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Principles in Legislation

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By Geoffrey C. Hazard, Jr.*

The distinguished jurist after whom this series of lectures is named, Benjamin Cardozo, gave a classic exposition entitled The Nature of the Judicial Process.¹ He was talking about decision-making by courts, although much of what he said can be interpreted as referring to law-givers generally, whether they be in courts or in legislatures. An earlier distinguished jurist, Jeremy Bentham, gave another classic exposition entitled Principles of Legislation.² He was talking about decision-making by legislators, although Bentham like Cardozo also can be read as referring to law-givers generally. An important theme of Cardozo's exposition was that the judicial process involved much more than deductive application of legal rules, and that it necessarily entailed some sort of calculus of normative considerations that transcends the reading of legal texts and drawing deductions from them. Bentham directly addressed the nature of that normative calculus, for in his view rational legal measures necessarily were founded in the principle of utility. That is, legal rationality consisted of applying general principle, specifically the principle of utility. Moreover, Bentham asserted that proper legislation was derivable by a deductive analysis from the principle of utility. I propose to juxtapose the subjects of these famous expositions and thereby consider the nature of the judicial process by exploring the role of principle in the legislative process.

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I. Introduction

A. The Question to be Considered

Suppose it were the case that legislation is substantially based upon principle and upon reasoning according to principle? If such were the case, it would seem to disconcert a great deal of philosophical and professional discussion in the American legal community about the nature and proper scope of the judicial process. Such is the rhetorical purpose of this presentation: To disconcert the widely though not universally held view the judicial process employs a peculiar mode of principled reasoning which in turn peculiarly legitimates the judicial process.

On a prior occasion, I have questioned this assumption about judicial reasoning through another line of argument. That line of argument was that a coherent interpretation of the legitimacy of what courts do must go beyond considerations of principle. The argument more specifically was that the judicial process not only necessarily but legitimately incorporates reference to the historical context of the legal issue immediately before a court, political determinants of the options open in any specific legal controversy, and the nature of the commitment to the future that is entailed in pronouncing rules that purport to be ones of law. The prior argument therefore was that considerations of principle are not the sole proper ingredient of judicial decisions. The present argument is that considerations of principle are not uniquely an ingredient of judicial decision.

The proposition that courts do not proceed simply on the basis of principle is of course a familiar one. Actual or alleged failures of courts to adhere to principle is at least as old a grievance against the administration of justice as the grievance against delay. However, it is one thing to say that judicial deviation from principle is a ground for criticizing the judicial institution, and quite another to say that judicial deviation from principle must be understood and accepted on the way to deeper understanding of how law is made and applied. When
the observation is toward the latter end, consideration of the role of legal principle in making law leads not necessarily to outrage at the injustice of administered justice but to intensified curiosity about the nature of administered justice—as Cardozo called it, The Nature of the Judicial Process. Thus, the purpose of such an inquiry can be analytic rather than polemical.

So also in the present inquiry. The conclusion advanced here is that courts are not unique in making decisions that are based on principle, but that the decisions of legislatures necessarily reflect considerations of principle as well. If that is true, then a clear distinction between the function of courts and the function of legislatures cannot be drawn in terms of the presence versus the absence of principles as a substantial element in the decision-making process. And from that it would follow that we have to go further or in some other direction to discern the special characteristics of the judicial process, if indeed it has any special characteristics that distinguish it from the legislative process.

B. Some Similarities of Courts and Legislatures

Let us bring the question into sharper focus by noticing some fundamental similarities between courts and legislatures. One similarity is, of course, that they are both organs of government. That proposition is obvious, but its obviousness may obscure its significance. That courts and legislatures are both organs of government is significant at the very least because courts and legislatures are in some sense accountable to the whole political community. By definition that is not true of any institution in the private sector—such as a business, a church, a family. The reference point of public accountability being inclusively the whole community, the process of public accountability must be one ultimately of internal review—What are "we" doing?—rather than external review—What are "they" doing? That being so, there is some minimal sense in which the functions of courts and legislatures must be assessed according
to a common normative standard.

Another fundamental similarity is that the provinces of the judiciary and that of the legislature are largely coextensive in terms of subject-matter. It is not the case, for example, that the judiciary is concerned only with such matters as the rules of contract while the legislature is concerned only with such matters as the rules of taxation, or that courts are concerned only with private law while legislatures are concerned with matters of public law. Quite the contrary. A clean subject-matter boundary between adjudication and legislation cannot be drawn because both the judicial power and the legislative power in fact address themselves to virtually all legal subject-matter.

