Introduction

Deciding cases is one of the most complex and fascinating tasks to which any legal professional may be called. The literature on judicial decision making is extensive; it explores a wide range of considerations from the pragmatic to the philosophic, and including studies of the various judicial bodies, their structure, and their procedures.[1] But these are the fundamental questions: What do judges do, how do they do it, and on what bases can their choices be justified?

The U.S. Supreme Court is perhaps the world's most influential judicial decision-making body. Its opinions have influenced not only the American legal system through the force of judicial review and binding precedent,[2] but also the legal systems of many other countries whose courts have often looked

[1] *See, e.g.*, ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1975); JOHN HART ELY, DEMOCRACY AND DISTRUST (1980); JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE (1949). Ronald Dworkin, *The Model of Rules*, 35 U. Chi. L. Rev. 15 (1967–1968); Oliver Wendell Holmes, Jr., The Path of the Law, 10 Harv. L. Rev. 457 (1896–1897); McNollgast, *The Political Economy of Law: Decision-Making by Judicial, Legislative, Executive and Administrative Agencies*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1153479; Roscoe Pound, *Mechanical Jurisprudence*, 8 Colum. L. Rev. 605 (1908); Roscoe Pound, *Juristic Science and Law*, 31 Harv. L. Rev. 1047 (1917–1918); Roscoe Pound, *Courts and Legislation*, 7 Am. Pol. Sci. Rev. 361 (1913); Roscoe Pound, *The Administrative Application of Legal Standards*, 42 Annu. Rep. A.B.A. 445 (1919); Roscoe Pound, *Common Law and Legislation*, 21 Harv. L. Rev. 383 (1907–1908); Martin Shapiro, *Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles*, 31 Geo. Wash. L. Rev. 587 (1963); Reinhold Zippelius, *"Trial and error" in Jurisprudence*, available at www.biblio.juridicas.unam.mx/libros/1/468/34.pdf.

[2] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("the federal judiciary is supreme in the exposition of the law of the Constitution").

to the U.S. Supreme Court for guidance.[3] As a lawyer and scholar educated and trained in both the civil law and common law systems, I have observed and studied the U.S. Supreme Court and its modern common law method in a series of procedural opinions and have come to the conclusion that this method is in serious need of reform.

The U.S. Supreme Court appears increasingly engaged in the development of doctrinal tests but insufficiently invested in the underlying principles and theories that should guide legal analysis and give uniformity to the relevant doctrines. The Court's analysis is often incomplete and fails to provide meaningful guidelines and directions for future developments in the areas of the law that are explored or revisited by the Court.

In the early twentieth century, Roscoe Pound described this type of jurisprudence as "mechanical," in that it elevates established formalities over common sense, "forgets the ends in the means," and uses conceptions as ultimate solutions rather than premises from which to reason.[4] This jurisprudence articulates narrow rules that confine judicial discretion and lead judges to try to fit the case to the rule rather than the rule to the case, as justice would instead demand.[5]

True, the common law method proceeds through case law, and judicial opinions are essential to give contour and content to principles and rules. This is, indeed, the beauty and strength of the common law system. However, in articulating and applying principles and rules, judicial opinions should not proceed mechanically and endorse mechanical tests and doctrines without exploring the facts before the court and the relationship between those facts and the underlying premises and ideas from which these tests and doctrines derive.[6]

Over a century ago, Pound sensed that the common law method was increasingly exposed to the risks of mechanical jurisprudence. Thus, he invited American scholars

> [t]o test the conceptions worked out in the common law by the requirements of the new juristic theory, to lay sure foundations for the ultimate legislative restatement of the law, from which judicial decision shall start afresh – this is as great an opportunity as has fallen to the jurists of any age.[7]

[3] Aaron B. Aft, *Respect My Authority: Analyzing Clims of Dimished U.S. Supreme Court Influence Abroad*, 18 Indiana Journal of Global Legal Studies, 421, 431–432 (2011) (challenging the thesis that the U.S. Supreme Court's influence over foreign jurisprudence is waning).
[4] Roscoe Pound, *Mechanical Jurisprudence*, 8 Colum. L. Rev. 605, 620–621 (1908).
[5] Roscoe Pound, *Courts and Legislation*, 7 Am. Pol. Sci. Rev. 361, 365 (1913).
[6] Roscoe Pound, *Mechanical Jurisprudence*, *supra* note 4, at 622–623.
[7] *Id.*

I take Pound's invitation, and I believe that in order to accomplish what Pound had in mind, any meaningful reform of legal analysis must necessarily involve both the judiciary and the legislature.

