which depend upon the integrity of language, to be subverted by the misuse of words.”¹⁹⁸ Therefore, the insightful legislator knows that a reviewing court examining the words of her statute at some time in the future will likely make judicious use of unabridged dictionaries to fathom *permissible*—not definite—linguistic meanings.¹⁹⁹ Judges will further study her statute with the help of textual maxims or canons “such as

195. *Id.*

196. *Id.* at 1375.

197. *Id.*

198. *Id.*

199. *Id.* at 1375-76.

ejusdem generis, expressio unius est exclusio alterius [and the like] as reassurances about the meaning which particular configurations of words *may* have in an appropriate context.”²⁰⁰ Maxims or canons “of [c]lear [s]tatement”²⁰¹ should also be a tool a legislator expects judges to employ in the task of reading a statute because these clear statement policies “have been judicially developed to promote objectives of the legal system which transcend the wishes of any particular session of the legislature,” often based on constitutional norms.²⁰²

Finally, chapter seven of *The Legal Process* reiterates for the good legislator the paramount importance of *articulating social purposes* in a statute and the concomitant reality that good judges will, likewise, emphasize *finding social purposes* in a statutory enactment. In “[i]nterpreting the [w]ords [of a statute] [t]o [c]arry [o]ut the [legislative] [p]urpose,”²⁰³ the complete legislator should be aware that conscientious judges will seek to give due regard: to the language of purpose in the statute, itself,²⁰⁴ to the “whole context of a statute” including internal legislative history,²⁰⁵ to appropriate post-enactment aids such as “judicial, administrative and popular construction of a statute”;²⁰⁶ and to various “presumption[s] drawn from some general policy of the law.”²⁰⁷

II. NEW LEGAL PROCESS PERSPECTIVES

“Legal process theory remains important in American law, but for recent generations of lawyers process theory has taken on new meanings and nuances.”²⁰⁸ These new legal process theorists can be usefully

200. *Id.* at 1376 (“They should not be treated as rules about the meaning which these configurations invariably *must* have.”). Hart and Sacks delve into this further:

As these maxims suggest, the proposition that words must not be given a meaning they will not bear operates almost wholly to *prevent* rather than to *compel* expansion of the scope of statutes. The meaning of words can almost always be narrowed if the context seems to call for narrowing.

Id.

201. *Id.*

202. *Id.* Thus, clear statement rules are particularly important in the case of criminal statutes, where the “words which mark the boundary between criminal and non-criminal conduct should speak with more than ordinary clearness,” *id.* at 1376-77, and when a court is faced with statutory language of such an expansive and provocative scope that “a court [decides not] to understand a legislature as directing a departure from a generally prevailing principle or policy of the law unless it does so clearly.” *Id.* at 1377.

203. *Id.* at 1380.

204. *Id.* at 1377.

205. *Id.* at 1379.

206. *Id.*

207. *Id.* at 1380.

208. Eskridge, *supra* note 11, at 206.

subdivided into three categories: (1) process formalists, (2) process progressives, and (3) process pragmatists. The discussion that follows focuses on what these three groups of theorists say, explicitly or by implication, about the institutional role and attributes of the good legislator.

A. *Process Formalists*

“The relatively traditional process thinkers emphasize the positivist features of that philosophy: its commitment to neutrality and neutral principles, the principle of institutional settlement, and the importance of continuity, precedent, and tradition in law,”²⁰⁹ among other characteristics.

Professor Dan Farber, in a 1989 article entitled *Statutory Interpretation and Legislative Supremacy*²¹⁰ offers a detailed model of process formalism. Farber makes several points relevant to a potential theory of the good legislator. First, from his discussion of “legislative supremacy” in policymaking vis-à-vis courts, one could infer that, in Farber’s view, a worthy legislator should be concerned about clearly articulating collective legislative intent in the words of a statute and in any accompanying documents of legislative history.²¹¹ To the extent intent is not clearly articulated, we would expect a Farberian legislator to try to change the language of a statute by appropriate amendment or, at the very least, to try to make a record of presumed legislative intent through floor statements or committee hearings.

Second, from Farber’s mention of a legislature’s “meta-intent”²¹²—a generalized collective process intent that goes beyond the specific substantive intent of the statute at bar, to contemplate, for example, that judges should not engage in “blind adherence to a statute” in the event of “an unforeseen development”²¹³ or that judges should not consider a future state of public opinion in interpreting a statute²¹⁴—one could infer that Farber would expect a conscientious legislator to see to it that the legislature has expressed this seeming contrarian intent somewhere in

209. *Id.* (“This group of thinkers is on the whole eclectic but formalist in its approach to law, emphasizing legislative supremacy and, with it, the importance of both textual plain meaning and legislative intent.”).

210. Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281 (1989).

211. *Id.* at 283.

212. *Id.*

213. *Id.* at 282.

214. *Id.* at 283.

the legislative record.

Third, Farber provokes thought on the meaning of a good legislator by the following observation:

The idea of legislative intent . . . is notoriously slippery. If it is taken to require that a majority of the legislators share the same subjective view of the statute, the condition will rarely be met. Most legislators do not have time actually to read and come to an independent understanding of the statutes on which they vote. Rather, legislators depend on institutional actors (sponsors, committees, floor leaders and staffers), who are charged with drafting statutes and moving them to enactment, to explain the meaning and import of the statutes under consideration. Legislators normally — quite legitimately — accept the statements of these actors as commitments about the meaning of the enactments.²¹⁵

This assertion suggests that as long as these primary institutional actors provide accurate and trustworthy accounts of the meaning of pertinent legislation, a conscientious legislator is justified in relying on short-cuts to ascertaining knowledge of the contents of proposed enactments. However, once this trust is breached, the implication of Farber's analysis is that the good legislator must do extra work in searching for replacement primary institutional actors to rely upon and, perhaps, rely only on his own close and complete readings of proposed statutory texts before casting a vote.

Fourth, Farber praises Chief Justice Burger's opinion in *Tenn. Valley Auth. v. Hill*²¹⁶ as "perhaps the most notable modern example of conscious judicial adherence to the supremacy principle."²¹⁷ Farber examines why it was appropriate for the Court to take Congress at its word in expressing the unqualified intent of Section 7 of the Endangered Species Act that "commanded all federal agencies 'to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence' of an endangered species, or 'result in the destruction or modification of habitat of such species'"²¹⁸ According to Farber, "As Chief Justice Burger's opinion made clear, Congress had repeatedly rejected efforts to qualify this language with references to the impairment of an agency's primary mission or to practicality. Moreover, the legislative history contains repeated references to the mandatory nature . . . of an agency's duty to protect

215. *Id.* at 290 (footnotes omitted).

