

Introduction: “Practical Reason” and the Scholarship of Philip P. Frickey

Daniel A. Farber†

[L]aw as life must mediate the pragmatic and the idealistic. . . . [A] good judicial opinion must deal with human complexity in a reasoned way. An opinion of this sort is a human accomplishment, in which law at least in part transcends the brute imposition of the coercive power of the state or the mechanical application of abstract geometric axioms to touch, if only briefly, the sublime.¹

On April 24, 2009, Berkeley Law held a daylong conference and gala dinner on behalf of the late Professor Philip P. Frickey. The conference produced an extraordinary set of essays, which appear in this symposium issue of the *California Law Review*.

Although the purpose of the symposium issue is to illuminate Professor Frickey’s scholarship, a few introductory words about his career seem in order. Professor Frickey graduated from the University of Kansas in 1975² and from the University of Michigan Law School in 1978, where he was editor-in-chief of the *Michigan Law Review*. After graduation, Professor Frickey clerked for Judge John Minor Wisdom of the U.S. Court of Appeals for the Fifth Circuit and for Justice Thurgood Marshall of the U.S. Supreme Court. He then practiced law for a couple years in Washington, D.C., before joining the faculty of the University of Minnesota Law School, where he taught for seventeen years. He joined the Berkeley Law faculty in 2000. He was appointed to the Alexander F. and May T. Morrison Chair in 2007, and held that chair until his

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† Sho Sato Professor of Law and Chair, Energy and Resources Group, University of California, Berkeley. James Brudney, Dianne Farber, Robert Post, and Peter Strauss provided helpful comments on a previous draft.

1. Philip P. Frickey, *Wisdom on Weber*, 74 TUL. L. REV. 1169, 1206 (2000).

2. In 2006, he received the University of Kansas’s highest award, the Distinguished Service Citation, “presented to men and women whose lives and careers have helped benefit humanity.” Press Release, KU News, Three Alumni to Earn Distinguished Service Citation, KU’s Highest Honor (May 15, 2006), <http://www.news.ku.edu/2006/may/15/servicecitation.shtml>.

untimely death in July of 2010. Before his appointment to that chair, he held the Richard W. Jennings '39 Chair.

All of these facts about Professor Frickey are a matter of public record. Less widely known are his role as long-time appointments committee chair in hiring and his devotion to mentoring an entire generation of junior faculty at Berkeley Law. Indeed, even among the senior faculty, there are those of us who learned from him about what it is to be a teacher and scholar.

Of his experiences prior to teaching, his clerkship with Judge Wisdom seems to have been especially significant. Judge Wisdom, one of the heroes of the civil rights era in the South, provided Frickey with a model of judicial performance. In explaining why he considered Judge Wisdom to be unsurpassed by any of his peers, Frickey explained that a “judge is neither solely a scholar nor solely a politician,” but rather a “complex combination[] of these and other elements,” which may sometimes be in “great tension.”³ In assessing a judge, “one must look not only for genius, but also for pragmatism and humanitarianism, not only for ideas, but also for results.”⁴

It is important to note two aspects of Frickey’s assessment. First, judicial craft and advancing societal goals receive equal billing. Second, although Frickey admitted that these goals may be in “great tension,” he did not seek to dissolve the tension by providing any formula for judicial decision making. As we will see, a notable feature of Frickey’s scholarship was his willingness to live with—and attempt to mediate—fundamental tensions without entertaining the illusion that they can be resolved once and for all.

This symposium issue contains works related to Frickey’s scholarship in three areas: constitutional law, legislation, and American Indian law. Perhaps his work on legislation is the best known, not least for his coauthorship of a casebook⁵ described by Judge Richard A. Posner as having virtually created the field.⁶ But he was also one of the leading figures in American Indian law in recent decades⁷ and an important contributor to constitutional law scholarship.

3. Philip P. Frickey, *Judge Wisdom and Voting Rights: The Judicial Artist as Scholar and Pragmatist*, 60 TUL. L. REV. 276, 313 (1985). Frickey returned to a discussion of Judge Wisdom as a judicial exemplar some fifteen years later in *Wisdom on Weber*, *supra* note 1.

4. *Id.*

5. The first edition of the book appeared twenty years ago. WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (1st ed. 1988). The genesis of this book is described in William N. Eskridge, Jr., *The Three Ages of Legislation Pedagogy*, 7 N.Y.U. J. LEGIS. & PUB. POL’Y 3, 6 (2003).

6. Posner said: “The book has done for legislation what Hart and Sacks did for legal process, or Hart and Wechsler for federal courts: it has demonstrated the existence of a subject.” Richard A. Posner, *Book Review*, 74 VA. L. REV. 1567, 1571 (1988). Posner also said: “The Eskridge and Frickey casebook on legislation is far and away the best set of teaching materials on the subject of legislation that has ever been published. Moreover, it has the potential to alter the law school curriculum; of few casebooks can *that* be said.” *Id.* at 1567.

7. In this field as well, he coauthored an innovative casebook. See ROBERT T. ANDERSON, BETHANY BERGER, PHILIP P. FRICKEY & SARAH A. KRAKOFF, *AMERICAN INDIAN LAW: CASES AND COMMENTARY* (2008). In combining an interest in Indian law with one in legislation, Frickey

His body of work—encompassing four books (plus resurrection of a key twentieth-century work of legal theory)⁸ and forty-six articles and book chapters (plus three book reviews)—is too large and diverse to describe fully in this Introduction, or even for the symposium participants to survey fully. But this symposium provides at least a good vantage point on his many contributions to legal scholarship.

Like the public event, this Introduction is organized by subject matter. We begin with constitutional law, and then consider legislation and American Indian law in turn. The Introduction closes with some final thoughts about the distinctive aspects of Frickeyan scholarship.

I

CONSTITUTIONAL LAW

The significance of Frickey's constitutional scholarship is exemplified by an important 2002 article⁹ that critiques some of the Supreme Court's federalism decisions. In those cases, the Court required proof that Congress both duly deliberated on a specific issue and had substantial evidence of misconduct by state governments before Congress could abrogate states' sovereign immunity in civil rights statutes.¹⁰ In doing so, said Frickey and his political scientist coauthor, the Court may have placed "responsibilities upon Congress that it simply cannot withstand—forcing Congress to behave like an administrative agency, despite the wildly different composition, structure, and goals of a legislature as opposed to an agency."¹¹ Thus, the article contended that the Court's approach was "institutionally wrongheaded" and that, "[w]hatever might be said . . . about the Court as philosopher or lawyer, it has flunked political science."¹²

In addition to this 2002 federalism article and a slew of other law review articles on the subject,¹³ Frickey also coauthored a widely used constitutional

was following in the footsteps of an earlier Berkeley Law faculty member, Max Radin.

8. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (1994) (publication editors Philip P. Frickey and William N. Eskridge, Jr. for the 1958 "tentative edition" of Hart and Sacks). This classic had circulated for decades in unpublished form.

9. Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 *YALE L.J.* 1707 (2002).

10. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999). Both decisions strike down provisions in statutes making states liable for damages for statutory violations on the ground that Congress had failed to make appropriate and supported findings of pervasive unconstitutional behavior by state officials.

11. Frickey & Smith, *supra* note 9, at 1751.

12. *Id.* at 1708.

13. See Philip P. Frickey, *Constitutional Structure, Public Choice, and Public Law*, 12 *INT'L REV. L. & ECON.* 163 (1992); Daniel A. Farber & Philip P. Frickey, *Is Carolene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 *CALIF. L. REV.* 685 (1991); Philip P. Frickey, *Lawnet: The Case of the Missing (Tenth) Amendment*, 75

law casebook¹⁴ and has touched on constitutional themes in his work on statutory interpretation. This symposium issue includes three Essays focusing on the constitutional dimensions of Frickey's scholarship. These Essays, by Robert Post, Ernest Young,¹⁵ and William Eskridge, explore Frickey's views about the relationship between law and politics, the institutional framework of democracy, and the use of practical reasoning by judges.

Elaborating on an important theme in Frickey's scholarship, Robert Post's symposium Essay focuses on the interplay between law and politics. Post analyzes different approaches to the law-versus-politics distinction as a way of illuminating a question he considers central to Frickey's work: can judges properly consider the political consequences of their decisions insofar as these consequences adversely affect fundamental national values, like the stability of the rule of law or of the American polity?¹⁶ Post views law and politics as distinct phases of a larger and more inclusive process of social integration through which modern heterogeneous societies produce solidarity and control.

Post describes politics as, at heart, a realm in which people with deeply opposed perspectives agree to fight their battles, and law as, at heart, the realm in which the results are interpreted and implemented. But politics is not necessarily a form of nonviolent civil war, because deliberation and dialogue are also possibilities.

Similarly, Post observes that law, in practice, is not hermetically sealed against political dispute. Because law begins with an agreed starting point—text or precedent—it maintains a degree of independence from the deeper struggles of politics. In theory, this independence gives credibility to the creed of “neutral principles” of law. Yet the separation of law and politics is not watertight, with fundamental conflicts sometimes reemerging in the legal sphere and threatening to disrupt law's implicit basis in social agreement. Post explains: “Law, we might say, is a practice that *presumes* agreement, in contrast to politics, which *presumes* disagreement.”¹⁷

MINN. L. REV. 755 (1991); Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615 (1987); Philip P. Frickey, *A Further Comment on Stare Decisis and the Overruling of National League of Cities*, 2 CONST. COMMENT. 341 (1985); Philip P. Frickey, *Stare Decisis in Constitutional Cases: Reconsidering National League of Cities*, 2 CONST. COMMENT. 123 (1985).

14. DANIEL A. FARBER, WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY* (4th ed. 2009).

15. Young's Essay bridges constitutional law and statutory interpretation, and for that reason is discussed in the next Section.

16. Robert Post, *Law, Politics, and Disagreement: Reconceiving the Relationship Between Law and Politics*, 98 CALIF. L. REV. 1319 (2010).

17. *Id.* at 1340.

Much of Post's discussion resonates deeply with Frickey's views, particularly in terms of the law's efforts to mediate fundamentally clashing values. But, perhaps because Frickey's focus was primarily on political institutions rather than political movements, his account of politics may place more emphasis than Post's on the power of politics also to mediate conflict, sometimes more effectively than courts. Frickey's view of politics is at the forefront of his 1998 essay on direct democracy (popular referenda, initiatives, etc.).¹⁸ Thus, it is useful to digress for a moment to take a close look at this essay and its vision of politics.

In his 1998 essay on direct democracy, Frickey contrasted the functioning of representative democracy in state legislatures with the unmediated expression of public opinion in direct democracy. Although the essay reflects a distrust of populism coupled with a belief in the virtues of legislative assemblies, Frickey also expressed mounting concerns about threats to the continued functioning of effective state legislatures. As to popular democracy, Frickey assembled evidence that electoral initiative and referendum results are often driven by the efforts of consultants and high-priced advertising campaigns, with few voters understanding the issues on which they are asked to vote.¹⁹ For instance, he reported that the amount spent on California initiatives in 1988 exceeded the total amount spent by both major parties' presidential campaigns that year.²⁰

In contrast, although he did not romanticize state legislatures, Frickey portrayed them as significant forums for deliberation about public policy. Although the legislative process rarely resembles an academic symposium, legislators may often attend to carefully gathered information. And the exchange of views over weeks, or even over multiple legislative sessions, may improve drafting, resulting in better-drafted legislation, less manipulation of opinion, and better policy, when compared with popular democracy.²¹ Short of consensus, a compromise or at least a more productive legislative dialogue might be possible down the road.²²

Frickey suggested that a willingness to at least suspend disbelief and take legislative competence as a given is an important pillar of constitutional law. His discussion of this issue emphasized that this endorsement of legislative competence was as much a normative commitment as an empirical assessment. In his view, constitutional law presumes "that the legislature will not only meet but will engage and deliberate with and about the relevant strangers in the

18. Philip P. Frickey, *The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere*, 34 WILLAMETTE L. REV. 421 (1998) [hereinafter Frickey, *Communion of Strangers*].

19. *Id.* at 431–37.

20. *Id.* at 433.

21. *Id.* at 435–36.

22. *Id.* at 436.

public sphere and that the strangers . . . will be treated with concern and respect.”²³ This idealistic vision of legislation is, he believed, essential to the operation of republican government.²⁴ In short, if “we view the world as if these things are true, we are, on balance, better off than if we do not.”²⁵ In contrast, Frickey was less sanguine about direct democracy; like James Madison, he viewed unmediated popular opinion as too prone to divisive factional lawmaking.²⁶

At least to the extent that legislative bodies can serve to mediate political strife, Frickey’s view of political life seems less focused on deep ideological conflict than Post’s and more amenable to constructive debate and politics. Nevertheless, Frickey would surely have conceded the existence of deep ideological fissures as well.