The judiciary and the legislature are organically bound together. They make the law jointly, one operating at a macro level and the other at a micro level. Thus, mechanistic legislation is likely to lead to mechanistic jurisprudence and, vice versa, mechanistic jurisprudence might implicitly "suggest" to the legislature that the adoption of mechanistic legislation is appropriate and required.

True, there are important differences between the judicial and the legislative processes. For instance, the judicial decision-making process is triggered by the need to resolve a specific case. Thus, differently from the legislature, which regulates issues from a less concrete factual perspective, the judge finds the law within a specific factual context and, because of that, his judgment might be improperly influenced by personal and subjective considerations that are triggered by the precise case in front of him.[8]

Since it is clear that both judges and lawyers make law, both the judicial and the legislative processes are law making in nature and both need the legislature's wisdom.[9] In fact, good legislation is premised on principles, a careful understanding of the relevant factual background to which the legislation might apply, and it is written in terms that permit application to a wide range of circumstances, some of which might be unforeseen. Likewise, good judicial decision making proceeds through a careful understanding of the facts, a consideration of the principles evoked by those facts, and the choice of a standard that is principled and durable in the sense that it can apply in a similar fashion to similarly situated cases.

Although this book contains suggestions for the legislative process, it is mainly focused on the judiciary and, more specifically, on the U.S. Supreme Court and that Court's modern common law method. It is also intended to promote a type of "legislative wisdom" that the U.S. Supreme Court seems to be currently lacking. Therefore, the studies in this book also include proposals for the restatement of judge-made procedural laws.

Chapter I introduces the reader to the common law method and suggests a perspective from which to assess and critique modern common-law judicial decision making. Chapters II and III analyze, respectively, personal jurisdiction and *forum non conveniens*, and the U.S. Supreme Court's common law approach to these topics. Both chapters offer a proposal for restatement of the

[8] *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 119–121 (1975).
[9] *Id.*, at 115.

developed common law principles and judge-made law in these areas. Chapter IV examines the law of personal jurisdiction, *forum non conveniens*, and conflict of laws rules in a transnational litigation context. It identifies important similarities between the civil law and common law approaches to these topics and suggests the possibility of harmonization. The purpose here is to open the modern common law method to principles and practices that may have been overlooked by the U.S. Supreme Court's mechanical jurisprudence. Chapter V studies the U.S. Supreme Court's common law method in the subject matter jurisdiction context as a paradigm example of the method gone awry. Chapter VI presents the reactions to the common law method by a selected group of judges, lawyers, and scholars from civil law systems. Finally, Chapter VII proposes the development of uniform guidelines for judicial decision making that would suit a democratic system of government and promote a global judicial dialogue.

1

The U.S. Supreme Court's Decision-Making Process: Deciding When and What to Decide

THE U.S. SUPREME COURT'S MODERN COMMON LAW METHOD AND ITS FLAWS: AN OVERVIEW

Roscoe Pound described three different judicial methods that reflect the arc of jurisprudential thinking over time: a jurisprudence of conceptions, a jurisprudence of premises, and an empirical jurisprudence. Under the jurisprudence of conceptions "[c]ertain fundamental conceptions are worked out from traditional legal principles, and the rules for the cause in hand are deduced from these conceptions by a purely logical process."[1] The jurisprudence of premises takes "the rules of a traditional system . . . as premises and . . . develop[s] these premises in accordance with some theory of the ends to be met or of the relation which they should bear, when applied, to the social condition of the time being."[2] Here, pure logic is thus tempered by consideration of the consequences, but still the analysis is cabined within the abstract legal standards and categories. Finally, an empirical jurisprudence begins with the facts and operates through a "process of inclusion and exclusion" and a method of "trial-hypothesis and confirmation" to discover the law.[3] Under this empirical approach, "[t]he tentative results of *a propriori* reasoning are corrected continually by experience. A cautious advance is made at some point. If just results follow, the advance goes forward, and in time a rule is developed. If the results are not just, a new line is taken, and so on until the best line is discovered."[4]