216. 437 U.S. 153 (1978).

217. Farber, *supra* note 210, at 294.

218. *Id.* (quoting 16 U.S.C. § 1536 (1976) (amended 1979)).

endangered species.”²¹⁹ A judicial interpretation that would discount such outward manifestation of intent by Congress while favoring what individual members of Congress might have privately felt about the policies set forth in the Endangered Species Act “would legitimate . . . legislative hypocrisy.”²²⁰ In Farber’s view, a good legislator should be sincere in voting on a measure and, also, expect his colleagues in the legislature to be similarly sincere in their votes. A good legislator, then, like a good judge, in Farber’s words, should expect “the legislature to act with integrity” and to “hold legislators to their public positions.”²²¹

B. *Process Progressives*

“At the other side of the spectrum [from process formalists] but still within the legal process tradition, are the progressives, who emphasize law’s purposivism, the fidelity owed by officials to reason, and the central role of public values,”²²² among other themes. Additional commonalities of process progressives include (1) an anti-pluralist bias: “legislation must be more than the accommodation of exogenously defined interests; law-making is a process of value creation that should be informed by theories of justice and fairness”²²³; (2) an aspiration to transcend the justice and fairness deficiencies of legislation by “creative law-making by courts and agencies . . . to ensure rationality and justice in law”²²⁴; and (3) a stress on “the importance of dialogue or conversation as the means by which innovative lawmaking can be validated in a democratic polity and by which the rule of law can best be defended against charges of unfairness or illegitimacy.”²²⁵

The two most prominent proponents of process progressivism are Professor Ronald Dworkin and Professor William Eskridge, Jr. Dworkin, writing in his 1986 book, *Law’s Empire*,²²⁶ makes one over-

219. Farber, *supra* note 210, at 294 (footnotes omitted).

220. *Id.* at 298.

221. *Id.* (“Judges must not allow legislators to use statutes to strike poses, knowing that courts will bail them out later. Not only does the supremacy principle act as a constraint on courts, it also, indirectly, disciplines the legislature.”) (footnote omitted). For other process formalist views, *see, e.g.*, MARTIN H. REDISH, *THE FEDERAL COURTS IN THE POLITICAL ORDER: JUDICIAL JURISDICTION AND AMERICAN POLITICAL THEORY* (1991); Earl M. Maltz, *Rhetoric and Reality in the Theory of Statutory Interpretation: Underenforcement, Overenforcement, and the Problem of Legislative Supremacy*, 71 B.U. L. REV. 767 (1991).

222. Eskridge, *supra* note 11, at 206.

223. *Id.*

224. *Id.*

225. *Id.*

226. RONALD DWORKIN, *LAW’S EMPIRE* (1986).

arching argument that relates to the meaning of a good legislator. Dworkin asserts that a “community of principle”²²⁷ is worthier than a mere “rulebook community”²²⁸ and that “legislation as well as adjudication must be evaluated by its contribution to the principled integrity of the community.”²²⁹ As such, in Dworkin’s ideal community of principle, “‘integrity in legislation’ requires [the good legislator] to try to make the total set of laws morally coherent.”²³⁰ In his own words, “integrity in legislation . . . restricts what our legislators and other lawmakers may properly do in expanding or changing our public standards.”²³¹ By implication, moreover, Dworkin’s principle of “integrity in adjudication” which “requires our judges, so far as this is possible, to treat our present system of public standards as expressing and respecting a coherent set of principles, and, to that end, to interpret these standards to find implicit standards between and beneath the explicit ones,”²³² requires the good legislator to exercise integrity in legislation in trying to anticipate and ameliorate judicial exercise of integrity of adjudication. Presumably, the worthy legislator could meet the principle of legislation by insisting that statutory language grants broad powers of judicial review and judicial supplementation of core legislative standards.

Professor William Eskridge, in his 1994 book *Dynamic Statutory Interpretation*,²³³ advances a number of points relevant to a potential theory of a good legislator. I shall focus on five salient observations that Eskridge made. First, his description of statute-making “in the modern regulatory state”²³⁴ suggests that the proficient legislator in today’s

227. *Id.* at 216. Dworkin notes:

A community of principle accepts integrity. It condemns checkerboard statutes and less dramatic violations of that ideal as violating the associative character of its deep organization. Internally compromised statutes cannot be seen as flowing from any single coherent scheme of principle; on the contrary, they serve the incompatible aim of a rulebook community, which is to compromise convictions along lines of power. They contradict rather than confirm the commitment necessary to make a large and diverse political society a genuine rather than a bare community: the promise that law will be chosen, changed, developed, and interpreted in an overall principled way.

Id. at 214.

228. *Id.* at 212 (“People in a rulebook community are free to act in politics almost as selfishly as people in a community of circumstances can. Each one can use the standing political machinery to advance his own interests or ideals.”).

229. Eskridge, *supra* note 11, at 206.

230. *Id.* at 206-07.

231. DWORKIN, *supra* note 226, at 217.

232. *Id.*

233. WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994).

234. *Id.* at 2.

context of complexity must be adept at understanding sometimes arcane policy ends and means in an elaborate mosaic of overlapping regulatory statutes. Eskridge contends that modern statutes crafted by legislators:

are greater [in number]; more of them are detailed in their prescriptions; statutes are frequently written as directives not to the citizenry but to the bureaucracy. Statutes today often delegate to agencies the authority to make specific rules. The content of the statute then consists of creating or identifying the agency, structuring its decision making, and suggesting the overall goals or guidelines for the agency's ongoing implementation of the statutory scheme. The legitimacy and operation of the modern state begins, and sometimes ends, with the official whose job it is to apply and interpret the statute.²³⁵

Second, Eskridge updates and modifies the Hart and Sacks assumption that legislators are "reasonable persons pursuing reasonable purposes reasonably."²³⁶ According to Eskridge, this "assumption is either trivial or false under modern thinking about the legislative process,"²³⁷ because of the current realization that legislators, in their preoccupation to get re-elected, tend to avoid the hard and risky work of statutory policymaking in favor of other activities. As Eskridge explains:

[L]egislators have a complex bundle of goals, most notably achieving re-election and prestige inside the beltway, as well as contributing to good public policy. To the extent that reelection is an important goal of legislators, they tend to deemphasize bold policy entrepreneurship and, instead, seek out popular activities such as pork barrel projects and constituent service to please important interest groups while avoiding positions that antagonize constituents or groups, and work out compromises on big issues that cannot be avoided. Given these political realities, reasonable legislators do not always produce reasonable policies. Some statutes are little else but back-room deals which distribute public benefits to groups that legislators want to help. This suggests that identifying the actual or even conventional purpose of a statute is just as difficult as identifying the actual or conventional intent of the legislature, or perhaps even more so, since legislators may have incentives to obscure the real purposes of the statute. Legislators do not say, "This is a back-room deal, distributing rents to a group."