So also there is at best only a marginal distinction between the judiciary and the legislature in terms of the relative generality of the legal propositions with which they deal. It is a common supposition that adjudication deals with particular situations, while legislation with general classes of situations. That distinction is substantially correct as applied to routine trial court adjudication. However, it is only roughly tenable when it comes to the kinds of adjudication that excite concern about the legitimacy of the judiciary—test cases, leading edge cases, cases where law is made, whether in trial courts or courts of appellate jurisdiction. Adjudication of any specific leading edge case is unintelligible only in terms of classes of cases, for "leading edge" contemplates some body of legal rules with respect to which the instant case is at the periphery. More fundamentally, adjudication affects general classes of cases even if it immediately addresses only individual cases. Correlatively, while legislation immediately addresses classes of cases, legislation is intelligible only when specific cases are brought to mind. These reciprocal relations are reflected in the language used by courts and legislatures. What legal propositions are more general, after all, than "due process of law" or "equal protection of the laws"? And what legal propositions are more specific, more narrowly focussed on specific instances, than some of the provisions of the
Internal Revenue Code, or of the laws governing the structure of government, or environmental protection regulations?

So also the judiciary's province is not satisfactorily demarked by references to the composition of the judiciary as compared with the legislature. Judges are, in the federal system at any rate, appointed; legislators are elected, and hence hold office on a fundamentally different constitutive basis. But that distinction, important as it is, is far from conclusive from an analytic point of view, whatever might be our premises concerning democratic theory. For one thing, it is not universally true that judges are appointive and legislators elective. In many states in this country the judiciary is constituted by election. For a long time one branch of our national legislature formally was constituted by appointment, i.e., the Senate until adoption of the XVII Amendment in 1913. More important as a practical matter, much of our "legislation" consists of regulations promulgated by nonelective officials of administrative agencies. Still more fundamentally, selection of nominees for the judiciary and for the legislature has important elements of similarity—clearance by key power-brokers, acceptability to significant constituencies, etc. And in terms of socioeconomic background and career experiences, judges and legislators generally are similar types. We could also add that, at least in the American experience, both judges and legislators are much engaged in dealing with specific cases as distinguished from the formulation of general rules or policies. A lot of legislator time and energy go into "legislative casework" as it is called. Indeed, legislative "casework" is often a complement to or substitute for judicial review of administrative action.8

These important similarities are all obstacles to establishing a satisfactory analytic distinction between the judicial function and the legislative function.9 Hence, the classic endeavor, at least in American jurisprudence, is the attempt to define the province of the judiciary in terms of its intellectual process. In American jurisprudence, that philosophical question is also a
fundamental constitutional question, for it implicates the question of the separation of powers between the judiciary and the legislature—the boundary between Article III and Article I. A key element, if not the exclusive element, of the supposed distinction between the judicial process and the legislative process is that the former, but not the latter, involves reasoning on the basis of principle. However, if it appeared on reflection that the modern legislative process and the modern judicial process are really quite similar in their underlying intellectual method, the conventionally accepted bases for defining the judiciary’s proper province would pro tanto be effaced.

C. Criteria in Pursuing the Question

Entertaining the proposition that legislatures themselves are in fact substantially guided by principle does not require saying that legislatures in fact are guided by principle alone. The essential character of a human institution, whether for the purpose of analysis or for the purpose of appraisal, is not drawn in terms of such an exacting criterion. We do not impose that criterion in determining whether a court is a court. With respect to courts, we are satisfied to say that precedent and principle are characteristic of their decision-making, when we find them to be salient therein, even though we also accept Cardozo’s thesis that the judicial process involves such other dimensions as policy and personal normative preferences. Let us apply a comparable standard to the legislature. Thus, the question is: Granting that legal innovation and policy and personal normative preferences play a substantial part in legislative law-making, is it not also true that principle plays a strong and perhaps even dominant part?