Pound thought that the first two categories of jurisprudence – conceptions and premises – were inadequate, as both were premised to some extent on the perceived immutability of established legal standards. If not based on natural

[1] Roscoe Pound, *Courts and Legislation*, *supra* note 5 (Introduction), at 371.
[2] *Id.*
[3] *Id.*
[4] *Id.*

law itself, they operated on the natural-law understanding that law can be perfectly established and, once so established, can serve as a sufficient tool for solving present claims and controversies, even those that were unanticipated by the law maker. Pound also found problems in the empirical jurisprudence, such as the slow pace at which the law must develop under a case-by-case approach, and he noted the "over-ambition of our courts to lay down universal rules," thus turning the empirical jurisprudence into a jurisprudence of conceptions.[5]

Despite its flaws, Pound considered empirical jurisprudence to be the best of the alternatives. He believed that the relationship between the legislative and the judicial law-making functions were essential to each other and to the full realization of the law. He saw the legislative role as laying the general standards from which the judiciary could discover what the law actually is in the context of pending cases. Thus, in his view, the legislature and the judiciary jointly make the law through the creation of standards, filtered through a judicial process of hypothesis, trial, corrections, and confirmations. At some point, the legislature should intervene to restate those confirmations and allow the judiciary to continue its process of discovery. Empirical jurisprudence is not experimenting for experimental sake: it is experimenting with the goal of testing old legal standards or discovering new ones and determining whether those standards are just and workable.

The current U.S. Supreme Court's modern jurisprudence seems not to fit any of the above categories. It is certainly not empirical, because its purported goal is to discover the true meaning of the law in original understandings and fundamental texts, often disregarding the facts before the Court. Thus, it thrives in fiction and not in fact. Moreover, the Court regularly denies that it is making the law; rather, it claims only to be revealing the established law. Yet, neither can the Court's modern common law method be viewed as a jurisprudence of conceptions or premises. While the Court often invokes established principles, it just as often ignores those principles or distorts them in service of unstated goals; for example, case management seems to be the subtext of many of the Court's procedural opinions. Of course, the Court will sometimes use conceptions, premises, and empiricism in deciding cases. But the occasional use of these tools does not reflect any particular judicial decision-making philosophy. Rather, cases and opinions sometimes seem mere opportunities for the Court to legislate, that is, to create rules designed

[5] *Id.*, at 372.

for future cases and contingencies.[6] To this end, the Court often endorses narrow rules and rigid multipart formulas that operate to closely constrain lower court discretion and judgment.[7] These narrow rules and formulas represent logic detached from principle and controlling facts. As such, they represent a return to the mechanical jurisprudence that Pound disparaged over a century ago.

When English case law was imported into the United States and the American legal system, American lawyers, judges, and scholars studied the relevant legal conceptions and considered the consequences to which their application would give rise. However, once the relevant legal theories were identified, the underlying conceptions were considered as established and were not reexamined. Principles lost their importance, and the law became an aggregate of increasingly narrow rules designed for easy, impersonal application that was seemingly infallible.[8] However, narrow rules are incapable of governing most aspects of human life, especially interests that are inherently

[6] As Kennth Culp Davis explained,

> [courts] always have the needed adjudicative facts, that is, the facts about the immediate parties – who did what, where, when, how, and with what motive or intent. But courts often have inadequate legislative facts, that is, the facts that bear on the court's choices about law and policy.

Kenneth Culp Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 Minn. L. Rev. 1, 7 (1986).