235. *Id.*

236. *Id.* at 26 (citing HART & SACKS, *supra* note 3, at 1378). *See also supra* note 186 and accompanying text.

237. ESKRIDGE, *supra* note 233, at 26.

Instead they say, “This statute helps America!”²³⁸

Eskridge’s insight about modern legislator behavior, while more skeptical than the Hart and Sacks view of the legislative process, does not obviate the conception of a good legislator. An Eskridgean good legislator simply needs to be more strategic: she needs to balance pursuit of pork, interaction with constituents and re-election activities with the pursuit of a few key legislative initiatives (e.g., authoring bills, co-sponsoring bills, committee or subcommittee oversight investigations, pursuit of legislative leadership posts, independent research) which she thinks are important for her district and for the larger polity (i.e. nation or state).²³⁹

Third, Eskridge adds nuance and sophistication to a description of modern legislative process in his explanation of legislative drafting of bills. He observes, in this regard:

[F]or any statute of consequence, the legislative drafting process ensures textual ambiguities, which only multiply over time. Ambiguities arise because there is no single author, because different authors write and rewrite provisions at different times and with different goals or strategies in mind, and because the goals of at least some of the authors are to create rather than avoid ambiguity.²⁴⁰

From the perspective of the good legislator, this insight suggests that the power and influence of an individual legislator can be magnified by having his staff keep track of bills that he cares about (for political, policy or ideological reasons) and offering proposed amendatory language (directly through his own suggestions or indirectly through another legislator, lobbyist or staff person).

Fourth, Eskridge expounds on the nature of personal perspective in the interpretation of statutory texts that has relevance for a robust theory of the good legislator. In rejecting what he labels “naive textualism” Eskridge contends that “the interpreter’s own context, including her situatedness in a certain generation and a certain status in our society, influences the way she reads simple texts.”²⁴¹ An astute legislator, like a crafty judge interpreting a statute in an adjudicatory setting, would be able to enhance her persuasive impact on other legislators in voting for or against particular language in a legislative document (e.g. bill, report,

238. *Id.* at 26-27 (footnotes omitted).

239. *See supra* notes 233-38 and accompanying text.

240. ESKRIDGE, *supra* note 233, at 38.

241. *Id.* at 41. *Cf.* Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1081-92 (2002) (discussing perspectivism as an aesthetic of law).

amendment, resolution) by fully appreciating the situatedness of other legislators and pitching reasons according to different perspectives.

Fifth, Eskridge helps a conscientious legislator to appreciate that “[b]ecause statutes have an indefinite life, they apply to fact situations well into the future,” and that “[w]hen successive applications of the statute occur in contexts not anticipated by its authors, the statute’s meaning evolves *beyond* original expectations.”²⁴² Moreover, as Eskridge explains, “sometimes subsequent applications reveal that factual or legal assumptions of the original statute have become (or were originally) erroneous; then the statute’s meaning often evolves *against* its original expectations.”²⁴³ Such deep knowledge about the legal process—amalgamating legislation, private ordering, adjudication and executive implementation—counsels for a legislator to cultivate epistemic humility in realizing that all things, including statutory enactments, evolve over time. Eskridge likens a statutory act to a

[V]essel launched on some one-way voyage from the old world to the new. The vessel is not going to return; nor are its passengers. Having only what they set out with, they cope as best they can. On arrival in the present, they deploy their native endowments under conditions originally unguessed at.”²⁴⁴

All in all, Eskridge points out that statutory interpretation is hierarchical and ever-changing—something the wise legislator should never forget:

Statutory interpretation is hierarchical and sequential. Interpretations by private parties can be corrected by administrators, who can be reversed by judges, who can be overridden by the legislature. Even if agencies and courts seriously sought to enforce original intent, text, or purpose, they would not do so because of a hydraulic process of feedback and anticipation which occurs as the system works out statutory meaning for issues that arise. Thus it is that agencies and courts are constantly pressed from below—by private communities of interpretation, by interest groups, by ground-level implementations of the statute—to interpret the statute in ways that are responsive to new facts, new needs, new ideas. They are also pressed from above—by congressional committees, by threat of legislative override, by the president—to interpret the statute in ways that are responsive to

242. ESKRIDGE, *supra* note 233, at 49.

243. *Id.* (footnote omitted).

244. *Id.* (quoting FRANCIS BENNION, STATUTORY INTERPRETATION 356 (1984)).

current rather than historical political preferences.²⁴⁵

C. Process Pragmatists

“In between process formalists and progressives lie a centrist group, which travels under the banner of ‘pragmatism.’”²⁴⁶ The overarching theme of this group of thinkers is “the eclectic and instrumental features of the process tradition: legal reasoning is a grab bag of different techniques, including not just textual analysis, but also sophisticated appreciation of the goals underlying the legal text and the consequences of adopting different interpretations.”²⁴⁷

While several commentators have struck process pragmatist notes,²⁴⁸ I will focus on the most prominent voice of this process-based legal philosophy: Judge Richard A. Posner.²⁴⁹ Two recent publications, one a book and one a law review article, provide his most recent thinking on the subject.²⁵⁰

In his 2003 book, *Law, Pragmatism and Democracy*,²⁵¹ Judge Posner makes numerous comments about law and pragmatism in a democratic context that helps us flesh out a good legislator theory. First, Posner contrasts the “pragmatic mood” with the speculative mood by contrasting the actions of Odysseus in Homer’s *Odyssey* with those of Achilles in the *Iliad*. As Posner explains:

The pragmatic mood is already visible in the *Odyssey*. The poem opens with Odysseus living on a remote island ruled by a nymph who offers him immortality if he will remain as her consort. A bit surprisingly to anyone steeped in the orthodox Western religio-philosophical-scientific tradition, he refuses, preferring mortality and a

245. ESKRIDGE, *supra* note 233, at 49.

246. ESKRIDGE, *supra* note 11, at 207 (footnotes omitted).

247. *Id.* (“Law involves a balance between form and substance, tradition and innovation, text and context.”).

248. See, e.g., DENNIS PATTERSON, *LAW AND TRUTH* (1996); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); Margaret J. Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781 (1989).