This is not to say that principle plays the same part in the rhetoric of legislative debates and in the legal product of legislation that it plays in the dialectic of advocacy before a court and in decisions that emanate from adjudication. What legislators say on the hustings and in legislative debate, and in the
corridors and cloakrooms, is indeed often quite different from what advocates argue to judges and what judges expound in their opinions. But that does not exclude the possibility that legal principles largely explain what legislatures do. It is not, in John Mitchell's phrase, that we should look only at what legislatures do and not what they say. It is rather that the rhetorical vulgarity and partisan cupidity often manifested in the legislature's discourse can be considered mere trappings that disguise a more rational process underneath the pattern of behavior necessary for staying in office. In the work of the judiciary that is done off the bench, we all know that there is also a good deal of rhetorical vulgarity and partisanship. By the same token, we have no difficulty in supposing that apparently reasoned discourse in judicial opinions is often a mere trapping for vulgar and partisan casuistry. Why can we not accept the converse? After all, economic analysis leads us to discern that intelligible patterns of human conduct are expressed in the apparent chaos of the market place, and indeed that the patterns produced by the market are more coherent than those actually resulting from the supposedly concerted efforts of public administration. In parallel fashion, we have to consider the possibility that, in the main and with due allowance for the legislative contrivances that facilitate re-election, the product of a legislature is a lot more intelligible in terms of principle than it presents itself as being.

II. The Nature of the Argument

The argument in support of this proposition consists of synthesizing observed characteristics of the legislative process. The argument is therefore suggestive rather than demonstrative, let alone being exhaustive.

With this in mind, I wish to bring into view four characteristics of the legislative process in addition to those already adverted to. First, if one looks at the content of legislation considered
as a whole, its corpus is describable in terms of general normative principles. That such a description can be made would seem possible only if such principles in fact guided the formation of the corpus of legislation in the first place. Of course, we could consider the product of legislatures as accidentally coherent. This possibility brings in mind the classic fable concerning the laws of chance that has to do with six apes at typewriters. The story of course is that if six apes sat down at typewriters long enough they would eventually replicate Shakespeare. There are certainly some attractions in thinking of the legislature's product in this way. Perhaps something like that process in fact was the genesis of the Internal Revenue Code. But on fuller reflection we recognize that it is simply against the laws of probability that the general corpus of a country's legislation would be describable in terms of principles unless that corpus of law was in fact formulated on the basis of the principles in terms of which it can be described.

Second, there is reason to think that legislatures are virtually driven to refer to principle as a means of doing political business and thereby avoiding their own atrophy and political demise. The argument is that a multi-member decisional body such as a legislature, unless controlled by very powerful external incentives, tends to array itself into subgroups and that as so arrayed tends toward deadlock. In a state of deadlock, the body becomes incapable of performing the very function it has been constituted to perform and will atrophy or be abolished unless it can escape this internal bondage. Falling back on principle is a means by which the legislative body can resolve such deadlock. Hence, reliance on principle in decision-making may be an intrinsic necessity for a legislature, perhaps even as much as for courts.

Third, if we consider the logic by which adjudication proceeds, at least in the adversary system, it has a structure that is in important respects similar to that by which statutes are
formulated. In making this comparison, the key point is to consider not only the products of the two processes—the legislative statute and the judicial decision—but the logic by which the product takes shape prior to the point of final adoption.

The fourth aspect of the argument proceeds on a more fundamental level. This is that the modern Western mind, whether occupied in legislation or adjudication, is culturally predisposed to think in terms of normative generalizations when it thinks in normative terms at all. The modern mind conceives of things in terms of abstracted characteristics and properties rather than in terms of unique identities. For example, it thinks of the conduct of a "reasonable person," not simply of the idiosyncratic conduct of specific persons. It thinks of motor vehicles and not simply of specific metal objects at the curbside. Correlatively, the modern mind is also more or less scientific, thinking of transactions in terms of general rules of cause and consequence. It is in such terms that we can conceive the notion of proximate cause in torts, or of "business income" in taxation, or of conditions precedent in contract law. If the modern mind thinks in these terms, the modern legislator like the modern judge ordinarily thinks in general concepts whether he wants to or not. Someone once described the Illinois legislature, I believe it was, as being constituted of the best minds of the Twelfth Century. That may be so, and the same thing might be said of the Upstate Caucus in Albany. But these instances even if actually verified would only be exceptions that prove the rule.

Let us further consider these points in order: That the legislative product in fact is generally based on principles; that legislation reflects general principles as a matter of political necessity; that the logic of the legislative process is importantly similar to the logic of the judicial process; and that legislation is an expression of general principles because it is in such terms that members of modern society think.
III. The Principled Content of Legislation

It is an interesting problem how to determine whether a corpus of legal rules expresses general principles or not. Yet there seem to be ways of testing the proposition.

