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Roger Traynor, the Legal Process School, and Enterprise Liability

EDMUND URSIN[†]

Roger Traynor, who served on the California Supreme Court from 1940 to 1970, the last five years as Chief Justice, was one of America's great judges. This Article compares Traynor's view of the lawmaking role of courts with the dominant jurisprudential perspective of mainstream legal scholars at time, that of the legal process school.

Today it is widely believed that Traynor was a "firm advocate of the legal process" approach to judicial lawmaking. The thesis of this Article, however, is that Traynor was a legal realist whose jurisprudence of what Judge Richard Posner has termed legal pragmatism was at odds with the legal process approach. In particular, Traynor's 1960s rewriting of tort law to expand avenues for victim compensation, hailed as a "renaissance in the common law" by the editors of the Harvard Law Review, had been opposed by the legal process scholars who insisted that judges base their decisions on "neutral principles." To Traynor, however, "neutral principles" were nothing more than meaningless "magic words" and an impediment to needed reform of the common law and, in particular, judicial adoption of what is now known as the theory of enterprise liability.

I have previously written about this subject in How Great Judges Think: Judges Richard Posner, Henry Friendly, and Roger Traynor on Judicial Lawmaking. The present Article sharpens the diffuse sketch in that piece by focusing solely on Traynor and on the two articles he considered his most important. The first, the 1956 Law and Social Change in a Democratic Society, appeared two years after the Supreme Court's 1954 decision in Brown v. Board of Education and defended judicial lawmaking against legal formalists who denied that judges are lawmakers. The second, the 1961 No Magic Words Can Do It Justice, directly targeted iconic 1959 articles by legal process scholars Henry Hart and Herbert Wechsler. The Hart and Wechsler articles had criticized the lawmaking of the Warren Court, including the Court's landmark decision in Brown v. Board of Education, for its failure to conform to their demand for neutral principles. In response, Traynor wrote, "What did Professor Wechsler have in mind beyond "magic words," comparing Wechsler to "desperate . . . students at examination time who search for "magic words" among mounting stacks"

In his 2016 book, Divergent Paths, Judge Posner writes that my Buffalo piece presents an "accurate genealogy of legal realism" and legal pragmatism from the mid-nineteenth century to the present day. The present Article presents, for the first time, a genealogy of the common law aspect of legal process jurisprudence throughout the twentieth century, from Roscoe Pound,

[†] Professor of Law, University of San Diego School of Law. Thanks to Judge Richard Posner for valuable comments on this and my previous articles on judicial lawmaking and to Roy Brooks and Kevin Cole for always helpful comments on previous articles on which I expand in this Article. I am extremely grateful to the many students who have provided valuable research assistance over a number of years.

through Justice Louis Brandeis, James Landis, and (later Justice) Felix Frankfurter, to Hart and Wechsler. Legal process scholarship is seen today to have been a public law jurisprudence, concerned with subjects such as the procedures for lawmaking by administrative agencies. My genealogy explains, however, that it was also a common law jurisprudence. And it was this jurisprudence that stood as an obstacle to courts adopting the enterprise liability agenda.

The Article closes by demonstrating the successes of legal pragmatism in the courts both through the example of judicial adoption of the comparative rule and by an analysis of the torts decisions of both the liberal (1960–1986) and conservative (1986–2018) iterations of the California Supreme Court—and offers in a Postscript, a preview of the jurisprudence of the post-2019 seven member court that now consists of four justices appointed by Democratic Governor Jerry Brown.

TABLE OF CONTENTS

INTRODUCTION	1104
I. ENTERPRISE LIABILITY AND LEGAL PRAGMATISM.....	1111
A. FROM GREEN AND LLEWELLYN TO TRAYNOR AND JAMES	1111
B. ENTERPRISE LIABILITY AND LEGAL FORMALISM.....	1113
II. LEGAL PROCESS JURISPRUDENCE AND ENTERPRISE LIABILITY	1116
A. LEGAL PROCESS JURISPRUDENCE AND THE COMMON LAW	1116
B. EARLY INCARNATIONS OF LEGAL PROCESS JURISPRUDENCE ...	1118
1. <i>Roscoe Pound</i>	1118
2. <i>From Brandeis, Frankfurter, and Landis, to Hart and</i> <i>Sacks</i>	1120
C. LEGAL PROCESS JURISPRUDENCE AND ENTERPRISE LIABILITY.....	1125
III. JUSTICE ROGER TRAYNOR, ENTERPRISE LIABILITY, AND LEGAL PROCESS JURISPRUDENCE	1130
A. JUSTICE ROGER TRAYNOR AND ENTERPRISE LIABILITY	1130
B. JUSTICE TRAYNOR’S LEGAL PRAGMATISM	1132
C. JUSTICE TRAYNOR’S REJECTION OF THE “MAGIC WORDS” OF LEGAL PROCESS JURISPRUDENCE	1137
IV. ENTERPRISE LIABILITY AND LEGAL PRAGMATISM IN THE CALIFORNIA SUPREME COURT	1143
A. ALTERED NORMS OF JUDICIAL LAWMAKING	1143
B. THE CALIFORNIA SUPREME COURT: THE LIBERAL ERA (1960–1985)	1146
C. THE CALIFORNIA SUPREME COURT: THE CONSERVATIVE ERA (1986–2019)	1148
POSTSCRIPT.....	1150

INTRODUCTION

Roger Traynor, who served on the California Supreme Court from 1940 to 1970—the last five years as Chief Justice—was one of America’s great judges.¹ It was under his guidance that the California Supreme Court became the most innovative and influential state supreme court in the nation.² Judge Richard Posner has recently identified Traynor as “great,” one of only eleven judges in American history whom Posner listed as great.³ Similarly, in 1983, Judge Henry Friendly characterized Traynor as the “ablest judge of his generation,”⁴ writing that Traynor “modernized every field of law that he touched, and, in the course of his long judicial service, he touched almost all.”⁵ As the editors of the *Harvard Law Review* wrote upon his retirement in 1970, Traynor “inspired a dramatic renaissance of the common law.”⁶ Nowhere was that renaissance more conspicuous than in the Traynor court’s rewriting of the law of torts.

Using tort law as an example, this Article will compare Traynor’s view of judicial lawmaking with the dominant jurisprudential view among mainstream legal scholars at the time, that of the legal process school of jurisprudence. In 1958, *The Legal Process*, the set of teaching materials by Henry Hart and Albert Sacks, appeared as a “tentative edition” in mimeograph form.⁷ These materials dealt—as their subtitle suggests—with “The Making and Application of Law.”⁸ *The Legal Process* was widely used in elite law schools across the nation in ensuing decades and lent its name to a school of jurisprudence that became dominant in the legal academy at the time.⁹ *The Legal Process*, and legal process scholarship generally, sought to articulate a uniquely judicial form of

1. Judge Henry Friendly ranked Traynor as one of the nine twentieth-century judges he regarded as great, indeed the only member of that august group who was of Friendly’s own generation. See DAVID M. DORSEN, HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA 121–22 (2012).

2. See GRANT GILMORE, THE DEATH OF CONTRACT 91 (1974). As measured by decisions that have been “followed”—as used by Shepard’s Citation Service’s—the court has been the nation’s most followed state high court. See Jake Dear & Edward W. Jessen, “Followed Rates” and *Leading State Cases, 1940–2005*, 41 U.C. DAVIS L. REV. 683, 710 (2007). Five of the six most followed decisions of the California decisions are tort decisions rendered since 1960. See *id.* at 708–09.