249. For a discussion of Posner’s judicial opinion style — which incorporates his pragmatic legal philosophy, see Robert F. Blomquist, *Dissent, Posner-Style: Judge Richard A. Posner’s First Decade of Dissenting Opinions, 1981-1991 — Toward an Aesthetics of Judicial Dissenting Style*, 69 MO. L. REV. 73 (2004); Robert F. Blomquist, *Playing on Words: Judge Richard A. Posner’s Appellate Opinions, 1981-82 — Ruminations on Sexy Judicial Opinion Style during an Extraordinary Rookie Season*, 68 U. CIN. L. REV. 651 (2000).

250. See *infra* notes 251-67 and accompanying text. Posner’s early thinking on pragmatism is articulated in two books: RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985) and RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990).

251. RICHARD A. POSNER, *LAW, PRAGMATISM AND DEMOCRACY* (2003).

dangerous struggle to regain his position as the king of a small, rocky island and be revisited with his son, aging wife, and old father. He turns down what the orthodox tradition says he should desire above all else, the peace that comes from overcoming the transience and vicissitudes of mortality, whether that peace takes the form of personal immortality or of communing with eternal verities, moral or scientific — in either case ushering us to the still point of the turning world. Odysseus prefers going to arriving, struggle to rest, exploring to achieving — curiosity is one of his most marked traits — and risk to certainty. . . .

Another thing that is odd about the protagonist, and the implicit values of the *Odyssey* from the orthodox standpoint is that Odysseus is not a *conventional* hero, the kind depicted in the *Iliad*. He is strong, brave, and skillful in fighting, but he is no Achilles (who had a divine mother) or even Ajax; and he relies on guile, trickery, and outright deception to a degree inconsistent with what we have come to think of as heroism or its depiction in the *Iliad*. His dominant trait is skill in coping with his environment rather than ability to impose himself upon it by brute force. He is the most intelligent person in the *Odyssey* but his intelligence is thoroughly practical, adaptive. Unlike Achilles, in the *Iliad*, who is given to reflection, notably about the heroic ethic itself, Odysseus is pragmatic. He is an instrumental reasoner rather than a speculative one.²⁵²

The good legislator, then, clutching the shield of Odysseus instead of the shield of Achilles, should embrace the hurley-burley of day-to-day political struggle; should appreciate the power of the indirect path in legislative maneuvering, avoiding, when possible, direct confrontation; should be skillful in tactical deception of opponents (and even allies) in the pursuit of legislative ends. Indeed, the Odyssean legislator implied by Posner's description, seems to be embodied in the machinations and intrigues of Lyndon Johnson's years in the United States Senate chronicled in Robert Caro's book, *Master of the Senate*.²⁵³

Second, Posner's take on pragmatism teaches the good legislator that values of commerce and evolution are important in fashioning useful legislative products. In short, Posner contends that citizens in a society, such as the United States, who are focused on trade, are little interested in "ultimate truths," and realize that argument and debate over fundamental issues "can be divisive as well as harmonizing."²⁵⁴

252. *Id.* at 26-27 (footnotes omitted).

253. ROBERT A. CARO, *MASTER OF THE SENATE* (2002).

254. POSNER, *supra* note 251, at 31.

Moreover, such citizens value human intelligence as a method to cope with their environment, not to arrive at “metaphysical insights that . . . have no adaptive value.”²⁵⁵ So the good legislator should go about his job looking for practical problems to solve while being mindful of the power of markets in allocating scarce resources.

Third, the wise legislator can learn about the utility of legal pragmatism as a strategy for legislating by considering the implications of Posner’s account of the pragmatic judge. Thus, if the pragmatic judge should be concerned with “systemic and not just case-specific consequences,” framed by the “ultimate criterion of . . . reasonableness,”²⁵⁶ and the “critical use of history,”²⁵⁷ this seems to be impeccable guidance for the conscientious legislator, as well. Indeed, the greater elasticity of the concept of legislative facts as compared to adjudicative facts²⁵⁸ might require the good legislator to engage in more sophisticated and broader assessments of consequences in passing or not passing a particular piece of legislation than the good judge in reasoning about judicial outcomes and doctrinal developments. Yet, mindful that a “pragmatic judge tends to favor narrow over broad grounds of decision in the early stages in the development of legal doctrine,”²⁵⁹ the pragmatic legislator, by analogy, should tend to favor incremental legislation over sweeping and comprehensive legislation when a new social problem or technology cries out for a statutory solution.

In a 2003 article entitled *Reply: The Institutional Dimension of Statutory and Constitutional Interpretation*,²⁶⁰ Judge Posner criticizes the lead article in the issue co-authored by Professors Cass R. Sunstein and Adrian Vermeule entitled *Interpretation and Institutions*.²⁶¹ Posner’s discussion of institutional considerations in interpretation of statutes and constitutions by courts highlights important factors to keep in mind in comparing the various branches of government:

These include the structure and personnel of the judiciary and of the legal profession more broadly; the structure, personnel, and operating

255. *Id.*

256. *Id.* at 59.

257. *Id.* at 72.

258. Adjudicative facts are those “specific to the case [and] provable only by sworn testimony or other trial-type methods.” *Id.* at 76. Legislative facts constitute “the background or context of the dispute giving rise to the case.” *Id.*

259. *Id.* at 80.

260. Richard A. Posner, *Reply: The Institutional Dimension of Statutory and Constitutional Interpretation*, 101 MICH. L. REV. 952 (2003).

261. Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003).

methods of the legislature; the relative competence of the different branches of government with respect to specific classes of issue; the power relations among the branches; and the political, economic, and social institutions of the society.²⁶²

Posner disagrees with Sunstein and Vermeule's claim that institutional considerations of the legal process have been underappreciated by scholars.²⁶³ In this regard, Posner notes first—at one end of the spectrum—that:

[S]tudents of public choice theory, and political conservatives generally [like Judge Frank Easterbrook]—who are skeptical about the good faith of legislators, fear the excesses of democracy, think of statutes as unprincipled compromises, and do not want to help legislators achieve their ends (these skeptics may doubt that legislation *has* ends worthy of assistance)—tend to favor strict interpretation. They doubt that statutes have a “spirit” or coherent purposes that might channel loose interpretation. They may also wish to hamstring legislatures, forcing them to make constant amendments to adjust to changing conditions; courts committed to strict construction refuse to lend legislatures a helping hand.²⁶⁴

The implications of this observation for a possible theory of the good legislator range from a nihilistic interpretation (i.e. the idea of good legislators is a sham; there are no such beasts as good legislators, only self-maximizing legislators making expedient deals) to a more modest skeptical interpretation (i.e. while the idea of good legislators is not necessarily a sham, most legislation crafted by legislators is based on unprincipled compromises that advance the careers of individual legislators in return for rents paid to special interest groups that profit at the public's expense).