One is by inquiring whether there are bodies of law that clearly are not based on principles, that is by using a technique of definition by contrast or exclusion. A search for such bodies of law based not on principle brings one familiar instance directly to mind: The Doomsday Book of William the Conqueror. It will be recalled that the Doomsday Book was a massive compilation of the various usages, rights, and obligations of the inhabitants of the English domain acquired by the conquering Normans. It was put together Wappentake by Wappentake, vill by vill, messuage by messuage, recording how many hides the tenant of Blackacre owed to his lord, what services were due at Michaelmas and Easter, what obligations arose upon the birth of a child or a marriage or a death. There are literally thousands of entries of what the rules were—a huge mass of normative particulars. There were no general principles. It was only in the subsequent evolution of the common law imposed by the King that general principles came into force. Indeed, it was the common applicability—the generality—of the king's law that distinguished it from the pre-existing English law and which led to its being called common law.

The condition revealed in Doomsday prevailed generally in the whole of Western Europe in medieval times—a mass of normative particularisms. One of the fundamental constitutional debates in the Renaissance and post-Renaissance periods was whether this settled mass of particularisms should be disturbed. There was great resistance to disturbing them. It is an interesting paradox that our own Declaration of Independence—declaring the foundation of a new political order—should rest in part on the grievance that ancient particular rights had been overturned, and that our own Constitution
while creating a new political order put some rights, such as rights of property, beyond the full reach of political authority. The most revolutionary of the post-Renaissance legal revolutions was expressed of course by the Napoleonic Code. The very purpose, aim, and effect of these codes was to displace the mass of legal particularism, lingering in France and then elsewhere in Western Europe, with general principles. Certainly it was Bentham's aim to get rid of such ancient usages:

"If we could conceive a new people, a race of children, the legislator, finding no expectations in existence to thwart his plans, might fashion them at his pleasure, as the sculptor shapes a block of marble. But, as there already exists in every clime a multitude of expectations, based upon ancient laws or time-honoured customs, the legislator is obliged to pursue a system of conciliation and concession, which hampers him at every turn."

By contrast with the compendium of medieval legal miscellany reflected in the Doomsday Book, or the normative localisms that the Code Napoleon undertook to destroy, the corpus of modern legislation is the essence of principled law-making. The accumulation of statutes enacted by modern legislatures can through application of rational principles be classified into codes. Legislative revision and recodification is indeed now a standard legislative process.

Let us consider another definition by contrast, this time comparing the content of public legislation with the content of the internal norms of governance of private organizations such as businesses, clubs, universities, and unions. It is unconventional to consider the internal governance of such organizations as "law," but surely it is in some very important respects. Private organizations, to the extent their powers and internal affairs are not regulated by supervening legislation, are governed by contract and internal custom. The rights and obligations so established are enforcible initially by private action but
ultimately by legal process. For example, an employee of a business is subject to sanctions such as discharge by his employer, and in most cities tenants and landlords can have a similar parting of the ways by private action. The sociologist or anthropologist would remind us that these private non-legal norms are backed initially and primarily by private non-legal sanctions—sanctions such as being shunned, berated, bad-mouthed, or left out of the social intercourse of the immediate context. The same is true of the structure of governance within a firm, a faculty, a congregation or a union.

Enough has been said to indicate that private governance, with norms and sanctions, is ubiquitous even in our relatively law-ridden modern society. In the daily life of real people, as distinct from lawyers, these private political systems, among which we should also include the family, are what the normative aspect of existence is mostly about. The law as lawyers know it is remote, and only episodically significant—just as the king's common law was remote and only episodically significant in the life of the medieval manner or vill. The governance of these private polities—families, businesses, neighborhoods, churches, clubs, etc.—is constituted of local, informal, ad hoc, ad hominem, traditional, unsystematic customs, usages, and ways.