It remains to consider the implications of these perspectives for law on politics. In addressing this issue, Post gives special attention to a key article by Frickey on the Warren Court’s use of passive resistance during the McCarthy Era.²⁷ As Frickey described, in those decisions, the Court used narrow interpretation and other technical legal arguments to forestall McCarthyism without a direct constitutional confrontation. The effect was to remand certain issues to Congress for further consideration, a tactic that ultimately proved successful, although only with some fortuitous intervention from Senate Majority Leader Lyndon Johnson.²⁸ Through arguably a manipulative use of legal doctrine, the Court was able to prevent additional damage to free speech. Both Frickey and Post found this episode telling.

Like Frickey, Post applauds the Warren Court for its effort to uphold in difficult circumstances the free speech values essential to democracy and hence to the vitality of democratic politics. For Post, as for Frickey, the lesson is that “judicial opinions can be constructed in ways that are more or less effective in promoting political support for essential values like the stability of the polity or the rule of law.”²⁹ But the resulting manipulation of legal doctrine to achieve

23. *Id.* at 444. Compare theologian Reinhold Niebuhr’s observation that a “free society requires some confidence in the ability of men to reach tentative and tolerable adjustments between their competing interests and to arrive at some common notion of justice which transcend all partial interests.” REINHOLD NIEBUHR, *THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS: A VINDICATION OF DEMOCRACY AND A CRITIQUE OF ITS TRADITIONAL DEFENSE*, at x (1944). Shortly thereafter, Niebuhr adds: “Man’s capacity for justice makes democracy possible; but man’s inclination to injustice makes democracy necessary.” *Id.* at xi. Those observations seem very much in the spirit of Frickey’s approach, and more could probably be written about the affinities between Frickey and Niebuhr’s thought.

24. Frickey, *Communion of Strangers*, *supra* note 18, at 444.

25. *Id.*

26. *Id.* at 414–25.

27. 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, *Warren Court*].

28. *Id.* at 429–30.

29. Post, *supra* note 16, at 1347.

strategic results risks abuse and undermines the achievement of legislative goals. Frickey's endorsement of the Warren Court's strategic behavior acknowledged these inherent costs, as we will see when we return to this important essay in the following Section.

In the next symposium piece, William Eskridge returns to the issue of direct democracy and also addresses practical reason, another important theme in Frickey's work. Eskridge's Essay uses the judicial response to a California anti-gay-marriage initiative to explore theories of constitutional law and the role of practical reasoning,³⁰ as championed by Frickey and others.

As Eskridge recounts, the California Supreme Court overturned the state's marriage law to the extent it precluded recognition of same-sex unions (permitted under other provisions) as legitimate marriages.³¹ This ruling was itself overturned in a popular initiative, Proposition 8. Ultimately, the California Supreme Court upheld Proposition 8, rejecting arguments that it was a constitutional "revision" rather than an amendment (which would require a different procedure) or that it unconstitutionally infringed an inalienable right.³²

Eskridge sees the struggle over Proposition 8 as embodying not only two opposing views of same-sex marriage, but also two contrasting views of constitutionalism. In Eskridge's view, supporters of Proposition 8 considered it not an exertion of raw majority power, but an expression of the deep values of the political community, which had previously been articulated in a series of statutes. Thus, they viewed the proposition as not only constitutionally valid, but also as exemplifying the function of constitutional law to embody deep cultural values. Opponents, in contrast, saw the state constitution as a grant of plenary power to the majority, but subject to reserved individual rights that were not transferred to government control by the social compact. Their perspective was reinforced by concerns about the abusive tendencies of majorities toward isolated political minorities—in this case gays and lesbians. Thus, for the opponents, Proposition 8 was an example of just what constitutions are designed to prevent: oppression of minorities by the majority. Both perspectives implicitly answer in very different ways the same question: what is a constitution for? One perspective answers in terms of the spirit of the polity, and the other in terms of protecting minorities.

Eskridge then explores a third theoretical perspective based on practical reasoning, which sees no simple answer to the question of constitutionalism's purpose. He highlights a disparity between politics as practiced by social movements that make nonnegotiable claims about respect for their rights and legislative politics that are often prone to produce compromise resolutions.

30. William N. Eskridge, Jr., *The California Proposition 8 Case: What Is a Constitution For?*, 98 CALIF. L. REV. 1235 (2010).

31. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

32. *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009). However, the Court held that Proposition 8 did not invalidate gay marriages performed prior to its passage. *Id.* at 119–20.

Courts can exploit the space opened up by this disparity in political modes. In applying practical reasoning, courts will intervene to reverse the burden of legislative inertia after a group begins to receive recognition as a bona fide participant in the legislative process, not when the group is completely powerless.

Thus, like the Warren Court decisions discussed above, the California Supreme Court's initial ruling on gay marriage put the burden of overcoming political inertia on opponents of an important constitutional value—here, equality. But the popular initiative process short-circuited the mediating power of legislative politics, leaving the California Court with little choice but to give way to the voters' will.

Frickey might well have seen the contrasting outcomes of the Warren Court and California experiences as illustrating his point about the virtues of legislative process over popular democracy. A small majority of voters in California was able to deprive the gay and lesbian minority of rights recognized by the California court, whereas the legislative process provided an opportunity for wiser heads to prevail and maintained the protection for dissenters recognized by the Warren Court.

Eskridge's account highlights Frickey's advocacy of "practical reason" as a mode of legal decision making. Its distinctive feature in his account is that it allows courts to play a more sophisticated role in pursuing multiple constitutional goals, so that both enforcement of the majority will, and protection of minority rights, become judicial goals. Because these goals are sometimes incompatible, as in the case of Proposition 8, the court may ultimately be forced to make a choice. But courts also may have some room to make tradeoffs, tweaking majority rule by shifting the burden of political inertia, and they remain willing to step out of the way if need be. As the next Part shows, practical reason was central to Frickey's view of statutory interpretation.