3. See RICHARD A. POSNER, DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY 88 (2016).

4. Henry J. Friendly, *Ablest Judge of His Generation*, 71 CALIF. L. REV. 1039, 1039–40 (1983).

5. *Id.* at 1040. For example, in 1948, six years before *Brown v. Board of Education*, 347 U.S. 483 (1954), Traynor wrote the opinion for his court in *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948) (holding unconstitutional California’s anti-miscegenation legislation). This was two decades before the U.S. Supreme Court would follow suit in *Loving v. Virginia*, 388 U.S. 1 (1967).

6. *Editors’ Dedication*, 83 HARV. L. REV. 1769, 1769 (1970).

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

8. *Id.*

9. William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, in HENRY M. HART JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW li, lii (William N. Eskridge & Philip P. Frickey eds., 1994) [hereinafter Eskridge & Frickey, *Historical Introduction*]. In a 1994 *Harvard Law Review* article, Eskridge and Frickey write that *The Legal Process* “provided the agenda, much of the analytic structure, and the name of the ‘legal process school.’” William N. Eskridge, Jr. & Philip P. Frickey, *Commentary, The Making of The Legal Process*, 107 HARV. L. REV. 2031, 2031 (1994).

lawmaking—and thus to limit the lawmaking role of courts. In this view, judges are lawmakers but, unlike legislators, they are constrained by the demand that they engage, for example, in a reasoned elaboration of neutral or durable principles.

In the *Historical Introduction* to the 1994 formal publication (in unaltered form) of the materials, William Eskridge and Phillip Frickey write “that ‘*The Legal Process* expressed an approach to law that became deeply entrenched among legal scholars’ in the 1950s and for some time thereafter.”¹⁰ It represented the “encapsulation of attitudes and thoughts widely held by an entire generation of public and academic lawyers.”¹¹

In 1997, James McCall wrote that “Traynor . . . played [a] very significant role[] in establishing the propriety of process theory—serving . . . as [an] exemplar[] of the component ideas of process theory.”¹² Similarly, the legal historian G. Edward White has expressed the widely shared belief that Traynor was a “firm advocate of the [legal] process theory,”¹³ which, if accurate, would add a significant datum to the claim that the legal process view was deeply entrenched in the thinking of a generation of legal thinkers.

This Article will demonstrate, however, that Traynor was not a legal process advocate. Indeed, Traynor’s vision of his court rewriting tort law to meet new conditions and new moral values was in fundamental conflict with the

10. Eskridge & Frickey, *Historical Introduction*, *supra* note 9, at lii (quoting Jan Vetter, *Postwar Legal Scholarship on Judicial Decision Making*, 33 J. LEGAL ED. 412, 417 (1983)).

11. *Id.* at lxix.

12. James R. McCall, *Thoughts About Roger Traynor and Learned Hand—A Qualifying Response to Professor Konefsky*, 65 U. CIN. L. REV. 1243, 1246 (1997).

13. G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* 245 (3d ed. 2007); *see also* BEN FIELD, *ACTIVISM IN PURSUIT OF THE PUBLIC INTEREST: THE JURISPRUDENCE OF CHIEF JUSTICE ROGER J. TRAYNOR* xiv (2003) (“White . . . has written the most thorough analysis of Traynor’s judicial thought to date.”). John Poulos is something of an exception to the work previously cited in this footnote. In a 1995 article, he sought to align Traynor’s jurisprudence with that of the legal process scholars. For example, he wrote that Traynor relied on what Poulos saw as the legal process scholars’ “coherent-articulation-of reasons principle.” *See* John W. Poulos, *The Judicial Philosophy of Roger Traynor*, 46 HASTINGS L.J. 1643, 1692 (1995). One problem with this is that it is unlikely that Traynor relied on legal process principles, rather than developing his own distinct jurisprudence. Leaving that aside, Poulos correctly notes in that article that Traynor rejected legal process bromides, such as the demand that courts base their lawmaking on the elaboration of neutral, or durable, principles. *Id.* at 1680–81. Each of the previously cited scholars, however, acknowledges tension between Traynor’s view that a basic aspect of judicial decision making involved making choices between conflicting social values or policies and legal process scholars’ emphasis on durable generalized rules. *See* FIELD, *supra*, at 122; WHITE, *supra*, at 296; Poulos, *supra*, at 1692. For example, despite characterizing Traynor as a “firm advocate of the process theory,” White wrote that Traynor “nonetheless saw its limitations as a vehicle for promoting the values of fairness and justice.” WHITE, *supra*, at 245. In White’s view, Traynor responded to these limitations by emphasizing “rationality [as] the essence of judging.” *Id.*; *see also* G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 188, 208 (2003) (writing of Traynor’s “activist theory of judging” and the policy-making role he assigned to judges in tort cases, and characterizing Traynor as “in some respects, the state court equivalent of a ‘Warren Court’ judge”). James McCall has written that Judge Posner’s call “for a renewal of appreciation and study of the pragmatic perspective in judging . . . is tantamount to a request for . . . renewal of [legal] process theory.” McCall, *supra* note 12, at 1246 (footnote omitted). However, Posner, like Traynor, rejected the legal process perspective on judicial decision making. *See, e.g.*, RICHARD A. POSNER, *HOW JUDGES THINK* 293–95 (2008).

jurisprudence of the legal process scholars. The tort theory that expressed those new conditions and new moral values is known today as the theory of enterprise liability. With his prophetic 1944 concurring opinion in *Escola v. Coca Cola Bottling Co.*,¹⁴ Traynor himself was an early pioneer in the enterprise liability project, proposing that courts adopt a doctrine of strict liability for defective products. Roughly speaking, enterprise liability scholars sought the expansion of avenues for victims of accidental injury to receive compensation through the tort system. The goals were to widely distribute accident losses and to create incentives for business enterprises to reduce the accident toll associated with their activities.¹⁵

Traynor and other enterprise liability scholars were legal realists whose jurisprudence of what Judge Richard Posner has termed “legal pragmatism” was at odds both with legal formalists who denied that judges make law and with legal process writers who sought to limit judicial lawmaking with formulas. In the view of the legal realists, judges are lawmakers with policy at the heart of their lawmaking. For Traynor, the problem was not undue judicial boldness but excessive judicial timidity.

I have previously written about this subject in *How Great Judges Think: Judges Richard Posner, Henry Friendly, and Roger Traynor on Judicial Lawmaking*.¹⁶ The present Article sharpens the diffuse sketch in that piece by focusing solely on Traynor and on the two articles written by Traynor that were responsive to two of the most important jurisprudential events of his time. The first article, the 1956 *Law and Social Change in a Democratic Society*, appeared two years after the Supreme Court’s decision in *Brown v. Board of Education*,¹⁷ and defended judicial lawmaking against legal formalists who denied that judges are lawmakers.¹⁸ The second, the 1961 *No Magic Words Can Do It Justice*, directly targeted iconic 1959 articles by legal process scholars Henry Hart and Herbert Wechsler.¹⁹ Hart’s *The Time Chart of the Justices* and Wechsler’s *Toward Neutral Principles of Constitutional Law* articles had criticized the lawmaking of the Warren Court, including the Court’s landmark decision in *Brown v. Board of Education*, for its failure to conform to their demand for neutral principles.²⁰ In response, Traynor asked, “What did Professor Wechsler have in mind beyond magic words[,]” comparing Wechsler to

14. 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring).

15. See *id.* (Traynor, J., concurring).

16. Edmund Ursin, *How Great Judges Think: Judges Richard Posner, Henry Friendly, and Roger Traynor on Judicial Lawmaking*, 57 BUFF. L. REV. 1267 (2009).

17. 347 U.S. 483 (1954).

18. Roger J. Traynor, *Law and Social Change in a Democratic Society*, 1956 U. ILL. L.F. 230, 240.

19. Roger J. Traynor, *No Magic Words Could Do It Justice*, 49 CALIF. L. REV. 615, 623–24 (1961); see Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); see also Henry M. Hart, Jr., *The Supreme Court 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).