Of course, there are private by-laws and company policy manuals and standard procedures. Relative to the group's informal norms, such compilations are systematic and coherent, often resembling a legal code in this respect. But by-laws and company policy manuals, even in the most bureaucratized organizations, are only a fraction of the norms that operatively govern the relationships within the organization. Moreover, and directly to the point of our comparison with legislation, the formal and informal rules of a private organization taken together have no necessary resemblance to the counterpart rules of other private organizations, even ones that are engaged in very similar activities. For example, recent sophisticated
analysis of business organizations often focus on the distinct and particular operating routines of particular businesses. That is what the currently popular book on "In Search of Excellence" is all about—the relationship between organizational norms and organizational performance. The same idiosyncrasies are exhibited in the internal governance structures of nonprofit private organizations and in the informal governance of public agencies and bureaus.

The point of these comparisons is to emphasize the relatively unique structure of law as such, including legislation as such, in terms of its generality and internal coherence. From this perspective it is simply a matter of fact that modern legislation like modern decisional law is relatively very general rather than relatively particularistic, compared either with law as it was known before the modern era or with the non-legal norms that we live with in our daily lives. If modern decisional law is more closely connected to general principles than is modern statutory law, the greater proximity is a matter only of slight degree.

Another way of developing the point is to inquire whether it is possible to formulate a principled analysis of, for example, the tax laws or corporation law or the law of procedure. These bodies of law are in origin and content largely statutory, in comparison with contract and tort, which in the Anglo-American law have always been primarily decisional. As to the tax laws, my former colleague and esteemed friend Walter Blum of the University of Chicago contended that the income tax law could be accurately analyzed in terms of five variables, which is surely no more than required to analyze the law of contract or torts. My former colleague and esteemed friend Marvin Chirelstein has indeed analyzed the income tax law in terms of a few basic principles whereby to make the subject at least as intelligible as contracts or torts.17 At a deeper level, Professor Blum and the late Harry Kalven gave us a rationale of the progressive income taxation that expresses fundamental principles as explicitly as, say, any restatement of contract or property law.18
Correlatively, Grant Gilmore has suggested that the decisional law representing contract doctrine, if critically read, revealed itself to be unprincipled to the point of unintelligibility. And anyone who is intrigued by anomalies and discontinuities in the law will find them as rampant in the tort law emanating from the courts as in the commercial law or penal law emanating from the legislatures.

What has been argued so far is simply a proposition of political fact: That however it may be considered possible to measure the degree to which a body of law is "principled," statutory law as such is not significantly less principled than decisional law. The suggested implication is that both statutory and decisional law, in substance if not in rhetorical manifestation, rest on general principles in much the same way.

IV. Resort to Principle as a Political Necessity

The second feature of legislation to be considered is that reliance on principle is politically useful and therefore politically necessary in the conduct of legislative politics. By "legislative politics" is meant the political process among contending factions within a legislature, as distinct from the electoral process by which legislators are chosen. Of course, principle plays some part even in electoral politics. While engaged in seeking election, legislators—whether incumbent or would-be—generally claim themselves to be appealing to principle rather than sheer cupidity and local interest. That claim need not be accepted at face value, yet neither should it be rejected on its face. Certainly candidates for the legislature find it useful to trade in the coin of principles, a least in communities where the ballot-counting is honest, and we should not lightly reject the verdict of that market-place.

Whatever may be the nature of electoral politics, however, the nature of the political process within a democratically selected legislature would seem to make resort to principle a virtual
necessity. The point is that without resort to principle, the legislature is at risk of falling into deadlock and thereby destroying its own usefulness.\textsuperscript{20} Although legislators may seem only dimly aware of the fact, a legislature as an institution is only contingently legitimate. Article I of the Constitution of course says there shall be a Congress. But the continued viability of Article I is ultimately contingent upon Congress's being able to provide a solution of the law-giving problem that is better than the available alternatives. State legislatures face the same problem. The legislators therefore must give satisfaction in the political marketplace in much the same sense that a business enterprise must give satisfaction in the economic marketplace. Otherwise, who needs them? If the legislatures cannot function as such, we could go back to having kings, or choosing law-givers by log as the Greeks used to do, or resort to wholesale delegation to administrative agencies and the executive.