Second, Posner notes the interplay of institutional assumptions of an opposite nature from the public choice theorists:

At the opposite end of the spectrum from the skeptics, Hart and Sacks [among others] urge loose interpretation . . . and do so on the basis of an explicit belief in the essential good faith, care, intelligence, and public spiritedness of legislators, who these scholars believe welcome a helping hand from judges. They may be quite wrong about legislators, but they can hardly be accused of being blind to institutional considerations—those are the very considerations that

262. Posner, *supra* note 260, at 954 (footnote omitted).

263. See Sunstein & Vermeule, *supra* note 261, at 886.

264. Posner, *supra* note 260, at 955-56 (footnote omitted).

motivate their theories.²⁶⁵

For Posner, loose interpretation of statutes versus formalistic interpretation “depends precisely on [pragmatic] institutional factors that vary across nations, legal cultures, issues, and epochs.”²⁶⁶ As he explains in greater detail, his pragmatic process bent can lead to different approaches:

[The German legal theorist] von Savigny[] propos[ed] that the German states (he was writing long before Germany became a nation in 1871) adopt the law of ancient Rome as the law of Germany—a highly formalistic version of Roman law, moreover [that deplored judicial discretion]. I have argued that Savigny’s formalism was right for his time and place, where the urgent need (as in developing societies today) was for clear, uniform rules that could be applied mechanistically; and that Holmes’ rejection of that formalism was right for *his* time and place, which were very different from Savigny’s. By Holmes’ time, “[t]he American legal system . . . had the suppleness and enjoyed the public confidence to be able to adapt legal principles to current social needs without undue danger of sacrificing legitimacy or creating debilitating uncertainty.”²⁶⁷

Viewed from the standpoint of the good legislator, Posner’s arguments in his *Michigan Law Review* article imply that the following aspects of legislator behavior can and should vary (depending on the comparative competencies and ideologies of his fellow legislators, members of the judiciary, and executive branch personnel): the substance of issues to be investigated and those that should be the subject of legislative proposals for change; the use of narrow legal rules versus broader standards in legislative enactments; close oversight of judicial and agency interpretation of enacted legislation, with accompanying frequent statutory corrective amendments versus lax oversight with infrequent statutory amendments.

III. FUTURE LEGAL PROCESS POSSIBILITIES

How can the good American legislator project, consistent with the

265. *Id.* at 956 (footnote omitted). Indeed, Posner relates a point made by Neil Duxbury: “[According to Hart and Sacks,] [a]djudication . . . is but one form of institutional activity within the legal process. Sometimes, within that process, legislatures, administrative agencies, arbitrators — even private parties themselves — may be better suited than the courts to deal with particular disputes.” Posner, *supra* note 260, at 956 (quoting NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 255 (1995)).

266. Posner, *supra* note 260, at 959.

267. *Id.* at 958-59 (footnotes omitted) (internal quotation marks omitted).

Legal Process tradition discussed in Parts I and II, be extended in the future?²⁶⁸ For purposes of this preliminary Article, I sketch three possible themes: (a) legislative ethics, (b) legislative advocacy, and (c) legislative webs.

A. *Legislative Ethics*

More attention needs to be paid to how ethics interacts with the legislative process, in general, and how ethics relates to the conception of the good legislator, in particular. Is the art of being a legislator limited to egotistical power plays? Is there such a concept as moral knowledge that can be applied to the enterprise of trying to describe what the good legislator does? The philosopher Simon Blackburn in his little book, *Being Good*,²⁶⁹ discusses some interesting possibilities for applying moral knowledge to the legislative process when he writes:

Is there moral progress? [This question is] not answered by science, or religion, or metaphysics, or logic. [It has] to be answered from within our own moral perspective. Then, fortunately, there are countless small, unpretentious things that we know with perfect certainty. Happiness is preferable to misery, and dignity is better than humiliation. It is bad that people suffer, and worse if a culture turns a blind eye to their suffering. Death is worse than life; the attempt to find a common point of view is better than manipulative contempt for it.

.....

...[I]f we reflect on an increased sensitivity to the environment, to sexual difference, to gender, to people different from ourselves in a whole variety of ways, we can see small, hard-won, fragile, but undeniable causes of pride. If we are careful and mature, and imaginative, and fair, and nice, and lucky, the moral mirror in which we gaze at ourselves may not show us saints. But need it not show us monsters either.²⁷⁰

Lucinda Peach, incorporates religious belief into an analysis of the good legislator. Her book, *Legislating Morality*,²⁷¹ provides one of the few serious explorations of the role that religion should play in a

268. See *infra* notes 9-267 and accompanying text.

269. SIMON BLACKBURN, *BEING GOOD: AN INTRODUCTION TO ETHICS* (2001).

270. *Id.* at 134-35.

271. LUCINDA PEACH, *LEGISLATING MORALITY: PLURALISM AND RELIGIOUS IDENTITY IN LAWMAKING* (2002).

legislator's public decisions. By way of example, she gives the following fascinating hypothetical that raises vital questions about how far personal religious conviction should go in framing the ethical perspective of a good legislator:

A state senator in a politically liberal state is contemplating how to vote on an upcoming bill regarding the abortion rights of minors. The bill would require the written consent of at least one parent before a doctor could legally perform an abortion requested by the minor. Many of the senator's constituents think the parental consent requirement is too restrictive, at least in the absence of some alternative procedure that would enable the minor to obtain the mandated authorization, and that a less burdensome parental notification requirement like several surrounding states have passed would be preferable. Despite the views of these constituents, the senator is reluctant to vote against the bill. Abortion is morally wrong according to his religious beliefs, and he is thus inclined to restrict the right to abortion whenever possible.

. . . .

. . . How should the [legislator] in th[is] scenario[] make [his] decision[]? Should [he] rely on [his] personal religious convictions or those of interested parties . . .? Or should [he] view religious considerations as inappropriate or even unconstitutional grounds for decision?²⁷²

Peach's comments raise the larger ethical, legal process issue of how diligently a legislator should be in scrutinizing the constitutionality of legislation that she votes on. The good legislator should take constitutional questions of legislation seriously and should seek to modify proposed unconstitutional legislation to remove unconstitutional provisions and—if not successful in modifying the proposal—should vote against it.