II

LEGISLATION

Just as in constitutional law, the importance of Frickey's contribution to the study of legislation and statutory interpretation is beyond dispute. In this symposium issue, John Manning, James Brudney, and Peter Strauss discuss that contribution. They touch on key topics such as practical reasoning by judges, the role of canons of statutory interpretation, and statutory interpretation by administrative agencies. Some of the concerns about the relationship between law and politics that were discussed in the previous Section reemerge here. Their Essays provide an apt occasion to consider the relationship between Frickey's thoughts and those of the classic thinkers in the legal process school.

To be sure, the reference to practical reason is not self-explanatory. Frickey's scholarship on statutory interpretation gave him the opportunity to

flesh out the concept of practical reason. In applying practical reason, he explained, a judge “considers a broad range of textual, historical, and evolutive evidence when it interprets statutes,” which in easy cases will point in the same direction.³³ In harder cases, however, the court must critically analyze each bit of evidence for its own cogency and its relationship with other evidence.³⁴ Thus, practical reason involves balancing conflicting evidence about the meaning of a statute without any a priori rule to resolve the conflict, bearing in mind the complexities of the legislative process and the boundaries of the judicial role.³⁵

This approach finds its philosophical foundations in Aristotle’s theory of practical reasoning (*phronesis*) and is manifest in American pragmatism.³⁶ It stands in opposition to methodologies, such as textualism, which seek to channel interpretative techniques narrowly to assure judicial legitimacy.³⁷ In contrast to those methodologies, as Frickey put it, practical reasoning recognizes that statutory interpretation involves creative policymaking by judges and is not just a matter of unearthing an answer that was planted in the statute by the legislature.³⁸ In short, statutory interpretation is neither archaeology nor cryptography, but rather a branch of governance.

Yet practical reasoning, at least in its Frickeyan form, is not an invitation to judicial activism: “Legislative history, precedent, reasoned commentary, and other constraining factors do not completely close off avenues of judicial discretion, but the Justices do seem to learn from those links between past and present and often are able to apply those lessons to solve concrete cases in narrow, practical ways.”³⁹ Indeed, the “text itself constrains, for the interpreter is charged with learning from the text and working from it to the current

33. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 322 (1990) [hereinafter Eskridge & Frickey, *Practical Reasoning*].

34. *Id.* at 323.

35. Practical reason seems akin to what Alexander Bickel called political reason:

Theories were not fit to live with, and any attempt to impose them would breed conflict, not responsive government enjoying the consent of the governed. The rights of man cannot be established by any theoretical definition; they are “in balances between differences of good, in compromises sometimes between good and evil, and sometimes between evil and evil. Political reason is a computing principle: adding, subtracting, multiplying, and dividing, morally and not metaphysically, or mathematically, true moral denominations.”

ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 23–24 (1975) (quoting Edmond Burke). Bickel added:

We find our visions of good and evil and the denominations we compute where Burke told us to look, in the experience of the past, in our tradition, in the secular religion of the American republic. . . . We hold to the values of the past provisionally only, in the knowledge that they will change, but we hold to them as guides.

Id. at 24.

36. Eskridge & Frickey, *Practical Reasoning*, *supra* note 33, at 323.

37. *Id.* at 324–45.

38. *Id.* at 345.

39. *Id.* at 384.

problem.”⁴⁰ In this view, text is important, but it is not as decisive as textualists would like to believe.⁴¹

Textualists have not accepted Frickey’s assessment of their approach, but they have benefited from Frickey’s work in refining their own views. In his symposium Essay, John Manning, who is among the most articulate and sophisticated defenders of textualism as a method of statutory interpretation, recounts the constructive role played by Frickey in the development of modern textualism.⁴² If Manning’s hypothesis is right, Frickey’s opposition to textualism ironically⁴³ produced a stronger and more powerful version of textualism.⁴⁴

Manning views first-generation formulations of textualism as invoking an uncomfortably cynical vision of legislatures. A book coauthored by Frickey forced textualists to move to stronger ground by critiquing the simplistic versions of public choice theory underlying that vision.⁴⁵ In response to this critique, the “new textualists” have adopted a more nuanced view of legislatures, based on a recognition that legislative structure is designed to give veto power to minorities, thereby allowing them to wrest concessions from the majority. According to new textualists, these hidden compromises can only be honored by adherence to text rather than recourse to the majority’s goals in passing legislation.

Textualism creates something of a quandary, however, in cases where the statutory text is ambiguous. What should a judge do when the text provides no answer, given that textualists reject the use of legislative history for guidance? A nontextualist might suggest that, in resolving ambiguities, judges should rely on statutory purpose or common norms of sensible policy, both of which Professor Manning eschews. As an alternative to assuming an explicitly political role of resolving ambiguous cases through open policy judgments, textualists have found recourse in canons of interpretation, which provide default rules for resolving statutory ambiguity.⁴⁶

40. *Id.* at 382.

41. *Id.* at 340–45.

42. John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287 (2010).

43. Frickey and his coauthors provided a cogent critique of textualism in WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 231–45 (2d ed. 2006).

44. Frickey returned the compliment by expressing gratitude for the role of arch-textualist Antonin Scalia in providing him with raw material: “In the main, . . . Scalia’s writings, primarily as a Supreme Court Justice in his opinions, have had the most long-term impact. . . . Although I have taken issue with much of his analysis, I must confess that Scalia has been a godsend to my career.” Philip P. Frickey, *Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger*, 84 MINN. L. REV. 199, 202–03 (1999).

45. DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991).

46. Another solution is for judges to defer to decisions by administrative agencies on the ground that resolving such ambiguities requires lawmaking of a sort and should be delegated to officials in the political branches. Peter Strauss’s article, discussed *infra*, explores this solution.