I will consider only the case where the legislature does not fall into two fully alienated hostile camps, wherein a stable majority is antagonistic on all issues to a permanent minority. Such situations of permanent dominance rarely exist in a political democracy. Indeed, the existence of such unreconcilable hostility between discrete groups appears invariably to be the precursor of either political subjugation or revolution, or both. In a context where there is no fixed majority confronting a wholly insular minority, the significance of reliance on principle can be considered from the respective viewpoints of the majority coalition and the minority.\textsuperscript{21}

A majority coalition is always at continuous risk of dissolving in dispute over the specific interests of its constituent factions. To maintain the cohesion required to stay in business, the managers of the majority coalition therefore must continually refer to common interests among these constituents. Moreover, since the majority is in constant risk of suffering defection, it must have a store of inducements by which to recruit replacements from the minority. Sheer patronage is an inducement, of
course, but it is never sufficient because demand for patronage is insatiable. The inducements therefore have to be found in common interests—for terms of mutual forebearance that yield mutual advantage. Common interests by definition transcend in some degree particular interest, and are stated in generalities. I have in mind such notions that all should bear some fair share of taxation, that all should have basic protection of person and property, and so on. An economic dimension of the point could be made by saying that public goods should be truly public. Such propositions begin to sound like matters of principle. It thus appears as a matter of political experience that an effective majority can maintain itself as such only on the basis of a platform of proposals that appeal to such common interests—equitable taxes, political equality, or whatever else.

The problem viewed from the perspective of the minority is counterpart. So long as the majority holds itself together, the minority is a passive observer and critic, not an initiator of policy. But the majority's continuous risk of dissolution is the minority's continual opportunity. The minority's "shadow agenda" is indeed crafted as an inducement to defection on the part of members of the majority coalition, either on the part of the electorate at the polls or on the part of those who were originally elected under the aegis of the majority. Moreover, the majority is saddled with the practical burdens that fall on those who hold responsible office. It is the government that must make the mistakes, compromise with reality, and disappoint expectations. The incumbent majority continuously ages from care and exhaustion; the minority continuously charges itself with the energy of fresh promises. But those promises must both hold the minority's present constituency while reaching out to the disaffected. And that too requires defining its program in broadly acceptable terms, in terms of principles of common interest and appeal.

This is only a sketch of what seems to be the dynamic of the internal politics of group decision-makers, the kind of dynamic
that occurs within a legislative body. The point, which I take it the converse of the famous Condocert paradox, is that survival in propounding a program through such a group requires being able to articulate and give effect to a transcendentally acceptable set of normative proposals. When the group is not able to do that, as our own Congress in recent years has had difficulty in doing, the group ceases to determine the agenda, as President Reagan has demonstrated. Over the long term, it is not in the professional interest of those who have found their vocation in legislative office to allow that to happen. Hence, resort to principle.

It might be added that essentially the same logic applies even when the group is much smaller. It would seem to apply, for example, to a group of twelve, as in a jury, or even a group consisting of nine members. Hence, another possible resemblance between legislatures and courts.

V. Legal Formulation in Judicial and Legislative Process

The third dimension for consideration is comparison of the process of formulation of rules in judicial decision-making and in legislation. Although only a very abbreviated analysis of this comparison can be given in a few words, it takes only a few words to make the essential point. That point is that the processes of law-making in legislation and that in adjudication have more in common than might first appear.

The judicial process—the decisional process to which Cardozo was referring in his classic lecture—is generally described in terms of decisions made by appellate judges in response to the cases before them. The case, not only the facts but the legal arguments submitted by the parties, is taken as given. On one hand is a party relying on a settled rule whose policy basis has been eroded by changing social context or industrial practice; on the other hand is a party relying on "policy" and the force of analogy from some more remote legal principle. On the one
hand is a party contending for the "plain meaning" of a statute, while the other party is contending for interpretation according to the purpose and general sense of the statute. The task for the court is to decide between more or less tightly framed alternatives tendered by the parties. It is in these terms that the court's function begins and in which the judicial function has been portrayed.

In contrast, according to the conventional view the legislature considers each new legislative problem with a clean slate. The legislature is free, according to this view, to define the problem in whatever terms it wishes, to consider the full range of possible solutions, such as regulation, taxation, and subsidy, and to innovate rules and procedures by which the solution is to be articulated. The legislature can define substantive duties, shift burdens of proof, legalize the illegal, proscribe the immoral, and so on.

There is certainly something to this view of legislative freedom. In a constitutional sense—in terms of what the legislature has authority to do—of course a legislature has such flexibility. And there is no question that legislatures have at times undertaken bold innovations. Yet the legislative product viewed in aggregate, with an eye to the typical case of legislation, reveals nothing of such heroic character. Most legislation consists of amendment to the existing legal corpus, generally minor amendment at that. More fundamentally, even major legislation usually consists of very traditional components put together in slightly rearranged form. Thus, the Interstate Commerce Act largely imitated state legislation that had been on the books for decades; most subsequent independent regulatory agencies created by the federal government were closely patterned on the Interstate Commerce Commission; the Uniform Commercial Code was very largely a rewrite of the old Sales Act and the Negotiable Instruments Act; the Federal Rules of Civil Procedure were a procedural magpie's nest. And so on.