Another related ethical inquiry that deserves more theoretical attention is what non-religious sources of ethical principles a good legislator should seek to draw upon in making public decisions that have an impact on religious beliefs of members of the polity.

272. *Id.* at 3-4. It would seem that the good legislator should reject out of hand any legislative proposal that, in his honest opinion, is or probably would be declared unconstitutional by the appellate judiciary. *See supra* note 30 and accompanying text.

B. Legislative Advocacy

More thought needs to be given to defining and providing examples and explanations of the art of legislative advocacy by good legislators. In this regard, Jack Davies, in his book *Legislative Law and Practice*,²⁷³ synthesized existing scholarship in describing roles and types of individual legislators—with certain characteristics being worthy of praise and other characteristics worthy of criticism. The “lawmaker” is a “legislative hero.”²⁷⁴ “Each lawmaker comes to the legislature with a purpose. Personal satisfaction comes not from public reputation, or high political position, but from results.”²⁷⁵ Indeed, “[t]he formulation and production of legislation are foremost, and the lawmaker spends more energy and attention on this than any other legislative type.”²⁷⁶ Moreover, “[t]he lawmaker is often a career legislator, and becomes . . . expert at using the structure and processes of the institution as an effective means to further public policy goals.”²⁷⁷ My own scholarship has discussed the late Senator Edmund S. Muskie of Maine as a legislative hero in his masterful use of the subcommittee process in the United States Senate to further environmental policy goals.²⁷⁸

Davies also discusses the following additional types of legislators—some being more praiseworthy than others: “[t]he advertiser,”²⁷⁹ “[t]he reluctant,”²⁸⁰ “[t]he spectator,”²⁸¹ “[t]he tribune,”²⁸²

273. JACK DAVIES, *LEGISLATIVE LAW AND PROCESS IN A NUTSHELL* (2d ed.1986).

274. *Id.* at 36.

275. DAVIES, *supra* note 273, at 36.

276. *Id.*

277. *Id.*

278. See Robert F. Blomquist, *In Search of Themis: Toward the Meaning of the Ideal Legislator — Senator Edmund S. Muskie and the Early Development of Modern American Environmental Law, 1965-1968*, 28 WM & MARY ENVTL. & POL’Y REV 539 (2004).

279. DAVIES, *supra* note 273, at 37. According to Davies:

The advertiser, bursting with ambition, comes to the legislature, not with an agenda for lawmaking, but rather with an agenda of personal advancement. Legislative office was sought and won, not because it was dreamed of, but rather because it was there, like Mount Everest, and climbing it would bring honor and profit. Since the advertiser’s personal advancement depends so heavily upon reputation, the advertiser selects a few high visibility issues and pursues them aggressively. Legislative service is only a temporary interest for the advertiser. After one or two terms the advertiser is ready to use the public recognition earned in the legislature for personal advancement elsewhere.

Id.

280. *Id.* In Davies’ words:

The reluctant does not come to the legislature to pursue a personal agenda of issues, or to achieve personal notoriety and success. She desires merely to be competent in her role as a cog in the legislative machine. Emphasizing rules of legislative process over the substance of particular bills, she believes that proper procedures will ensure proper legislation. The reluctant provides the legislative balance wheel, protecting the

“[t]he ritualist,”²⁸³ “[t]he inventor,”²⁸⁴ “[t]he broker,”²⁸⁵ “[t]he opportunist,”²⁸⁶ “[t]he shaman,”²⁸⁷ “[t]he warlord,”²⁸⁸ “[t]he godfather,”²⁸⁹ “[t]he dependable friend,”²⁹⁰ and “[t]he ideologue.”²⁹¹

institution from those who would pursue their lawmaking or advertising at all cost.

Id.

281. *Id.* The spectator:

[is a] born follower . . . lack[ing] the ability or self confidence to promote his own legislation. Having a low standard of success, he is content to bask in the prestige of office, and act as a supporter of party leaders. Since his participation in legislation is strictly vicarious [one seeking to lobby] the legislature need not worry about the spectator. If the support of party leaders is gained, the support of the spectator will soon follow.

Id. at 37-38.

282. *Id.* at 38. As Davies explains:

Historically, the tribune’s function was to fight the people’s battles against the Crown. The tribune in the legislature today is concerned mainly with taking care of problems at home; doing case work for constituents that does not necessarily have anything to do with legislation. If the tribune is involved with the formulation of legislation, it is a bill to aid the home district.

Id.

283. *Id.* The ritualist, having similarities to the reluctant, “is an expert at the intricate procedures, rules, etiquettes and formal understandings of the legislative process. The ritualist emphasizes the formal aspects of capitol hill duties and routines; legislative work, overseeing, investigation and committee specialization serve as the means to gain influence.” *Id.*

284. *Id.* “An inventor emphasizes problem solving or policy innovation, and takes a broad view of the role as a legislator.” *Id.*

285. *Id.* at 39. This legislative type, serves as a “politician in a pluralistic society, balancing and blending diverse interests, including home district interests versus [the state or] national interests.” *Id.*

286. *Id.* at 39. “This legislator stresses the job of campaigning and re-election. Although all [legislators] have a primary interest in re-election, some have no other interest.” *Id.*

287. *Id.* Interestingly:

This little known legislator is most visible after a crisis (such as Three Mile Island) dispensing shame for greater self glory. The shaman’s power does not derive from the authority of position, or from any practical results produced, but from the confidence displayed, and the emotion extracted from followers. The shaman is an expert at making real the threats of unseen demons: world communism, the Mafia, monopoly cabals, the moral majority, or the immoral minority.

Id.

288. *Id.* According to Davies:

This legislator carefully chooses one piece of legislative terrain, slowly dominates it, strengthens it, and gradually extends it outwards, increasing its scope. The warlord concentrates on intensive, rather than extensive politics. As a group, warlords hold the real power. Although each controls only a part of the whole organization, they have strategically selected every spot to maximize a particular brand of power.

Id.