The canons are an important part of statutory interpretation, even more so given the rise of textualism among key judges. In his symposium Essay, James Brudney explores Frickey's treatment of the canons, and questions the textualist view that canons have more legitimacy than legislative history.⁴⁷ Frickey himself criticized the use of language canons (such as interpreting "shall" to eliminate discretion) as undermining predictability, and substantive canons as undermining both predictability and legitimacy because of the Supreme Court's tendency to invent new canons as the occasion presents itself.⁴⁸ Frickey also contended that recourse to the canons shortcuts efforts to undertake serious analysis of text, history, or precedent.⁴⁹ Yet he did see the canons as ways for the Court to signal its discomfort with legislation that invades constitutional or quasi-constitutional values, as he argued in his Warren Court article discussed earlier.⁵⁰

Brudney argues that Frickey's position did not probe deeply enough into the legitimacy issues surrounding the canons, in comparison to those relating to legislative history. In direct opposition to the views of many textualists, Brudney contends that the use of the canons has less legitimacy than the use of legislative history, which textualists criticize. As a constitutional matter, he points out, the Journals Clause requires each House to "keep a Journal of its Proceedings, and from time to time publish the same,"⁵¹ enshrining legislative transparency as a constitutional value. Legislative history is merely a further elaboration of that value. Brudney's research indicates that the founding generation's insistence on publication, and its shift from select to standing committees, gave rise to the importance of legislative history as a means of informing both their constituents and the legislators themselves. In contrast, Brudney maintains, the canons receive no recognition of any kind from the Constitution and thus lack the constitutional roots that legislative history can claim. In addition, the use of legislative history is more predictable because the Court has established a hierarchy of resources based on functional lawmaking factors (e.g., favoring committee reports over floor statements). Textualists, on the other hand, have not established such a hierarchy for canons. Although Brudney does not advocate abandoning the canons, he argues that more credence should be given to legislative history.

In cases involving administrative agencies, the Supreme Court has partially dodged the problem of ambiguity through the *Chevron* doctrine, which gives agencies the power to resolve such ambiguities.⁵² To the extent there is a

47. James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 CALIF. L. REV. 1199 (2010).

48. Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1 N.Y.U. J. LEGIS. & PUB. POL'Y 105, 128–31 (1997).

49. Philip P. Frickey, *Interpretative-Regime Change*, 38 LOY. L.A. L. REV. 1971 (2005).

50. Frickey, *Warren Court*, *supra* note 27.

51. U.S. CONST. art. I, § 5, cl. 3.

52. See ESKRIDGE, FRICKEY & GARRETT, *supra* note 43, at 322–38 [chapter on

political element—or at least an element involving value judgments—in resolving ambiguities, the Court apparently feels more comfortable leaving the task to the executive branch rather than the judicial branch, given the greater democratic pedigree of the executive branch.

Symposium contributor Peter Strauss points out, however, that the Supreme Court's attitude toward executive agencies is deeply ambivalent. He views agencies,⁵³ on the one hand, as devoted to implementing statutory standards provided by Congress and, on the other hand, as tools in the hands of the President to achieve his political and policy objectives. Once again, the complex relationship between law and politics rears its head. In short, the Court cannot seem to decide whether administrative law is a sphere of law or politics,⁵⁴ even as Presidents have devoted themselves to bringing agencies within their own political orbits. In Strauss's view, the choice regarding law and politics is not either/or, but necessarily both/and, with part of the judicial responsibility being to maintain a place for law in agency decisions even if it cannot be exclusive. This approach resonates with Frickey's pragmatism and his effort to mediate tensions between law and politics.

The relationship between law and politics is also linked with a particularly important canon of statutory interpretation. The "constitutional avoidance" canon requires courts to avoid, where possible, interpreting statutes in ways that might make them unconstitutional. This canon is the subject of Ernest Young's Essay.⁵⁵ He focuses on *Northwest Austin Municipal District No. One v. Holder*,⁵⁶ in which the Supreme Court narrowly construed the preclearance requirement of the Voting Rights Act in order to avoid a constitutional challenge to the continued validity of the requirement. In Young's view, the Court adopted a less-than-natural interpretation of the statute in the service of constitutional values. Young defends this strategy, as well as the judicial creation of clear statement rules, as ways of integrating statutes into the broader constitutional structure.

Professor Young helpfully situates Frickey's scholarship in relation to the legal process school, a post-World War II approach to jurisprudence.⁵⁷ As he explains, the legal process school took a purposive approach, requiring judges to implement legal values through reasoned elaboration and the articulation of

administrative interpretation and *Chevron*].

53. Peter L. Strauss, *Legislation That Isn't—Attending to Rulemaking's "Democracy Deficit,"* 98 CALIF. L. REV. 1351, 1355–57 (2010).

54. See *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) (giving judicial deference to agency judgments about the best way to implement congressional goals, but requiring that the agency interpretation be reasonable and consistent with the statute's text).

55. Ernest A. Young, *The Continuity of Statutory and Constitutional Interpretation: An Essay for Phil Frickey*, 98 CALIF. L. REV. 1371 (2010).

56. 129 S. Ct. 2504 (2009).

57. For an insightful analysis of the legal process school, see William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031 (1994).

neutral principles.⁵⁸ Legal process theorists took an intermediate position between formalism and legal realism, maintaining adherence to neutral principles while responding to the fundamental value commitments of American society. To oversimplify somewhat, in interpreting a statute, a legal realist would care most about the best outcome in policy terms, a formalist would care most about the specific words in the law, and a legal process theorist would care most about advancing the legislature's purpose. The effect, as Young says, was to create continuity between statutory and constitutional law. That is, not only do constitutional values inform statutory meaning, but certain statutes may constitute part of an extra-canonical constitutional order.⁵⁹

Frickey's article on the Warren Court, mentioned earlier,⁶⁰ provided a window into his views of the legal process school, the constitutional doubts canon, and the general interaction between law and politics. In that essay, Frickey explored the relationship between constitutional law and statutory interpretation that is encapsulated in the constitutional avoidance canon, as well as some other techniques used by the Warren Court. Frickey analyzed how the Warren Court used this canon to partially defuse McCarthyism in the first half of the 1950s. His analysis involved close attention to a series of often-forgotten Supreme Court opinions from this era, as well as available evidence about judicial motivation and historical context. What he told was a story about the virtues of thinking small rather than big, clinging to legal technicality, and "talking descriptively while thinking normatively."⁶¹ In telling this story, Frickey linked the Warren Court's rulings with the contemporaneous views of legal process scholars.

Legal process theory seems to have a modern reputation of naively assuming that legal problems can be resolved into uncontroversial conclusions. That clearly was not Frickey's view as a close student of legal process theory. Instead, in his view, legal process theory was designed to "mediate the fundamental tensions of our legal system, not resolve them."⁶² In the Warren Court article, he referred to one opinion by Justice Harlan as "a masterful performance of legal process theory, all the while illuminating the submerged normativity and judicial power authorized by that approach."⁶³ This is not unvarnished praise—"submerging" normativity and judicial power seems decidedly sneaky if not Machiavellian.