A distinguished predecessor in giving these Cardozo lectures,
a lawmaker with broad experience in all forms of law-making, has put the point very succinctly. In his 1965 Cardozo Lecture, Chief Judge Breitel said:

"It is often thought that the legislative process is a relatively free-wheeling one, untouched by precedent, tradition, policies, or the need to justify its products in elaborated rational fashion. The contrary is true. The legislative process by its own internal traditions, as well as its external political necessities, is also controlled by precedents, traditions, and policy considerations. This is true in the area of public law. It is dramatically true in the area of private law.""23

This imitative and derivative pattern of legislation is not accidental. Quite the contrary, it expresses basic legal and political necessity. Legally, if one wants to accomplish a result through new legislation, the most likely instrument is something that has worked before and which the judges and lawyers will understand. Politically, if one wants to explain how a proposal will work, and what it will avoid doing as well as what it will do, the most effective means is to point to an existing example. Indeed, there is a kind of law of inverse relationship between the aim of a legislative measure and the means employed to accomplish its result: The more far-reaching the statutory objective, the more conventional and familiar should be the components of the statutory instrument.

Thus, legislation in fact works very much by a system of precedent rather than by surges of normative inspiration. And the accumulation of precedent expressed in legislation manifests general principles—accepted basic terms for the ordering of society.

If the legislative process considered in full view is largely a system of precedent, the judicial process considered in full view actually entails a far wider range of alternatives than those served up to the appellate court. Before an appellate court is
given opportunity to reshape the law, that opportunity has been shaped in form of the case presented to the court. Obviously, the case may bear the imprint of the trial court—the record, the rulings, the findings, and so on. All of those trial court choices pro tanto define the possibilities that open when the case has reached appeal. Even more determinative is the work of the lawyers, particularly the plaintiff's lawyer, in bringing the case in the first place.

We are considering here "leading edge" cases, those in which an appellate court may eventually have occasion to make the fateful choices to which Cardozo referred. Such cases arrive in court, initially in the trial court and later in the appellate courts, as products of the lawyers' legal transformation of raw normative potential into more or less specific legal proposals. What was legally amorphous and protean has been hammered into familiar legal propositions. The lawyer has been first draftsman so to speak—that is, author of the first draft of the work that will become the appellate court's ultimate legal product. In that first draft, the lawyer selects from the dull range of the common law's possibilities. He or she settles on those that are most promising, i.e., which will find most ready acceptance before a skeptical and often unwilling appellate bench. And what possibilities are most promising? Those, of course, that are more conventional and most familiar, manifesting generally accepted principles. Just the choices made by the legislative draftsman.

VI. Principle and the Modern Mind

The final proposition that I wish to advance for consideration is that modern legislation is based on principle because thinking in terms of general principles is the medium of our very minds. This is not to say that the modern mind cannot think in terms of isolated specifics, or to deny the existence of other tendencies in modern thought, such as extreme egoism, political romanticism, or religious fanaticism. It is only to say
that in the Twentieth Century when we think of the objects and means of legislation, we think in terms of generalizations and universals. This mode of thought predominates regardless of our political aims and political philosophy, and regardless of the theories of history and of social interaction we may hold. Thus, while Marx and Marxism radically contradict Adam Smith and the neoclassical economists, for example, all economic theories hold that the behavior of man operates according to general rules. So also, not all of Freud's successors agree with his explanation of psychic behavior, but they all agree that psychic behavior is rationally explicable. We all work with generalizations about existence.

The generalizations about existence that emanate from modern social science, whether economics or sociology or psychology, are the predicates of modern law-making. All legal norms state or imply some theory of causation, because concepts of responsibility and authority are unintelligible without theories of causation. The witchcraft trials during the Renaissance were premised on a supposition that witches were capable of bewitching; the modern theory of criminal responsibility is premised on the supposition that some persons who appear bedeviled are in fact incapable of controlling their own conduct. Modern theories of causation are formulated in scientific generalizations: the laws of thermodynamics, of cybernetics, and so on. We believe no longer that any chain of events is analytically unique, but that all chains of events are in principle explicable in common terms. Otherwise, we would not see a connection between deaths in Bhopal and risk of death in Institute, West Virginia.