289. *Id.* at 40. A master manipulator who:

[i]gnor[es] the committee structure, this tactician concentrates on the political party structure, seeking elected posts within [the legislature] as party whip and party leader, putting together ad-hoc coalitions and deals, and playing a fast game. Like warlords, the godfathers have a career commitment to [the legislature], but unlike them, they are too

Davie's typology is useful in pigeonholing a few legislators like the late U.S. Senator Joseph McCarthy of Wisconsin, whose demagogic anti-communism exhibited the shaman and the ideologue types.²⁹² For more complex legislator types, like Senator Lyndon B. Johnson of Texas, we can chart an evolutionary matrix of types: starting in 1949 with a razor-thin electoral majority, Johnson acted the roles of the dependable friend to conservative southern interests and the advertiser, to gain personal financial security. Later, in 1950 through 1952, he assumed the legislative roles of the shaman and the ideologue, ranting at America's so-called lack of military preparation for the Korean War. Then, from the early 1950's until his election as Vice President in 1960, LBJ assumed the role of broker and godfather, as he took on party leadership positions within the United States Senate, culminating in his selection as the youngest Majority Leader in American history.²⁹³

Another helpful book on the subject of legislative advocacy—from the standpoint of Speaker of the Wisconsin House of Representatives—is Tom Loftus' book, *The Art of Legislative Politics*.²⁹⁴ Drawing on

impatient to accrue power slowly in a single area. Godfathers act as brokers, keeping warlords in balance by treating them as any politician treats a constituency. They are backroom negotiators and group facilitators.

Id.

290. *Id.* The dependable friend type is not hard to spot:

Soon after a person is seated as a member of a legislative body, observers spot patterns in the votes cast. The legislator may demonstrate consistent allegiance to party, to [the] farm bloc, to management, to labor, to the chief executive, or to the local courthouse crowd, editor, or industry. . . .

For the legislator, being thought of as a dependable friend creates problems. When a vote is cast against political allies, they feel double-crossed and resentful, or at least let down. A respected political slogan is, "You dance with them what brung you." A legislator votes against traditional allies with reluctance because the price of doing so is high.

The problem of being *no one's* dependable friend is daunting. If the performance of a legislator is so unpredictable that it earns the loyal support of no constituency, the legislator seeks re-election lacking a strong base of support. It is difficult to be a maverick in an institution and in a profession where loyalty is a highly valued quality.

Id. at 40-41.

291. *Id.*

The ideological legislator takes a totalitarian stand on the few issues which are near and dear to his heart, while all but ignoring the other issues before the legislature. The ideologue will settle only for the perfect solution to pet projects, not for a workable solution. This hard line approach and an interest in only a few issues makes the ideologue an ineffective and short lived legislator.

Id.

292. See CARO, *supra* note 253, at 542-56 (discussing McCarthy's unscrupulous anti-communist activities).

293. *Id.* at 109-515 (discussing LBJ's meteoric rise to power in the U.S. Senate).

294. TOM LOFTUS, *THE ART OF LEGISLATIVE POLITICS* (1994).

fourteen years in the Wisconsin House, Loftus provides an insider's account of who wins legislative battles and how, what influences a legislator's vote, what leadership strategies are effective in passing or blocking bills, and what tactics lobbyists employ. In the same genre as the Loftus book is John E. McDonough's fascinating book, *Experiencing Politics: A Legislator's Stories of Government and Health Care*.²⁹⁵ McDonough, who was a member of the Massachusetts House of Representatives for thirteen years, knits together stories of politics, policy and lawmaking with interesting theoretical models. McDonough, in the spirit of Hart and Sacks, takes an optimistic view of the potential of legislative process and politics to solve social problems, concluding his book with the following observation:

Whatever the prevailing corruption-influence peddling climate, each generation spawns leaders who attempt to summon the best in us, who seek to use politics for the improvement of society, and who keep their gaze firmly fixed on the opportunities to improve social and economic justice. Many times, they fall short and fail. At other times, they create the civil rights and women's rights revolution, public education, Social Security, workers' compensation, child labor laws, unemployment insurance, Medicare and Medicaid, and so much more.

Politics is by no means the only mechanism at our disposal for the improvement of society and individuals. But it is a mightily important one. We need to pay it more respect.²⁹⁶

Scholars should follow McDonough's lead and explore the numerous advocacy roles played by the good legislator—in constituent casework, in investigatory activities and in ethically advocating legislative proposals.

Finally, good legislative advocacy by the good legislator is informed by the tradition of Machiavelli's classic book, *The Prince*.²⁹⁷ This might be viewed as the realm of *principled* hard-ball politics. A few good books discuss the details of this sport. Two of the best are Chris Matthew's *Hardball*²⁹⁸ and Carnes Lord's *The Modern Prince*.²⁹⁹

295. JOHN E. MCDONOUGH, *EXPERIENCING POLITICS: A LEGISLATOR'S STORIES OF GOVERNMENT AND HEALTH CARE* (2000).

296. *Id.* at 322.

297. See NICOLÒ MACHIAVELLI, *THE PRINCE* (Paul Sonnino trans., Humanities Press 1996) (1513).

298. See CHRISTOPHER MATTHEWS, *HARDBALL* (1988).

299. See CARNES LORD, *THE MODERN PRINCE* (2003). In a book review, a critic says the following about Lord's work:

Borrowing from Plato and Aristotle, Mr. Lord warns that "the people" can be a fickle lot

C. *Legislative Webs*³⁰⁰

Renewed effort should be undertaken to understand the ways that the good legislator interacts with other people and institutions in the process of making laws. This theme overlaps to a degree with the theme of *legislative ethics*³⁰¹ (because in any web of interactions the good legislator must be mindful of ethical considerations) and with the theme of *legislative advocacy*³⁰² (since one of the main purposes of participating in webs with other people will be for the good legislator to be an effective advocator of proposed laws). Yet, the theme of *legislative webs* is distinct for the two reasons: (1) what a good legislator hopes to accomplish is derived not only from her past experiences and ideology, but also from her connections with a variety of other people and institutions while serving as a legislator, and (2) how a good legislator goes about pursuing her hopes for a legislative accomplishment depends on the information, ideas and examples available to her.

A classic book on the constellation of pressures and personalities inherent in the legislative process is Eric Redman's *The Dance of*

and that often their will and the rule of law are at odds with each other. It is precisely to temper the passions of the people that we resort to representative rather than direct democracy. Such a form of government, in turn, imposes an obligation on our elected leaders not merely to follow public opinion but to shape it.

Brian M. Carney, *What Machiavelli Can Still Teach Us, Even in a Democracy*, WALL ST. J., Aug. 21, 2003, at D8.

300. I draw on the writings of J.R. McNeill and William H. McNeill for inspiration in articulating this legal process possibility. In their book, the McNeills posit a much more expansive web of interaction than I envision. According to the McNeills:

A web [of interaction in human history] . . . is a set of connections that link people to one another. These connections may take many forms: chance encounters, kinship, friendship, common worship, rivalry, enmity, economic exchange, ecological exchange, political cooperation, even military competition. In all such relationships, people communicate information and use that information to guide their future behavior. They also communicate, or transfer, useful technologies, goods, crops, ideas, and much else. Furthermore, they inadvertently exchange diseases and weeds, items they cannot use but which affect their lives (and deaths) nonetheless. The exchange and spread of such information, items, and inconveniences, and human responses to them, is what shapes history.