Yet, despite such possible misgivings, Frickey also ultimately agreed with another commentator's judgment that the Harlan opinion was "a brilliant

58. Young, *supra* note 55, at 1382.

59. *Id.* at 1384.

60. Frickey, *Warren Court*, *supra* note 27.

61. *Id.* at 402. Indeed, it is appropriate to observe, much of Frickey's own scholarship could be considered an exercise in making major gains by thinking small to illuminate large normative issues.

62. *Id.* at 416.

63. *Id.* at 425.

example of legal craftsmanship and judicial statesmanship on the side of the angels.”⁶⁴ Part of his approval of Harlan’s opinion stemmed from its role in the development of constitutional doctrine at a time when the Court had no other clear avenue for proceeding. The Court had “no working majority in agreement on how to develop and implement either rules or standards for protecting freedom of expression in the context of alleged subversion,” and while there may have been consensus about avoiding the polar extremes, “how to construct rules or standards for intermediate circumstances was hardly self-evident from the case law or commentary, nor easily achievable for a divided Court.”⁶⁵ In this situation, the avoidance canon “provided a valuable tool for addressing these concerns,”⁶⁶ allowing Justice Harlan to use deliberately opaque prose “to provide a testing ground, leave open future possibilities, and attempt to avoid a congressional repudiation that would have stunted First Amendment law.”⁶⁷

Frickey’s view of the earlier generation of legal process theorists, though clearly positive, was not without its nuances. He expressed concern that legal process theorists overestimated the ability of legislatures to engage constructively with constitutional issues.⁶⁸ He also criticized the founders, or at least leading exponents, of legal process theory for their failure to engage constitutional issues: “Without a theory of constitutional law, or at least an approach to it, it is essentially impossible to develop guidelines for how courts should police the borderline between constitutional and statutory interpretation through the avoidance canon and related policies of clear statement.”⁶⁹ He worried about “the sheer judicial brute force” involved in some of the Warren Court opinions, while still viewing them as evidence that “the technicalities of law can be used masterfully in a statesmanlike manner.”⁷⁰ The challenge, according to Frickey, is to “provide some principled limitations to a tool that may seem to have a virtually limitless capacity for uncabined judicial innovation,”⁷¹ and he provided some suggestions on how to meet this challenge.⁷²

Frickey’s Warren Court article is striking in its meticulous attention to historical detail and context, its nuanced appraisal of the Court’s efforts, and its refusal to accept easy resolutions of the tension between conflicting values. It also shows that his relation to classic legal process theory was admiring in

64. *Id.* at 454. Frickey was quoting Harry Kalven, an important scholar of the prior generation whose contributions deserve greater attention than they seem to currently receive, perhaps because he could not be easily classified as a member of any “school” but his own.

65. *Id.* at 462.

66. *Id.*

67. *Id.* at 463.

68. *Id.* at 449.

69. *Id.* at 442–43.

70. *Id.* at 461.

71. *Id.*

72. *Id.* at 455–61 (suggesting that use of the avoidance canon was particularly appropriate where the Supreme Court was indicating to Congress that it had not actively considered an issue of “grave importance,” particularly one implicating “underenforced constitutional norms”).

many ways, but not uncritical; in particular, he dug deeper than the legal process theorists did in order to find ways of reconciling principled adjudication with reliance on substantive values.

The article also shows that legal process theory is not just a comfortable formula for deciding cases while dodging hard choices. At least as practiced by Frickey, it involves an ability to live with painfully unresolved tensions in the legal system, finding small-scale ways of compromising conflicts or accepting that sometimes one value must be compromised to provide critical protection to another value. This willingness to recognize value conflicts was also central to Frickey's scholarship on American Indian law, which is discussed in the following Section of this Introduction.

III

AMERICAN INDIAN LAW

Although Frickey's contribution to American Indian law was as significant as his contribution to constitutional law and legislation, his scholarship in this area is probably less well known to many readers. In their symposium Essays, Sarah Krakoff, Bethany Berger, and Robert Anderson provide insights into Frickey's work on American Indian law and show why it has been so important in shaping the field. Krakoff provides an overview of Frickey's contribution to American Indian law, while Berger focuses on his insights about the application of equal protection principles. Anderson then considers Frickey's views about negotiation as a preferred path for advancing Indian interests. Readers unfamiliar with American Indian law will find Krakoff's Essay especially helpful, for it traces in some detail the evolution of Frickey's scholarship.⁷³ This Section will first explore Frickey's views on American Indian law and then consider an important puzzle about how this work relates to his other scholarship, which at first blush seems to contradict it in some ways.

Some readers may wonder what drew Frickey to American Indian law. His experience working on those cases as a law clerk for Justice Thurgood Marshall seems to have been crucial in piquing his interest, but Krakoff shows that his background may have also played a role. Krakoff's Essay probes the "last Indian raid in Kansas," which took place in the vicinity of Frickey's hometown of Oberlin, Kansas.⁷⁴ Her research reveals that the active efforts of the Indians of the Oberlin area to resist dictates from Washington resulted in not only bloodshed, but ultimately in the successful establishment of a reservation in Montana, rather than in the Oklahoma destination favored by the government. That "hometown" experience may well have attracted Frickey's

73. Sarah Krakoff, *The Last Indian Raid in Kansas: Context, Colonialism, and Philip P. Frickey's Contributions to American Indian Law*, 98 CALIF. L. REV. 1253 (2010).

74. *Id.* at 1265–78.

attention to the subject.

The unifying theme that Krakoff sees in Frickey's scholarship is an appreciation of the structural nature of American Indian law as revolving around conflicts between sovereigns.⁷⁵ The key concept is that American Indians receive special treatment not because they are a disadvantaged minority group, but because they constitute a unique political community, or more accurately, set of political communities.

For this reason, as Bethany Berger points out in her symposium Essay, Frickey correctly argued that laws providing distinct treatment for Indians should not be subject to equal protection challenge because they reflect a classification based on sovereign status rather than on ethnic identity.⁷⁶ Indeed, as she suggests, failure to recognize tribal sovereignty is itself rooted in racism, particularly in stereotyped views of tribal government and courts and in a fear of allowing American Indians to exercise control over non-Indians.