20. Hart, *supra* note 19, at 163–64; Wechsler, *supra* note 19, at 22–23.

“desperate . . . students at examination time who search for [magic words] in anguish among mounting stacks”²¹

In his 2016 book, *Divergent Paths*, Judge Posner writes that my *Great Judges* piece presents an “accurate genealogy of [legal] realism” and legal pragmatism from the mid-nineteenth century to the present day.²² The present Article offers, for the first time, a genealogy of the common law aspect of legal process jurisprudence throughout the twentieth century, from Roscoe Pound, through Justice Louis Brandeis, James Landis, and (later Justice) Felix Frankfurter, to Hart and Wechsler. Today we are likely to see legal process scholarship as an influential body of *public law* jurisprudence, concerned with subjects such as constitutional restraints on the state, the interpretation of statutes, and the procedures for lawmaking by administrative agencies.²³ My genealogy explains, however, that it was also a *common law* jurisprudence. Indeed, Hart and Sacks devote more attention to “Courts and the Common Law” (307 pages) than they do to “Statutory Interpretation” (271 pages). And it was this common law jurisprudence that stood as an obstacle to courts adopting the enterprise liability agenda.

This Article explains the relationship between the enterprise liability theory and its jurisprudence of legal pragmatism on the one hand, and legal process jurisprudence on the other by tracing the evolution of these lines of scholarship from the turn of the twentieth century. The Article proceeds as follows. In Part I, we see that the enactment of workers’ compensation legislation in the early decades of the twentieth century served as an inspiration for enterprise liability scholars, from Leon Green and Kart Llewellyn in the 1920s and 1930s, to Traynor and Fleming James in the 1940s and 1950s. These writers urged courts to adopt their agenda of assuring accident victims adequate, but not undue, compensation.²⁴ This, of course, was an affront to traditional (fault-based) tort theorists and legal formalists who held that courts apply but do not make law. Not surprisingly, therefore, a critic at the time objected that enterprise liability scholars were inviting courts to step beyond their appropriate role and “to remake the law themselves.”²⁵ Enterprise liability scholars, however, simply ignored such protests. Aside from Llewellyn’s idiosyncratic foray into jurisprudence,²⁶ they were generally content with the knowledge that courts are, and throughout American history have been, lawmakers. In their view, that was

21. Traynor, *supra* note 19, at 623–24.

22. POSNER, *supra* note 3, at 88 n.14.

23. See Eskridge & Frickey, *Historical Introduction*, *supra* note 9, at liii n.3.

24. See Edmund Ursin, *Holmes, Cardozo, and the Legal Realists: Early Incarnations of Legal Pragmatism and Enterprise Liability*, 50 SAN DIEGO L. REV. 537, 538–39 (2013). See generally VIRGINIA E. NOLAN & EDMUND URSIN, UNDERSTANDING ENTERPRISE LIABILITY: RETHINKING TORT REFORM FOR THE TWENTY-FIRST CENTURY 32 (1995).

25. Luke K. Cooperrider, *A Comment on the Law of Torts*, 56 MICH. L. REV. 1291, 1299 (1958).

26. See, e.g., Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930).

the way it was and should be, and no fancy jurisprudential justification was needed.²⁷

Part II then recounts the development of legal process jurisprudence over the same period. From its earlier incarnations, the common law jurisprudence of legal process writers stood in tension with the substantive and jurisprudential views of the enterprise liability scholars. This tension, however, went largely unnoticed through the mid-1950s, as these lines of scholarship focused on different areas of substantive law and proceeded along parallel paths. In retrospect, however, the tension is apparent. Unlike enterprise liability scholars who looked to courts as sources of reform, legal process writers focused on the perceived inadequacies of courts as lawmakers as they developed a public law jurisprudence that sought to justify key elements of the emerging administrative state. A constant theme of these writers was the lack of lawmaking competence and political accountability of courts—and thus the need to limit the lawmaking role of courts in favor of lawmaking by legislatures and administrative bodies.²⁸ This perspective is treated by Eskridge and Frickey simply as a predicate for lawmaking by these bodies. Although not identified as such, when applied to common law subject matter it represents the common law jurisprudence of the legal process school. And it is this jurisprudence that would stand as an obstacle to courts modernizing tort law in the same manner that legislatures and administrative agencies would for public law.

In the mid-1950s, Fowler Harper and Fleming James's *The Law of Torts*, the most comprehensive treatment of the enterprise liability theory, and Hart and Sacks's *The Legal Process* appeared within two years of each other in 1956 and 1958, respectively. Then, in 1959, Wechsler's *Neutral Principles* and Hart's *Time Chart of the Justices* articles appeared.²⁹ Although neither of these articles dealt with the common law, their general approach to judicial lawmaking would prove influential as writers focused on lawmaking in the common law. Taking their cue from the Wechsler and Hart articles—and, importantly, the Hart and Sacks materials—legal process scholars demanded, for example, that courts rendering common law decisions refrain from lawmaking that could be considered “political,”³⁰ or lacking in “neutrality.”³¹

These constraints were in fundamental conflict with the invitation of the Harper and James treatise for courts to remake the law of torts to attain “the benefits and values of social insurance.”³² Indeed, Robert Keeton, a leading legal process and torts scholar at the time, wrote that the legal process constraints

27. See Ursin, *supra* note 24, at 538–39; see also NOLAN & URSIN, *supra* note 24, at 32.

28. Eskridge & Frickey, *supra* note 9, at lxi–lxii.

29. See Wechsler, *supra* note 19; Hart, *supra* note 19.

30. ROBERT E. KEETON, VENTURING TO DO JUSTICE: REFORMING PRIVATE LAW 94 (1969).

31. Henry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 238 (1973).

32. Fleming James, Jr., *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549, 552 (1948); Fleming James, Jr. & John J. Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769, 782–94 (1950).

offered “some reassurance against the specter of runaway social engineering with ill-considered emphasis on risk-spreading capacity.”³³ Keeton feared that courts would follow the siren song of James to rewrite tort law in the image of the enterprise liability theory.

But that was precisely what Justice Traynor had in mind for his court. In Part III, therefore, I examine the relationship of Traynor and the enterprise liability theory to legal process scholarship. I explain that Traynor—like James—saw his *Escola* proposal for strict products liability as part of a broader “enterprise liability or social insurance.”³⁴ And a goal of his extrajudicial writings was to persuade his court to write that agenda into tort law. To do this, however, he would have to overcome jurisprudential objections, first of legal formalists who, no doubt, counted among their ranks the great majority of rank and file lawyers and judges, and then of the increasingly influential legal process scholars. In an aptly titled 1956 article, *Law and Social Change in a Democratic Society*, Traynor took on the formalists and staked out the view that it is the task of courts to “hammer out new rules that will . . . anticipate what contemporary values will best meet [the] tests [of reason and experience].”³⁵ At that time, Traynor was, in all likelihood, unaware of the developing legal process scholarship, most of which had appeared in teaching materials as opposed to widely accessible articles or books.