What drives history is the *human ambition to alter one's condition to match one's hopes. But just what people hoped for, both in the material and the spiritual realms, and how they pursued their hopes, depended on the information, ideas, and examples available to them. Thus, webs channeled and coordinated everyday human ambition and action — and still do.*

J.R. MCNEILL & WILLIAM H. MCNEILL, *THE HUMAN WEB: A BIRD'S EYE VIEW OF WORLD HISTORY* 3-4 (2003) (emphasis added).

301. See *supra* notes 269-72 and accompanying text.

302. See *supra* notes 273-99 and accompanying text.

*Legislation.*³⁰³ Redman spent two years as a member of the staff of U.S. Senator Warren Magnuson of Washington, helping Magnuson draft and pass a piece of legislation—S. 4106, the National Health Service Bill.³⁰⁴ The book illustrates how a web of interactions with a vast assortment of other people — bureaucrats, legislators, lobbyists, analysts and others — helped define the substance of the legislation as well as the path to passage in the Senate.³⁰⁵

Another book, by way of illustration, *Legislating Together: The White House and Capitol Hill From Eisenhower to Reagan*³⁰⁶ by Mark A. Peterson, describes and theorizes about the web of interactions between Congress and the President in influencing how choices are made about the content of legislation and the process for its consideration and passage. In colorful and humorous language, Peterson summarizes the web of interactions between federal legislators, the President, and others:

An unusual menagerie—whales, boll weevils, gypsy moths, and lame ducks, not to mention lions and foxes.

Assorted instruments of persuasion—whips, ships, telephones, tickets, planes, and (most infamous) “the Treatment.”

Diverse forms of exercise—elbow bending, often “lifting a glass to liberty,” arm twisting, coalition building, and the taxing gymnastic maneuver of going over the heads of Congress.

Utilitarian accounting conventions—political resources, currency, capital, and credits, all to be invested, expended, or squandered.

A variety of social gatherings—parties, interest groups, voting groups, study groups, chowder and marching societies, constituencies, and the last tuition-free institution, the electoral college.

Several inflatable objects—egos, rhetoric, positions, and consumer prices, though no ducks.

Plotted “ayes” and crossed “tees,” especially committees, subcommittees, committees of the whole, committees on committees,

303. See ERIC REDMAN, *THE DANCE OF LEGISLATION* (1973).

304. *Id.*

305. *Id.*

306. MARK A. PETERSON, *LEGISLATING TOGETHER: THE WHITE HOUSE AND CAPITOL HILL FROM EISENHOWER TO REAGAN* (1990).

committees to reelect, rules committees, special committees, select committees, and standing committees, since everyone is too busy to be sitting.

Programs approved for many audiences—to be moved or lost, major releases and minor dramas, new innovations and old reruns, and much type casting.

Finally, an assortment of letters to challenge even Johannes Gutenberg—from LAs, AAs, CBO, EOP, WHO, OMB, DC, OPD, PRMs, and the CEA, to OPL and OCL, the “*liaison*” *d’être* of the presidential-congressional relationship.³⁰⁷

Surely, there is much new ground to explore regarding the complex, process-based subject of legislator webs of interaction—not simply from the political science perspective, but from the perspective of law. Legal scholars should investigate, by way of example: interactions between legislators and intellectuals,³⁰⁸ interactions between legislators and legislators of other states and countries; interactions between legislators and influential members of the media; and interactions between legislators and the books they read.³⁰⁹

IV. CONCLUSION

The understanding by legal theorists of the role (or roles) of the individual legislator in the American legal system is in need of reexamination and illumination. An efflorescence of theoretical understanding of the good American legislator could be achieved if legal scholars reconsidered the foundational legal process theory of Hart and Sacks, as well as new legal process perspectives of process-formalists, process-progressives, and process-pragmatists.³¹⁰ Moreover, legal

307. *Id.* at x-xi.

308. *Cf.* BENJAMIN R. BARBER, *THE TRUTH OF POWER: INTELLECTUAL AFFAIRS IN THE CLINTON WHITE HOUSE* (2001); DANIEL PATRICK MOYNIHAN: *THE INTELLECTUAL IN PUBLIC LIFE* (Robert A. Katzman ed., 1998); TEVI TROY, *INTELLECTUALS AND THE AMERICAN PRESIDENCY: PHILOSOPHERS, JESTERS, OR TECHNICIANS?* (2002).

309. *Cf.* Adam J. Hirsch, *Cognitive Jurisprudence*, 76 S. CAL. L. REV. 1331 (2003) (discussing the bounded rationality of decision making by legal decision makers and the implications of limited cognitive resources on the quality of legal outputs like judicial opinions and legislative statutes).

310. *Cf.* Guido Calabresi, *An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts*, 55 STAN. L. REV. 2113 (2003). This is an interesting recent article arguing that legal process theory is one of “four approaches to have vied for dominance among legal scholars” during the last century until the present. *Id.* at 2113. According to Judge Calabresi, scholars of the legal process school are interested primarily in “comparative institutional analysis.”

theorists need to re-deploy, assimilate and build on predominantly political science writings dealing with legislative ethics, legislative advocacy and legislative webs to develop robust models of how the good American legislator can aspire to improve lawmaking, in both small and big ways. The good legislator project, therefore, can assist in amplifying the emerging theoretical field of legisprudence.³¹¹

Id. at 2123. Moreover, Calabresi points out that new legal process theorists, known as “the Columbia School,” embrace “a spirit of Deweyan ‘experimentalism’ by focusing on the development of *new* institutions.” *Id.* at 2125, n.50.

311. See LEGISPRUDENCE: A NEW THEORETICAL APPROACH TO LEGISLATION (Luc J. Wintgens ed. 2002) [hereinafter LEGISPRUDENCE]. “Legisprudence has as its object legislation and regulation, making use of the theoretical tools and insights of legal theory. The latter predominantly deals with the question of the *application* of law by the *judge*. Legisprudence enlarges the field of study to include the *creation* of law by the *legislator*.” Luc J. Wintgens, *Rationality in Legislation — Legal Theory as Legisprudence: An Introduction* in LEGISPRUDENCE *supra* at 2. For a classic political science perspective on improving legislation see ARTHUR MAASS, CONGRESS AND THE COMMON GOOD (1983).