Unlike Berger, Frickey himself steered away from any assessment of motives, but like her, he was clearly disturbed deeply by the Supreme Court's incursions on tribal sovereignty. As Krakoff documents, this concern about the Court's trajectory was a feature of Frickey's American Indian law scholarship from the beginning. Krakoff says the first phase of Frickey's scholarship recognized that the Supreme Court was moving away from principles that it had formerly considered foundational, such as the canon of interpretation requiring that treaties be construed in favor of the Indians.⁷⁷ He saw at work on the modern Justices the tension between tribal autonomy, as embodied in the sovereign-to-sovereign relationship of tribes to the federal government, and the pull of constitutional and public law values toward protection of nonmembers from tribal government.

In what Krakoff considers the second period of his American Indian law scholarship, Frickey explored Chief Justice John Marshall's contributions, which Frickey viewed as a fusion of method and substance.⁷⁸ In opinions that became foundational, Marshall's method of interpretation presumed that treaties created a unique relationship between tribes and the United States, building recognition of mutual sovereignty in the DNA of American Indian law. Frickey called upon the modern Supreme Court to return to Marshall's approach—and it is no tribute to the current Court that its methodology could be considered less enlightened than that of a Justice of nearly two centuries ago.⁷⁹

75. *Id.* at 1257–58, 59.

76. Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 CALIF. L. REV. 1165 (2010).

77. Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CALIF. L. REV. 1137 (1990).

78. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993) [hereinafter Frickey, *Marshalling Past and Present*].

79. *Cf.* FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND*

In what Krakoff considers Frickey's third period, Frickey seemed less optimistic about the potential for the judiciary to return to Marshall's values.⁸⁰ Instead, he favored negotiation as a method for preserving the core values of American Indian law. Robert Anderson explores the use of negotiation in his symposium Essay, finding that it has played a large and successful role in solidifying reserved water rights held by the tribes.⁸¹ Intriguingly, he also finds that the settlements themselves are beginning to enunciate some emerging principles, such as recognition of tribal instream flows for protection of fishery habitats.

In Krakoff's view, the fourth phase of Frickey's American Indian law scholarship was even more negative about the judicial role, viewing the Court as bent on assimilating American Indian law into the general body of public law at the expense of its unique structural emphasis on tribal sovereignty.⁸² And in what might be considered an additional fifth phase, Frickey recently seemed to be calling for a deeper understanding of the operation of tribal institutions, particularly tribal courts, in the hopes that this will spark greater faith by the Court in their competence and integrity.⁸³ At least as seen by Krakoff, Frickey's scholarly journey was deeper into pessimism concerning the Supreme Court's role in American Indian law, while not giving up hope for improved tribal authority.

Frickey's American Indian law scholarship raises an intriguing question for those who are familiar with his work on statutory interpretation, for the "Indian law Frickey" may seem to criticize the Court for the kind of legal creativity and policymaking that the "statutory interpretation Frickey" seemed to praise. Frickey plainly disapproved of the failure of these Justices to appreciate the value of Indian sovereignty and their use of interpretation to promote other values. But is this merely a quarrel about results, or did Frickey have a deeper objection to the Court's direction? Is the problem merely that the Court's pragmatic approach is based in a different set of political values than those he favored?

CONTEMPORARY TRIBAL LIFE 46 (1995) ("It may be fairly said that we have made little or no progress from Chief Justice Marshall's pathbreaking yet ultimately cautious and ambivalent efforts . . ."). Pommersheim also comments that Marshall's "form of serious interpretation seems woefully absent from today's Supreme Court . . ." *Id.* at 192.

80. Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754 (1997).

81. Robert T. Anderson, *Indian Water Rights, Practical Reasoning, and Negotiated Settlements*, 98 CALIF. L. REV. 1133 (2010).

82. Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431 (2005).

83. Philip P. Frickey, *Address at University of Kansas Conference on Tribal Law and Institutions, February 2, 2008: Tribal Law, Tribal Context, and the Federal Courts*, 18 KAN. J.L. & PUB. POL'Y 24 (2008).

Frickey addressed this issue at length in a 1999 article.⁸⁴ As he saw the case law, judicial interpretation in the field of American Indian law had become “dynamic” almost to a fault. He was scathing in his description of the Court’s work. It hardly matters, he lamented, whether “the Court acknowledges that no authoritative text controls and that the Court is engaged in federal common-lawmaking that divests tribes of inherent sovereignty or whether . . . the Court purports to rely upon statutory or treaty text to diminish tribal interests,” for in any event, “the Court reaches whatever result seems most practical in the current context” and in effect embraces “a common law for our age of colonialism.”⁸⁵ But, we must ask, did Frickey not endorse this kind of common law reasoning in other contexts? Is not sauce for the liberal civil-rights goose also sauce for the conservative anti-Indian sovereignty gander?

Frickey seemed initially to plead guilty to the charge of inconsistency. “At first glance,” he admitted, “the Court’s sensitivity to current context might seem to be a pragmatic interpretative effort defensible under William Eskridge’s theory of ‘dynamic statutory interpretation.’”⁸⁶ Yet, according to Frickey, the Court’s performance is actually in direct conflict with the recommendations of Eskridge about modes of statutory interpretation, not to mention Frickey’s own conception of practical reasoning. Frickey’s explanation of this point gives us a much deeper understanding of not only his critique of current trends in American Indian law, but also his vision of statutory interpretation.

In addressing the issue of inconsistency, Frickey pointed to two fatal flaws in the Court’s move toward common-law decision making. First, he said, the Court is guilty of a fatal lack of candor, pretending to rely on conventional legal sources when its opinions are purely consequentialist.⁸⁷ This lack of candor allowed the Court to avoid any serious examination of its own value judgments, which unthinkingly endorsed the interests of tribal nonmembers without crediting the crucial interests of the tribes in maintaining their own distinct cultures and political coherence. Second, the Court has ignored the unique context and history of American Indian law, and in particular, the historic judicial commitment to American Indian law as a “structural, sovereign-to-sovereign arrangement that seeks to meld historical practices of colonization with a current commitment to tribal survival.”⁸⁸ As a result, the Court has forgotten that the traditional attitude toward Indian sovereignty was

84. Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1 (1999).

85. *Id.* at 58. Frickey did not define colonialism, but the term here seems to refer to the relationship between a dominant political society and a subordinate one. Such a relationship existed between Great Britain and India prior to independence, and exists between the United States and Indian tribes today.

86. *Id.* at 60.

87. *Id.* at 61.