This changed, however, with the 1959 publication of the Hart and Wechsler articles, which took the Warren Court to task for its failure to base its decisions on “neutral”³⁶ or “impersonal and durable principles.”³⁷ Traynor’s rebuttal came quickly with his 1961 *No Magic Words Can Do It Justice*,³⁸ which was scornful of the unhelpful “academic tintinnabulation of enduring principles.”³⁹

In Part IV, we find that, at the date Traynor wrote, a mix of legal formalism and legal process concerns over the lack of competence and political accountability of courts still exerted its hold on many lawyers and judges. Attitudes toward the possibility that courts might adopt a doctrine of comparative negligence illustrate the firm grip that such thinking had in mainstream legal thought well into the 1960s. As late as 1968, for example, courts had uniformly refused to replace the contributory negligence doctrine with a rule of comparative negligence, not because they preferred the former, but because, as the Illinois Supreme Court concluded in 1968, “such a far-reaching change, if desirable, should be made by the legislature rather than by the court.”⁴⁰

33. Robert E. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401, 444 (1959).

34. See Roger J. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 376 (1965).

35. Traynor, *supra* note 18, at 232.

36. Wechsler, *supra* note 19, at 19.

37. Hart, *supra* note 19, at 99.

38. See Traynor, *supra* note 19, at 627.

39. *Id.*

40. *Maki v. Frelk*, 239 N.E.2d 445, 447 (1968).

No doubt this posture accurately reflected the blend of legal formalism and legal process concerns that dominated the first six decades of the twentieth century. Beginning in the early 1960s, however, the California Supreme Court left legal formalism and legal process jurisprudence in the dust as it embraced the jurisprudence of legal pragmatism and the agenda of the enterprise liability scholars—and other state supreme courts soon followed suit. In fact, in 1973, the Florida Supreme Court adopted the comparative negligence rule,⁴¹ which was quickly followed by the California and Alaska supreme courts⁴²—and then eventually by the Illinois Supreme Court itself.⁴³

The Article concludes by briefly surveying the tort lawmaking that resulted from the California Supreme Court's embrace of legal pragmatism. From the 1960s to the mid-1980s, that court consisted of a majority of justices appointed by Democratic governors. It was an ideologically liberal court that wrote large swaths of the enterprise liability agenda into law, adopting both the doctrine of strict products liability and expansive negligence doctrines. Then, in 1986, when three justices were voted out of office by the electorate, the court became a conservative court with a majority of justices appointed by Republican governors. Yet, the jurisprudence of this court remained the same as its predecessor. It was an avowedly lawmaking court, with (this time conservative) policies at the heart of its lawmaking. This court refined or cut back on—but in most cases did not abandon⁴⁴—the enterprise liability doctrines put in place by its predecessor, while at times adopting new policy-based doctrines limiting defendant liability.⁴⁵

In a postscript, I note that Governor Jerry Brown took office in 2011 and served until 2019.⁴⁶ Brown, a Democrat, appointed four members to the seven-member court. Early signs indicate that this court will embrace legal pragmatism. If so, legal pragmatism will have been the jurisprudence of the California Supreme Court for more than six decades while the common law jurisprudence of the legal process school has largely dropped from sight.

41. *Hoffman v. Jones*, 280 So.2d 431, 438 (Fla. 1973).

42. *See Kaatz v. State*, 540 P.2d 1037, 1049 (Alaska 1975); *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1242 (Cal. 1975).

43. *See Alvis v. Ribar*, 421 N.E.2d 886, 897 (Ill. 1981).

44. *But see Peterson v. Superior Court*, 899 P.2d 905, 906 (Cal. 1995) (overruling strict landlord liability rule previously adopted in *Becker v. IRM Corp.*, 698 P.2d 116, 122 (Cal. 1985)).

45. *See, e.g., Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207, 215–16 (Cal. 1993) (limiting the duty of business premises owner to protect persons against violent third-party crime); *Knight v. Jewett*, 834 P.2d 696, 712 (Cal. 1992) (Mosk, J., concurring and dissenting) (abolishing traditional consent-based defense of assumption of risk and establishing a new no-duty rule for co-participants in recreational sports); *Thing v. La Chusa*, 771 P.2d 814, 815 (Cal. 1989) (restricting recovery for negligent infliction of emotional distress).

46. *See infra* text accompanying notes 399–419.

I. ENTERPRISE LIABILITY AND LEGAL PRAGMATISM

A. FROM GREEN AND LLEWELLYN TO TRAYNOR AND JAMES

The enactment of workers' compensation legislation in the early decades of the twentieth century marked a seminal moment in American personal injury law, indicating that nineteenth century restrictions on tort liability were out of touch with the conditions and values of twentieth-century America. In the late 1920s and early 1930s, the visionary legal realists Leon Green and Karl Llewellyn responded to the challenge posed by this situation and, in doing so, laid the foundations for the enterprise liability doctrines that courts would adopt decades later.⁴⁷

At the time that Green and Llewellyn wrote, formalism—the view that judges apply but do not make law, and that policy has no role in judicial decision making—was the norm in judicial decisions and mainstream legal thought.⁴⁸ In the field of torts, formalism was linked to what might be called “traditional tort theory.” Traditional tort scholars wrote of “the fundamental proposition of the common law which link[ed] liability to fault.”⁴⁹

In Green's view, however, fault, the cornerstone of traditional tort theory, “had become bankrupt.”⁵⁰ In its place, Green offered policy, or “dut[y],” factors to determine common law duty and liability rules—and whether legislatively enacted compensation plans modeled after workers' compensation plans should displace tort in discrete categories of accidents.⁵¹ Perhaps most provocative was Green's suggestion that loss spreading capacity should be a legitimate factor in fashioning liability rules, which he linked to the proposal that courts single out industrial premises cases for special consideration, including the possibility of replacing the no-duty rules that protected landowners from liability with a full duty of care.⁵²

For his part, Llewellyn proposed something more radical—that courts bring into tort law an emerging area of strict liability that could be found in his area of expertise, the law of sales. Llewellyn saw the law of sales and, in particular, the implied warranty of quality that attaches to the sale of goods as a source for courts to use in developing a doctrine of strict products liability.⁵³ The “needed protection,” Llewellyn wrote, “is twofold: to shift the immediate

47. For a detailed depiction of the legal realists/enterprise liability scholars, see NOLAN & URSIN, *supra* note 24, at 30–37, 71–81, 88–99; *see also* Ursin, *supra* note 24, at 538.

48. *See* Warren A. Seavey, *Tribute, Mr. Justice Cardozo and the Law of Torts*, 52 HARV. L. REV. 372, 372; 48 YALE L.J. 390, 390; 39 COLUM. L. REV. 20, 20 (1939) [hereinafter cited to HARVARD LAW REVIEW].

49. *Id.* at 375 (noting that the policy of not imposing liability for non-negligent conduct). Ezra Ripley Thayer, *Liability Without Fault*, 29 HARV. L. REV. 801, 815 (1916).

50. Leon Green, *The Duty Problem in Negligence Cases: II*, 29 COLUM. L. REV. 255, 270 (1929).

51. *Id.* at 255–57.

52. *Id.* at 273–75.

53. *See* KARL N. LLEWELLYN, *CASES AND MATERIALS ON THE LAW OF SALES* 341–42 (1930) [hereinafter LLEWELLYN, *CASES AND MATERIALS*]; Karl N. Llewellyn, *On Warranty of Quality, and Society*, 36 COLUM. L. REV. 699, 704–05 n.14 (1936) [hereinafter Llewellyn, *Warranty of Quality*].

incidence of the hazard of life in an industrial society away from the individual over to a group which can distribute the loss; and to place the loss where the most pressure will be exerted to keep down future losses.”⁵⁴

Llewellyn wrote that courts, by “fudging [their] logic,”⁵⁵ had begun to impose strict liability in food cases. However, Llewellyn did not see this development as “confined to [the food cases] . . . It spreads to cover other hazards to consumers.”⁵⁶ And Llewellyn’s “ideal picture” of a broad strict liability doctrine indicated “a set of tendencies toward . . . which [the cases were] . . . driving.”⁵⁷