[7] *See, e.g.*, Frank Cross, Tonja Jabobi & Emerson Tiller, *A Positive Political Theory of Rules and Standards*, U. Ill. L. Rev. 1 (2012); Tom S. Clark, *A Principal-Agent Theory of En Banc Review*, 25 J.L. ECON. & ORG. 55, 76 (2008); Toby J. Heytens, *Doctrine Formulation and Distrust*, 83 Notre Dame L. Rev. 2045 (2008); Kirk A. Randazzo, *Strategic Anticipation and the Hierarchy of Justice in U.S. District Courts*, 36 AM. POL. RES. 669, 671–75 (2008); Tonja Jacobi & Emerson H. Tiller, *Legal Doctrine and Political Control*, 23 J.L. ECON. & ORG. 326, 329 (2007); Stefanie A. Lindquist, Susan B. Haire & Donald R. Songer, *Supreme Court Auditing of the U.S. Courts of Appeals: An Organizational Perspective*, 17 J. PUB. ADMIN. RES. & THEORY 607, 610 (2007); Tracey E. George & Albert H. Yoon, *The Federal Court System: A Principal-Agent Perspective*, 47 ST. LOUIS U. L.J. 819, 820–22 (2003); Susan B. Haire, Stefanie A. Lindquist & Donald R. Songer, *Appellate Court Supervision in the Federal Judiciary: A Hierarchical Perspective*, 37 LAW & SOC'Y REV. 143, 162–64 (2003); Sara C. Benesh & Malia Reddick, *Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent*, 64 J. POL. 534, 536 (2002); Tracey E. George & Michael E. Solimine, *Supreme Court Monitoring of the United States Courts of Appeals En Banc*, 9 SUP. CT. ECON. REV. 171, 175 (2001); Charles M. Cameron, Jeffrey A. Segal & Donald Songer, *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions*, 94 AM. POL. SCI. REV. 101, 103 (2000); Matt Spitzer & Eric Talley, *Judicial Auditing*, 29 J. LEGAL STUD. 649, 670 (2000); Donald R. Songer, Jeffrey A. Segal & Charles M. Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court–Circuit Court Interactions*, 38 AM. J. POL. SCI. 673 (1994).

[8] Roscoe Pound, *Mechanical Jurisprudence*, *supra* note 4, at 611–612.

complex.[9] And although narrow rules may seem easier to apply than general principles or standards, they cannot meet the needs of a developed legal system,[10] one that is not stable nor absolute, but fluid and changeable through a process of endless "becoming."[11] Pound thought that only a mature legal system could have the confidence to rely on reasoning rather than mechanical and rigid rules,[12] and that reasoning is an infallible and impersonal instrument but much superior in its results to mechanical forms.[13]

Indeed, principles and standards should be part of the analysis and guide it because, differently from narrow rules – more apt to govern property and business transactions – principles and standards are more apt to govern the conduct of enterprises and, in general, more complex situations that require the use of intuition more than rigid formulas.[14] Furthermore, general principles and conceptions allow courts to better identify and separate what is accidental and nonessential from what is instead essential and relevant to legal analysis.[15] They better unify and rationalize the particulars and may properly project and extend themselves to new cases,[16] thus inviting more efficient and fair results.

Now it remains to consider how we might assess and criticize what courts actually do.

LEGAL PROCESS: A MODEL TO CONSIDER

In an article written in 1994, Richard Fallon lamented a former teacher's observation that the study of federal courts had become an "intellectual backwater."[17] Fallon mounted a hearty defense to the charge, and in so doing

[9] Roscoe Pound, *The Administrative Application of Legal Standards*, *supra* note 1, at 454.
[10] *Id.*
[11] *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, *supra* note 8.
[12] Roscoe Pound, *The Administrative Application of Legal Standards*, *supra* note 1, at 453.
[13] *Id.*
[14] *Id.*, at pp. 462–463.
[15] In this regard, Cardozo observed:

> The problem remains to fix the bounds and the tendencies of development and growth to set the directive force in motion along the right path at the parting of the ways. The directive force of a principle may be exerted along the line of logical progression this I will call the rule of analogy or the method of philosophy; along the line of historical development; this I will call the method of evolution; along the line of the customs of the community; this I will call the method of tradition; along the lines of justice, morals and social welfare, the *mores* of the day; this I will call the method of sociology.

See BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 30 (1975).
[16] *Id.*, at 31.
[17] Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 Vand. L. Rev. 953, at 955 (1994) (hereinafter Fallon, *Reflections*).

endorsed the continuing vitality of the legal process school, from which the scholarly discipline of "Federal Courts" emerged in the 1950s.[18] Despite this endorsement, Fallon noted that legal process theory was born of a different era – post-*Lochner* and pre-*Warren* Courts – and that modern circumstances and perceptions of the law and of the role of federal courts might require some modification of the animating principles and methodology.[19] He also called for future federal courts scholarship that would, among other things, use the legal process method to provide "critical analysis of cases and doctrines, proposals for law reform, [and] efforts to identify immanent values or purposes in light of which bodies of law might be rationalized."[20]

I agree with Fallon that legal process remains a worthy perspective from which to examine the law of federal courts and, more generally, the modern common law method and judicial decision making. I also agree with Fallon and others that legal process theory needs to be revitalized in light of current jurisprudential developments and insights.[21] I have some thoughts on the direction that the common law jurisprudence should take, an approach that both borrows and diverges from the legal process model.