88. *Id.* at 76.

not based on a preference for tribal interests, but on a recognition that Congress could make the judgment about how far Indian rights should be subordinated to the interests of the general society.

In another article a few years later,⁸⁹ Frickey elaborated his critique of the institutional dimension of the Court's path. In "arrogating to itself a case-by-case role of refereeing disputes in Indian country, the Court has undertaken a rudderless task for which it is particularly poorly suited," for it "cannot possibly understand the dynamics of tribal-nonmember interactions in the multitudinous contexts in which they arise."⁹⁰ By intervening, the Court "preempted what would likely have been some sort of political solution—indeed, perhaps many localized political solutions."⁹¹ Thus, Frickey saw politics—either local or congressional—rather than litigation, as affording a better way of deciding certain kinds of disputes. Once again, his charitable view of the legislative process played a role, although it is doubtful that he romanticized the congressional attitude toward the tribes.

Frickey's American Indian law scholarship highlights several aspects of his jurisprudence. First, whatever the founders of legal process theory might have thought about judicial neutrality, it was certainly not Frickey's view that judging should be value-free: his critique of the Court rang loudly with his passionate support for tribal sovereignty, tempered—but not undermined—by an appreciation of political realities. Second, his approach in American Indian law cases was rooted in a deep understanding of the history of the field, and particularly in respect for Chief Justice Marshall's efforts to manage the tension between positive law and morally compelling tribal claims. Frickey's approach, then, was not one that ignored the lessons of the past or slighted the efforts of earlier generations of judges. Third, his belief in the necessary creativity of the judicial role sat side-by-side with his appreciation of the irreplaceable strengths of the legislative process. It was no carelessness of phrasing that his legislation casebook is subtitled "statutes and the creation of public policy," not "statutory interpretation and the creation of public policy." Judges stand "in the shadow of the legislature"⁹² and, while making their own creative contribution, should not overlook the legislature's dominant policy role.

89. Philip P. Frickey, *Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law Through the Lens of Lone Wolf*, 38 TULSA L. REV. 5 (2002). This article provides a particularly helpful overview for non-specialists of the development and current state of Indian law.

90. *Id.* at 30.

91. *Id.* at 32.

92. The phrase is from the title of Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875 (1991).

CONCLUSION

This examination of Frickey's scholarship has revealed several themes that cut across multiple fields of law. One important theme is a deeply institution-based view of the legal process. That view is perhaps most crisply expressed in the *Harvard Law Review* Supreme Court *Foreword* that he coauthored. He viewed law as a state of equilibrium between competing institutions (Congress, the executive, the federal courts, the states); each institution seeks to promote its own vision of the public interest, but with a strategic awareness that this "vision can be achieved within a complex, interactive setting in which each organ of government is both cooperating with and competing with the other organs. To achieve its goals, each branch also acts strategically, calibrating its actions in anticipation of how other institutions would respond."⁹³ This process "renders law more adaptable over time because groups objecting to outdated legal rules have multiple fora in which to press their petitions for change," and also yields "more broadly acceptable rules because their evolution will reflect input from various institutions."⁹⁴

This institutional interplay is not a free-for-all, however, and the *Foreword* faults the Supreme Court for showing too little restraint in statutory cases and suggests it should be less activist in lawmaking.⁹⁵ Recall that Frickey made this accusation even more forcefully in his American Indian law scholarship, where the Court has, in his view, usurped Congress's plenary power over American Indian affairs.⁹⁶ Recall also that he accused the Court of intrusively trying, in a line of constitutional cases, to restructure the legislative process to function in a way more appropriate for an administrative agency.⁹⁷ As an institution, the Court has an important role to play, but Frickey insisted that its role should be one of cooperation, not attempted dominance.

A second theme in Frickey's scholarship is a willingness to accept contradictory imperatives as a fact of life. We see this most clearly in Frickey's American Indian law scholarship. He saw American Indian law as "rooted in the fundamental contradiction between the historical fact and continuing realities of colonization, on the one hand, and the constitutional themes of limited government, democracy, inclusion, and fairness that, on the other hand, constitute part of our 'civil religion.'"⁹⁸ This acceptance of contradiction also surfaces prominently in the Warren Court article, with its concerns about potential conflicts between rule-of-law values and core constitutional values, such as free speech, for which there is an imperative need for judicial defense.

93. William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term – Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 28–29 (1994).

94. *Id.* at 35.

95. *Id.* at 76–77.

96. See *supra* text accompanying notes 89–92.

97. See *supra* text accompanying notes 9–11.

98. Frickey, *Marshalling Past and Present*, *supra* note 78, at 384.

Such contradictions cannot be resolved at the wholesale level by theory; they need to be addressed at the retail level by judges in specific cases—thinking small but normatively.

A third theme is practical reasoning. Practical reasoning involves more than simply recognizing that multiple legal sources are relevant to statutory interpretation, with no one source being automatically privileged. It is more than just a rejection of universal formulas for resolving hard cases. Practical reasoning also involves an important set of attitudes.

In an important article on practical reasoning, Frickey and a coauthor elaborated what they saw as the appropriate stance for judges in statutory interpretation. They touted their view of practical reasoning for more than just its rejection of foundationalism, but rather for its several key strengths, which included “its focus on the concrete . . . , its willingness to acknowledge indeterminacy and conflicting values rather than indulge in makeweight arguments . . . , and its effort to engage in a dialectic of interpretation.”⁹⁹ They viewed the last point as perhaps the most critical, because statutory interpretations too often “ignore opposing arguments or treat them in a dismissive, mechanical fashion . . . and too rarely do they engage in an open dialogue that notes the virtues of various positions and explains why one of them is preferable.”¹⁰⁰ Perhaps it is quixotic to expect this kind of open-minded, sensitive, and dialogic reasoning process from judges. Yet, it is a worthy goal all the same, and Frickey’s scholarship has done as much as the work of any academic to promote that goal.

This kind of practical reasoning—with its emphasis on concreteness, acknowledgement of conflicting values, intellectual candor, and dialogue—is not a virtue only when practiced by judges. It is also a virtue for scholars. And in his own work, Frickey not only advocated practical reasoning, but also exemplified it at its best. As fellow scholars and students of the law, we were lucky to have had him among our company.

99. Eskridge & Frickey, *Practical Reasoning*, *supra* note 33, at 371.

100. *Id.*