The jurisprudential view of Green and Llewellyn was simple and clear: in the common law realm, courts (1) do make law—they legislate—and (2) such lawmaking is so clearly desirable, necessary, and embedded in our common law tradition that it needs no complex jurisprudential justification—beyond, that is, arguments as to the *substantive* desirability of particular proposals. Today, we would identify this jurisprudential view, which traces to the teachings of Holmes and Cardozo,⁵⁸ as what Judge Posner has termed legal pragmatism.⁵⁹ And, indeed, Fowler Harper, a contemporary of Green and Llewellyn, coined the term “juristic pragmatism” in 1929 to describe Green’s (and Holmes’s) jurisprudence.⁶⁰

By the 1940s, Green and Llewellyn had been followed by a second generation of scholars who elaborated on themes they had initiated. Foremost among this second generation were Fleming James and Justice Roger Traynor, who had been appointed to the California Supreme Court in 1940. We have already encountered Justice Traynor’s seminal 1944 proposal for strict products liability. James, Traynor’s academic counterpart, carried forth the enterprise liability agenda with a series of articles in the 1940s and 1950s which became the volume on accidental injury of *The Law of Torts*, the treatise James co-authored with Fowler Harper.⁶¹ While endorsing the doctrine of strict products liability, the main thrust of James’s work was an “assault on the citadel of fault,”⁶² developing the implications of the enterprise liability theory “for the administration of the fault principle.”⁶³ Thus, James sought to attain the “benefits and values of social insurance . . . under [the] present system.”⁶⁴ In doing this, James applied the techniques suggested by Green in the 1920s and

54. LLEWELLYN, *CASES AND MATERIALS*, *supra* note 53, at 341.

55. Llewellyn, *Warranty of Quality*, *supra* note 53, at 704–05 n.14.

56. LLEWELLYN, *CASES AND MATERIALS*, *supra* note 53, at 342.

57. *Id.*

58. See Ursin, *supra* note 24, at 583.

59. Judge Posner writes that “judges in our system are legislators as well as adjudicators” and policy plays an important role in their lawmaking. POSNER, *supra* note 13, at 118.

60. See Fowler Vincent Harper, *Some Implications of Juristic Pragmatism*, 39 INT’L J. ETHICS 269, 273 (1929).

61. 2 FOWLER V. HARPER & FLEMING JAMES, JR., *THE LAW OF TORTS* 742–44 (1956).

62. Fleming James, Jr., *Accident Liability: Some Wartime Developments*, 55 YALE L.J. 365, 374 (1946).

63. James, Jr. & Dickinson, *supra* note 32, at 782.

64. James, Jr., *supra* note 32, at 552; James, Jr. & Dickinson, *supra* note 32, at 782–94.

1930s to approve of doctrines and interpretations of doctrines that expanded negligence liability and to urge the limitation of doctrines that restricted it.⁶⁵ Consistent with the compensation plan model, James linked this call for the expansion of liability with the elimination or limitation of damages for pain and suffering.⁶⁶

Upon its publication in 1956, the Harper and James treatise stood beside William Prosser's hornbook as the source judges and lawyers would look to in researching the law. As a critic noted, however, the treatise examined "[e]very legal principle and the result of every case . . . through one lens"—which was, of course, the enterprise liability perspective.⁶⁷ This critic wrote that the treatise treated

any "no duty rule" not based upon the scope of foreseeable danger, and any "rule of thumb" which subtracts from the jury's power to determine the "reasonableness" of the parties' conduct . . . [as] aberrational in terms of the aesthetic principle and therefore to be decried by all right thinking jurists.⁶⁸

The critic feared that the treatise was an invitation for courts "to remake the law themselves"⁶⁹—which, of course, it was.

B. ENTERPRISE LIABILITY AND LEGAL FORMALISM

The legal pragmatism embraced by enterprise liability scholars would become the jurisprudence of the California Supreme Court beginning in the 1960s. It was also the view of Justice Roger Traynor, the leader of that court. But it is important to recognize that legal formalism remained the dominant "mainstream" outlook in American law well into the 1950s, and in tort law, this meant that the legal realist/enterprise liability agenda could be rejected or ignored. A prominent example of this phenomenon is provided by the

65. See James, Jr., *supra* note 62, at 371–74; James, Jr., *supra* note 32, at 553, 554, 556; Fleming James, Jr., *Assumption of Risk*, 61 YALE L.J. 141, 141 (1952); Fleming James, Jr., *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667, 686–87 (1949); Fleming James Jr. & Roger F. Perry, *Legal Cause*, 60 YALE L.J. 761, 761–62 (1951); Fleming James, Jr., *Proof of the Breach in Negligence Cases (Including Res Ipsa Loquitur)*, 37 VA. L. REV. 179, 198–99 (1951); Fleming James, Jr., *Scope of Duty in Negligence Cases*, 47 NW. U. L. REV. 778, 778 (1953); Fleming James, Jr., *Statutory Standards and Negligence in Accident Cases*, 11 LA. L. REV. 95, 95 (1950); Fleming James, Jr., *The Qualities of the Reasonable Man in Negligence Cases*, 16 MO. L. REV. 1, 1 (1951); Fleming James, Jr., *Tort Liability of Occupiers of Land: Duties Owed to Trespassers*, 63 YALE L.J. 144, 146 (1953). For example, decisions that expansively interpreted the doctrine of *res ipsa loquitur* were praised as "outstanding" demonstrations of "real judicial statesmanship." James, Jr., *supra* note 62, at 392. In contrast, there was "a sound basis both in reason and on authority for treating contributory negligence as a disfavored defense in a system wherein liability for negligence is ever expanding." James, Jr. & Dickinson, *supra* note 32, at 789. And James reported in 1946 that liability had been expanding. Specifically, the "system of liability based on fault [was] being modified by the courts so as constantly to extend the bases of recovery for accident victims." James, Jr., *supra* note 62, at 400.

66. Fleming James, Jr., *Damages in Accident Cases*, 41 CORNELL L. REV. 582, 584 (1956).

67. Cooperrider, *supra* note 25, at 1299.

68. *Id.* at 1309.

69. *Id.* at 1299.

scholarship of Warren Seavey, the leading torts scholar at Harvard Law School and Reporter for the *Restatement of Torts*.⁷⁰

Seavey's writings on torts had appeared over the decades in the *Harvard Law Review* and represented six of the fifteen articles in the *Review's* 1967 edition of *Essays on the Law of Torts*.⁷¹ Seavey's 1939 article, *Mr. Justice Cardozo and the Law of Torts*, was published simultaneously in the *Harvard Law Review*, the *Columbia Law Review*, and the *Yale Law Journal* as part of a tribute to Justice Cardozo,⁷² who had died in 1937. Seavey's discussion of the lawmaking role of courts reflects Seavey's view, ignoring Cardozo's extrajudicial writings.⁷³ Seavey wrote that Cardozo's "power lay in his ability to see the plan and pattern underlying the law and to make clear the paths which had been obscured by the undergrowth of illogical reasoning."⁷⁴

According to Seavey, Cardozo "did not first decide from some internal and unexplainable sense of justice that one of the parties was entitled to the decision and then find or invent a formula to fit the facts."⁷⁵ Similarly, Cardozo did not "allow his private opinions of policy to sway him from the lines into which the law had been moulded."⁷⁶ Seavey was particularly disdainful of the policy of compensating victims of accidents and spreading of accident losses, writing that Cardozo "did not become the protector of the injured merely because the defendant had ample funds to meet a judgment or had an ability to spread the loss."⁷⁷ In this vein, Seavey wrote that Cardozo's "scales were those of legal justice, not sentimental justice."⁷⁸ Thus, Cardozo "used principles deduced from

70. This discussion of Seavey is adapted from Edmund Ursin, *Judicial Creativity and Tort Law*, 49 GEO. WASH. L. REV. 229, 282–85 (1981).