More immediately relevant to legal analysis, whether we are thinking about judicial decisions or statutes, we think in terms of economic, sociological and political principles that operate across specific legal contexts. The economic concept of cost applies whether we are talking about breach of contract or criminal sanctions; the sociological concept of social identity
applies whether we are talking about race discrimination or military discipline; the political concept of public information applies whether we are talking about the law of evidence or the law of defamation.

As the baffling and illuminating Foucault says:

"[T]he positivity of the human sciences rests simultaneously upon . . . the three domains of biology, economics, and the study of language . . . function and norm, conflict and rule, signification and system completely cover the entire domain of what can be known about man."²⁵

More trenchantly and pragmatically, Chief Judge Breitel said:

"Indeed, man, even the non-rationalist himself, is doomed to debate, communicate, and decide by the rational process. His mind has no other way to do its work in its waking moments outside of a mental hospital."²⁶

These being the structural components of our ideas of what goes on in the world, they are also the structural components of our ideas of what ought to go on in the world. In the empirical assessments by which we explain events to ourselves, we project from the past into the present, and from the present into the future in terms of such structural components. In the normative assessments by which we explain who is responsible for what, now or in the future, we follow the same pathways. Indeed, it is only because our minds proceed on such pathways that we can conceive the idea of legal inconsistency. At one time, the official doctrine in Western society was that all events were the work of God. On that basis, any question of inconsistency in the ways of mankind is presumptuous at least, and incoherent at worst. What is Is. God made it, and if anyone is bothered by the situation, he ought take it up with Him later. There is a weaker form of much the same idea, one that still has a strong following. This the theory of vested rights: Whatever
was Is. In a pure theory of vested rights, questions of inconsistency are legally outre. In a regime governed by such a theory, law is not an analytic undertaking but a complex descriptive one, like the Doomsday Book. We have gone beyond that point of view.

FOOTNOTES

2 Bentham, Theory of Legislation, originally published under the title Principles of Legislation, in 1802.
4 Accountability as a practical matter cannot be immediate and direct. There is always some delay, which in turn enlarges the array of events necessarily considered in the accounting. For example, in the case of elected representatives there is delay until the next election. Officials other than those subject to reelection are accountable even more indirectly. In the case of judges, the ultimate sanction is impeachment or similar procedure.
5 Hence, the connundrum of differentiating legislation from quasi-judicial administrative action for purposes of fixing the scope of judicial review. Compare Londoner v. Denver, 210 U.S. 373 (1908), with Bi-Metallic Investment Co. v. Colorado, 239 U.S. 441 (1915).
6 The pattern of jury verdicts, for example, is an important determinant of the settlement value of pending cases not yet gone to trial.
7 Hence, the art of visualizing specific instances that might be included by the terms of a statute or regulation. The practice of tax law, for example, is to an important extent a practice of this art.
8 See, e.g., Ogul, Congress Oversees the Bureaucracy, Chs. 2-5 (1976).
9 A thesis for exposition on another occasion is that the most important determinants of the provinces of judiciary and legislature is the legal powers with which they are endowed and the legal basis upon which their members have incumbency. In terms of H. L. A. Hart's distinction between primary and secondary rules, the kind of primary rules that emanate from a governmental authority is determined chiefly by the kind of secondary rules by which the authority is constituted. Constitutional analysis might be well advised to turn unto itself.
10 It is well documented that the individual legislator, in the American system of legislative composition, necessarily is preoccupied with reelection. See, e.g., Mayhew, Congress: The Electoral Connection (1974).
11 The fullest contemporary exegesis on the subject appears to be in Dworkin, A Matter of Principle (1985). Yet if I correctly understand Professor Dworkin's argument at id., pp. 95-96, the only principled limitation on a principle is another principle. This may be correct, but if so it would seem to negate the concept of principle that is engaged in the analysis.
15 Bentham, op. cit. n. 2, p. 196.
20 The death of the American legislature is, like that of Mark Twain, widely reported but much exaggerated. See generally Keefe and Ogle, The American Legislative Process, ch. 14 (5th ed. 1981).
26 Breitel, op. cit. supra note 23, at p. 42.