As is well known, the legal process school is directly traceable to the work of Professors Henry Hart and Albert Sacks.[22] And while the influence of Hart and Sacks may have waned during the 1960s, their basic ideas have been woven into the common law jurisprudence and remain persistently influential. Professor Philip Frickey, a modern proponent of legal process, described the Hart and Sacks theory as follows:

> [Hart and Sacks] understood all law—including the legislature's role in statutory creation and the administrative and judicial roles of statutory implementation and application—as a purposive endeavor designed to promote social utility. They assumed the legislature to be made up of reasonable persons pursuing reasonable purposes reasonably, and the judges interpreting statutes to be engaged in the reasoned elaboration of those purposes as they could be made to fit within the broader legal fabric. Under this view, it was

[18] HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953).

[19] Fallon, *Reflections*, *supra* note 17, at 959–960.

[20] *Id.*, at 977.

[21] Robert Post, *Theorizing Disagreement, Reconceiving the Relationship Between Law and Politics*, 98 Calif. L. Rev. 1319 (2010) (hereinafter Post, *Theorizing Disagreement*). Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 Calif. L. Rev. 397 (2005) (hereinafter Frickey, *The Avoidance Canon*).

[22] HENRY M. HART, JR., & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (Tentative edition, 1958).

> simply unacceptable to conclude that a statute lacked a sensible purpose. Moreover, unless it was impossible to conclude otherwise, courts were to avoid the perspective of cynical observers who might see only short-term political compromise rather than the embrace of reasonable public policy purposes.[23]

More specifically, legal process theory can be seen as premised on five interrelated elements: institutional settlement, antiformalism, rule of law, reasoned elaboration, and consistency with the broader legal fabric.[24]

The principle of institutional settlement posits that "decisions which are the duly arrived at result of duly established procedures . . . ought to be accepted as binding. . . ."[25] In this sense, institutional settlement determines what the law "is." That determination is legitimized by reference to institutional allocations and institutionally relevant procedures and practices through which the determination is made. The principle of institutional settlement elevates procedure above substantive law. In the words of Hart and Sacks, "these procedures and their accompanying doctrines and practices will come to be seen as the most significant and enduring part of the whole legal system, because they are the matrix of everything else."[26] In a sense, one could say, that from a legal process perspective, the way things are done will determine, to a large extent, what will and can be done.

The antiformalism principle rejects rigid interpretations of the law and posits that the law should instead be read in accord with evolving circumstances and a pluralistic range of norms and interests. As Hart put it, the law should be considered as "a continuous process of *becoming*. If morality [for example] has a place in the 'becoming,' it has a place in the 'is.'"[27] The antiformalism principle does not embrace legal realism, but attempts to stake out a middle ground between realism and positivism.[28] This approach to judicial decision making is sometimes described as "purposive."[29] It also strongly suggests that the judicial decision-making process consists of something more than merely finding and applying the law.

[23] Frickey, *The Avoidance Canon*, *supra* note 21, at 405.
[24] *See* Fallon, *Reflections*, *supra* note 12, at 963–970. Fallon identifies a sixth principle, structural interpretation. For reasons I will explain in the text, I treat that principle separately. *See infra*, text accompanying notes 46 to 52.
[25] HART & SACKS, THE LEGAL PROCESS, *supra* note 22, at 4.
[26] *Id.*, at 6.
[27] Henry M. Hart, Jr., *Holmes' Positivism – An Addendum*, 64 Harv. L. Rev. 929, 930 (1951).
[28] *See* Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U.L. Rev. 609, 619 (1991) (describing the distinction between Legal Realism and the Legal Process school in terms of the limits imposed on the adjudictory role by Legal Process) (hereinafter Wells, *The Parity Debate*).
[29] Post, *Theorizing Disagreement*, *supra* note 21, at 1332–1336.