71. See Warren A. Seavey, *Principles of Torts*, 56 HARV. L. REV. 72 (1964) [hereinafter Seavey, *Principles of Torts*]; Warren A. Seavey, *Negligence—Subjective or Objective?*, 41 HARV. L. REV. 1 (1927); Warren A. Seavey, *Nuisance: Contributory Negligence and Other Mysteries*, 65 HARV. L. REV. 984 (1952); Warren A. Seavey, *Reliance Upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913 (1951); Warren A. Seavey, Comment, *Res IPSA Loquitur: Tabula in Naufragio*, 63 HARV. L. REV. 643 (1950); Warren A. Seavey, *Swift & Co. v. Shuster—Liability to One Aware of Danger*, 65 HARV. L. REV. 623 (1952).

72. Seavey, *supra* note 48, at 372.

73. See Ursin, *supra* note 24, at 562. In his classic 1921 book, *The Nature of the Judicial Process*, Cardozo flatly rejected the legal formalism that Seavey would later espouse—and attribute to him. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 102 (1921). Echoing themes developed by Holmes, Cardozo wrote that "[i]t is the function of our courts . . . to keep the doctrines up to date with the *mores* by continual restatement and by giving them a continually new content." *Id.* at 135 (internal quotation marks omitted) (quoting Arthur L. Corbin, *The Offer of an Act for a Promise*, 29 YALE L.J. 767, 771 (1920)). Common law judges must innovate, "for with new conditions there must be new rules." *Id.* at 137. Cardozo further opined that "[t]his means . . . that the juristic philosophy of the common law is at bottom the philosophy of pragmatism." *Id.* at 102 (citing Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 609 (1908)). Nevertheless, it is also true that Cardozo cast opinions, such as *MacPherson v. Buick*, 111 N.E. 1050 (1916), which paved the way for the elimination of the privity requirement in tort actions against negligent manufacturers, in a formalistic style. See, e.g., RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 42, 109 (1990).

74. Seavey, *supra* note 48, at 372.

75. *Id.* at 373.

76. *Id.*

77. *Id.*

78. *Id.*

the cases and weighed competing interests as had the judges who had gone before him.”⁷⁹ To do otherwise, according to Seavey, would be to “destroy[] [his court] as a court of law.”⁸⁰

According to this restrictive view, tort law was synonymous with the negligence principle, which was accepted as a given from which subsidiary rules could be deduced. Seavey, for example, wrote that by the time Cardozo came to the bench in 1914, the “generalizations had already been made.”⁸¹ Specifically, “both in England and the United States there was recognition of the policy of making a negligent person liable for harm resulting from his activities and of not imposing liability for [non-negligent conduct].”⁸² The task of torts scholarship was to refine this system of liability based on fault—to articulate the “principles deduced from the cases.”⁸³

James and his fellow enterprise liability scholars no doubt simply dismissed views like Seavey’s as out of touch with the reality of judicial lawmaking as it was actually practiced in the courts. For them, there was no need to provide fancy justification for the legal pragmatism implicit in their writings. Moreover, James appeared optimistic about the prospects for the enterprise liability agenda in the courts, writing in 1946 that “[j]udicial modification [of tort law was] . . . likely to continue along the same lines and at about the same pace” as in the recent past.⁸⁴ But others were not so confident.

Charles Gregory, who in 1951 urged the adoption of strict liability rules by courts, saw courts “undermining the old fault principles, little by little.”⁸⁵ But, at the same time, he saw courts doing so in a hesitant manner, often not acknowledging openly what they were doing.⁸⁶ In his view, the judiciary had to pick up its game. Indeed, he saw a need for a new type of judge suited to this task. And he had a role model in mind: Lemuel Shaw, Chief Judge of the Supreme Judicial Court of Massachusetts from 1830 to 1860. Shaw was the author of *Brown v. Kendall*, the cornerstone of the negligence system,⁸⁷ and *Farwell v. Boston & Worcester Railroad*, which adopted the fellow servant rule

79. *Id.*

80. *Id.*

81. *Id.* at 374.

82. *Id.* at 375. Seavey reported that “*Fletcher v. Rylands*, with its tendency towards the creation of liability irrespective of negligence, had gained little headway in the United States.” *Id.* (footnote omitted). Decisions imposing strict (warranty) liability in food products cases were “predicated upon a failure to perform . . . [a] contractual duty,” and thus were irrelevant to tort analysis. Seavey, *Principles of Torts*, *supra* note 71, at 86.

83. Seavey, *supra* note 48, at 373. Seavey and other traditional theorists were uninterested in (and often hostile toward) proposals to supplant tort by compensation plans. When the initial apprehension over the enactment of workers’ compensation legislation subsided, this legislation was seen as irrelevant to tort analysis because it “create[d] an insurers’ rather than a tort liability.” Seavey, *Principles of Torts*, *supra* note 71, at 86. It followed, of course, that theorists could entirely omit proposals for automobile compensation plans in analyses whose goal was to explicate principles of torts. *See id.*

84. James, Jr., *supra* note 62, at 400.

85. Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 396 (1951).

86. *Id.* *See* NOLAN & URSIN, *supra* note 24, at 95–96.

87. 60 Mass. (6 Cush.) 292, 295–98 (Mass. 1850).

and the defense of assumption of risk.⁸⁸ Shaw's creative lawmaking shaped the tort law and all of the common law of his era.⁸⁹ It was because of this judicial lawmaking that Holmes praised Shaw as "the greatest *magistrate* which this country has produced."⁹⁰

Gregory recognized that for the enterprise liability theory to prevail, a new generation of Shaw-like judges was needed to boldly accept the task of reforming tort law. Thus, Gregory called for judicial "statesmanship,"⁹¹ for

men as able and clear-headed as Chief Justice Lemuel Shaw—men who have faith in their evaluation of the needs of the times, who know where they want to go and who have the talent for stating their convictions in clear and consistent principles which operate as beacon lights to guide the rest of the profession.⁹²

II. LEGAL PROCESS JURISPRUDENCE AND ENTERPRISE LIABILITY

A. LEGAL PROCESS JURISPRUDENCE AND THE COMMON LAW

The problem with Gregory's prescription was that merely calling for judicial statesmanship might not be enough. This was because, dating back to the early years of the twentieth century, a powerful body of scholarship had been developing alongside enterprise liability scholarship, warning against this very type of judicial lawmaking. And its most complete articulation came just two years following publication of the Harper and James treatise with the appearance of the legal process materials by Henry Hart and Albert Sacks in 1958. For Hart, Sacks, and their followers, Gregory's judicial statesmanship would be an illegitimate exercise of raw judicial power. Shaw, an avowed practitioner of this style of judicial lawmaking, was a poster child for judicial lawmaking gone wrong.

For many, it may come as a surprise to learn that Shaw would be held up as an example of impermissible judicial lawmaking. After all, one of his most notable accomplishments was to establish the legitimacy of the police power, and with it, the idea of judicial deference to legislative judgments.⁹³ It may also surprise some to learn that legal process scholars would limit judicial lawmaking in *common law* subjects.

Today, when we think of legal process jurisprudence, we are likely to think of it as an influential body of *public law* scholarship centered around Hart and Sacks's classic book *The Legal Process*.⁹⁴ William Eskridge and Phillip Frickey have ably traced the historical development of this jurisprudence from the turn of the twentieth century to *The Legal Process*, and then to the early 1990s, at

88. 45 Mass. (4 Met.) 49, 57–62 (Mass. 1842).

89. See LEONARD W. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 13 (1957).

90. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 106 (1881).

91. Gregory, *supra* note 85, at 396.

92. *Id.*

93. LEVY, *supra* note 89, at 229.

94. HART & SACKS, *supra* note 7.

which time their historical introduction to this important work served as a preface to its formal publication.⁹⁵ (It had appeared only as a mimeograph “Tentative Edition” in 1958.)

Eskridge and Frickey write that the scholarship in the first four decades of the twentieth century laid the groundwork for post-war scholars to “set forth the basic intellectual framework from which law professors developed a public law curriculum.”⁹⁶ By “public law” Eskridge and Frickey “mean the law pertaining to public administration, including constitutional constraints upon the state, the interpretation of statutes, the procedures for agency action, and the relationship of public institutions to one another and to the citizenry.”⁹⁷ Between 1938 and 1958, they write, “most of the ground-breaking work was accomplished in the form of teaching materials,”⁹⁸ culminating in *The Legal Process*, “the classic exposition of the post-war consensus in public law.”⁹⁹

These materials, Eskridge and Frickey continue, represented the “encapsulation of attitudes and thoughts widely held by an entire generation of public and academic lawyers.”¹⁰⁰ Indeed, they “expressed an approach to law that became deeply entrenched among legal scholars in the 1950s and for some time thereafter.”¹⁰¹

According to Eskridge and Frickey, “[f]ew published law books have enjoyed [the] . . . widespread influence” of *The Legal Process*.¹⁰² These materials, however, did not touch upon issues of constitutional law. But a pair of articles published in 1959 by iconic legal process scholars Herbert Wechsler and Henry Hart, did.¹⁰³ These articles, both critical of the jurisprudence (and “activism”) of the Warren Court, together with *The Legal Process*, represent the cornerstones of legal process jurisprudence. Eskridge and Frickey write that “[l]eading theories of statutory interpretation developed during the 1980s are lineal descendants of Hart and Sacks’[s] . . . theory.” Similarly, “the most sophisticated theories of judicial review are process theories in the Hart and Sacks tradition.”¹⁰⁴

But to think of legal process jurisprudence as public law jurisprudence is to miss a key feature of this scholarship; for it is also, importantly, a *common law* jurisprudence.¹⁰⁵ As in the case of its well-known constitutional counterpart, legal process scholars demanded that courts refrain from lawmaking that could

95. Eskridge & Frickey, *Historical Introduction*, *supra* note 9, at li–lii.

96. *Id.* at lxviii.

97. *Id.* at liii n.3.

98. *Id.* at lxviii.

99. *Id.* at xcvi.

100. *Id.* at lxix.

101. *Id.* at lii (quoting Jan Vetter, *supra* note 10, at 417).

102. *Id.*

103. See Hart, *supra* note 19; Wechsler, *supra* note 19.

104. Eskridge & Frickey, *Historical Introduction*, *supra* note 9, at lii.

105. Hart and Sacks devote more attention to “Courts and the Common Law” (307 pages) than they do to “Statutory Interpretation” (270 pages). See HART & SACKS, *supra* note 7, at 341–647, 1111–1380.

be considered “political” or lacking in “neutrality.”¹⁰⁶ And it is that jurisprudence which stood in opposition to the substantive and jurisprudential views of enterprise liability scholars. To understand this situation, it is useful to trace the development of legal process-type scholarship during the first five decades of the twentieth century before turning to the mature elaboration of what we now know as the scholarship of the legal process school.

B. EARLY INCARNATIONS OF LEGAL PROCESS JURISPRUDENCE

1. *Roscoe Pound*

In his famous dissent in *Lochner v. New York*, Holmes took the Supreme Court to task for its willingness to overturn economic and social legislation.¹⁰⁷ In their call for judicial self-restraint, critics of the *Lochner* Court constantly drew upon Holmes’s position. A prominent early example is Roscoe Pound, who later served as dean of Harvard Law School for two decades. In 1908, Pound wrote of judges who purported to deduce results in cases from preexisting principles, which he called “mechanical jurisprudence.”¹⁰⁸ The fatal flaw of this jurisprudence was that it ignored the social reality to which legal rules must be applied. In contrast, Pound called for a “sociological jurisprudence,”¹⁰⁹ which he defined as “the movement for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles.”¹¹⁰

Not surprisingly, Pound wrote that Holmes’s *Lochner* dissent was not only a source of his ideas, but also the best exposition of sociological jurisprudence in America.¹¹¹ In response to the Supreme Court’s “nullification of the social policies to which more and more [of the public] . . . is compelled to be committed,”¹¹² Pound, like Holmes, demanded that courts restrain themselves in their exercise of the power of judicial review.

106. See *infra* text accompanying notes 175–190.

107. 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

108. Ursin, *supra* note 70, at 268–69 (discussing Pound, *supra* note 73, at 605–07). Pound was a prolific writer whose work spanned half a century. For examples of his work bearing on the themes discussed in this Article, see generally Roscoe Pound, *Do We Need a Philosophy of Law?*, 5 COLUM. L. REV. 339 (1905); Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910); Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931); Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607 (1907) [hereinafter Pound, *Sociological Jurisprudence*]; Roscoe Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 641, 802, 940 (1923) [hereinafter Pound, *Judicial Decision*]; Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591 (1911); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 140 (1911). For a biography of Pound, see DAVID WIGDOR, *ROSCOE POUND: PHILOSOPHER OF LAW* (1974). See generally G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972) (discussing movement from mechanical justice to sociological jurisprudence).

109. See Pound, *Sociological Jurisprudence*, *supra* note 108, at 609.

110. Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 464 (1909).

111. *Id.*

112. Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 407 (1908).

What *Lochner* critics, such as Pound, overlooked, however, was that Holmes coupled his call for judicial self-restraint in constitutional adjudication with a call for policy-based lawmaking by courts in common law subjects. For Holmes, there was nothing anomalous in recognizing the role of policy in the common law, where the legislature can always undo the law the courts have made while calling for judicial self-restraint when the legislature has spoken. Indeed, in his famous 1897 essay, *The Path of the Law*, Holmes had chastised courts of that era for their lack of such lawmaking.

Focusing on the law of worker accidents, Holmes first noted the “inclination of a very large part of the community . . . to make certain [well-known businesses] . . . insure the safety of those with whom they deal.”¹¹³ Then, turning to the lawmaking role of the courts—and setting aside how he would decide the substantive issue if it were to be presented to him—Holmes suggested that *courts* might properly rewrite the pre-workers’ compensation tort law governing workplace accidents.¹¹⁴ Holmes wrote that “our theory upon this matter is open to reconsideration, although I am not prepared to say how I should decide if a reconsideration were proposed.”¹¹⁵

Progressive critics of the *Lochner* Court, such as Pound, however, ignored or, at times, explicitly rejected the reform role Holmes urged for courts in the common law. In his 1908 article, *Common Law and Legislation*,¹¹⁶ for example, Pound wrote that “[a]s the development of law goes on, the function of the judge is confined within ever narrowing limits; the main source of modifications in legal relations comes to be more and more exclusively the legislature.”¹¹⁷ Pound stressed both competence and political accountability arguments for limiting the judicial role, much like what legal process scholars would do decades later. He wrote that “[c]ourts are less and less competent to formulate rules for new relations which require regulation. They have the experience of the past. But they do not have the facts of the present.”¹¹⁸ In this vein, Pound continued, “[w]e are told that law-making of the future will consist in putting the sanction of society on what has been worked out in the sociological laboratory. That courts cannot conduct such laboratories is self-evident.”¹¹⁹ Moreover, courts lack political accountability. Pound wrote that “legislation is the more truly democratic form of lawmaking. We see in legislation the more direct and accurate expression of the general will.”¹²⁰ Thus, “[i]t is a sound instinct of the

113. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897).

114. *Id.* at 467.

115. *Id.*

116. Ursin, *supra* note 70, at 279–80 (discussing Pound, *supra* note 112, at 407).

117. Pound, *supra* note 112, at 403 n.2 (quoting HENRY SIDGWICK, *THE ELEMENTS OF POLITICS* 203 (2d ed. 1897)).

118. *Id.* at 403.

119. *Id.* at 406 (footnote omitted).

120. *Id.* at 406.

community that objects to the settlement of questions of the highest social import in private litigations between John Doe and Richard Roe.”¹²¹

Pound gave up on the courts as a major lawmaking institution.¹²² As Eskridge and Frickey have noted, Pound’s writings supported the “position . . . that the role of courts in a democratic society should be the elaboration and application of statutory policy, rather than the naked creation of public policy in the common law.”¹²³

2. *From Brandeis, Frankfurter, and Landis, to Hart and Sacks*

Pound’s pessimistic view of courts as lawmakers was shared during subsequent decades by scholars whose work can be seen as a precursor to the legal process scholarship of the 1950s. Looking back on this period, Louis Jaffe wrote, “When I was a student in the Harvard Law School in 1928 and 1931, I came to believe that the judiciary by its very nature was at the worst reactionary and at the least undependable.”¹²⁴ The source of this belief, of course, was *Lochner* and its progeny. “This was a time when the courts were declaring social legislation unconstitutional, were stifling union organization by injunction, and more or less generally throwing their weight behind big business and finance.”¹²⁵ This was an era of extreme distrust of judicial power for Harvard Law School students and scholars. As Jaffe wrote, “Led by Frankfurter we were all passionate believers in the dogma of judicial restraint. Some of us indeed were sympathetic to the argument that John Marshall’s assertion in *Marbury v. Madison* of the power to declare legislation unconstitutional was ‘usurpation.’”¹²⁶

When one examines thinking regarding the common law, one finds, as Pound’s scholarship suggested, a restrictive view of the lawmaking role of courts—which thus conflicts with the views of Holmes, as well as the views of the legal realists Leon Green and Karl Llewellyn. In part, this restrictive view can be explained by the fact that the early and continuing focus of legal process thinking was the task of “justifying the key feature of the modern regulatory state—lawmaking by agencies.”¹²⁷

121. *Id.* at 404.

122. *Id.* at 403 n.2; see Pound, *supra* note 73, at 622. Pound at times envisioned what appears to be a more creative role for the judiciary. See, e.g., Pound, *Judicial Decision*, *supra* note 108, at 802, 940. Nevertheless, the themes of limited judicial competence and accountability and the desire to restrict judicial lawmaking persisted in his writings throughout his life. See, e.g., ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 102–03 (1954).

123. Eskridge & Frickey, *Historical Introduction*, *supra* note 9, at lviii. Although Hart and Sacks never formally published their legal process materials, the 1958 “Tentative Edition” became the standard version for more than thirty years and was preserved intact by the 1994 Eskridge & Frickey edition.

124. LOUIS L. JAFFE, ENGLISH AND AMERICAN JUDGES AS LAWMAKERS 85 (1969); see Ursin, *supra* note 16, at 1295; Ursin, *supra* note 70, at 281.

125. JAFFE, *supra* note 124, at 85.

126. JAFFE, *supra* note 124, at 86 (discussing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 151 (1803)).

127. Eskridge & Frickey, *Historical Introduction*, *supra* note 9, at lxi.

Eskridge and Frickey trace the antecedents of legal process thinking during the early decades of the twentieth century through the work of Justice Louis Brandeis, (later Justice) Felix Frankfurter, and James Landis.¹²⁸ In the work of these scholars and Justices, we see the “emerging concept of ‘institutional competence.’”¹²⁹ Central to this concept was the idea that “each organ [of government] has a special competence or expertise, and the key to good government is not just figuring out what is the best policy, but figuring out which institutions should be making which decisions and how all the institutions should interrelate.” This line of thought posited “the futility of solving complex social problems through case-by-case adjudication by isolated judges” and argued that “such problems are better left to the legislative and administrative process.”¹³⁰

The contrast between the institutional competence viewpoint and that of Holmes can be seen in *International News Services v. The Associated Press*,¹³¹ a 1918 Supreme Court decision presented in the Hart and Sacks materials,¹³² and discussed by Eskridge and Frickey.¹³³ In a formalistic opinion analogizing news stories generated by the Associated Press to other categories of property, the majority held that the Associated Press was entitled to an injunction against publication of its news stories by International News Service.¹³⁴ Holmes agreed that an injunction was appropriate, but he rejected the majority’s formalism, writing that property is “a creation of law” rather than some pre-existing entity.¹³⁵ Brandeis dissented on the ground that the complexity of determining the proper boundaries of this new property right and the appropriate remedies were best left to legislators. He would have “decline[d] to establish a new rule . . . in the effort to redress a newly-disclosed wrong, *although the propriety of some remedy appears to be clear.*”¹³⁶ Eskridge and Frickey describe the difference between the Holmes and Brandeis views as “[t]he difference between a simple law-is-policy viewpoint and a law-is-policy-but-also-institutional-architecture viewpoint.”¹³⁷

In the 1920s and 1930s, Felix Frankfurter and James Landis “deployed the institutional competence idea to develop a framework for justifying . . . lawmaking by agencies.”¹³⁸ Beginning in the 1920s, Frankfurter “constructed his ‘Public Utilities’ seminar at the Harvard Law School around the institutional competence idea.”¹³⁹ In 1930, Frankfurter argued that the development of “useful policies depend[ed] not only upon the enactment of good

128. *Id.* at lix–lxii.

129. *Id.* at lx.

130. *Id.*

131. *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918).

132. HART & SACKS, *supra* note 7, at 527.

133. See Eskridge & Frickey, *Historical Introduction*, *supra* note 9, at lix.

134. *Int’l News Serv.*, 248 U.S. at 215.

135. *Id.* at 246 (Holmes, J., concurring).

136. *Id.* at 267 (Brandeis, J., dissenting) (emphasis added).

137. Eskridge & Frickey, *Historical Introduction*, *supra* note 9, at lix.

138. *Id.* at lxi.

139. *Id.* at lx.

legislation and judicial deference to those legislative judgments . . . but much more upon the elaboration and application of those policies by an expert administration.”¹⁴⁰ These ideas were further developed by Landis in his 1938 book, *Administrative Process*. Landis “argued that the expansion of administrative agencies ‘sprang from a distrust of the ability of the judicial process to make the necessary adjustments in the development of both law and regulatory methods, as they related to particular industrial problems.’”¹⁴¹ The problem with looking to courts was that judges “too often held economic and social opinions opposed to ideals of their time.”¹⁴² In contrast, to courts whose “decisions are influenced by . . . unsophisticated policy views,” administrative agencies “are more sophisticated, better able to assemble the data and balance the socio-economic factors, and more democratically accountable.”¹⁴³ Moreover, “the case-by-case approach is too slow and imprecise for laying out workable rules for society to follow.”¹⁴⁴ These themes of competence and accountability had, of course, appeared in Pound’s early writing and they would be central to the mature legal process scholarship of the 1950s.

Green and Llewellyn were writing during this period, and they might well have agreed with the strand of institutional competence scholarship that recognized the advantages of legislative and administrative solutions. Green for example, wrote that compensation plans, modeled after workers’ compensation plans and tailored to specific classes of cases, represented “a more rational process for imposing responsibility.”¹⁴⁵ However, Green’s preference for this more rational process did not mean that he gave up on courts as a vehicle for the reform of traditional tort law, which after all, was littered with no-duty rules that denied injured victims recovery despite defendant negligence.¹⁴⁶ Courts and judicial lawmaking could modify and eliminate such rules, and Green proposed just that.

Llewellyn, as we have seen, also saw courts as a vehicle for reform, but his major efforts were aimed at legislative reform. These efforts would reach fruition in the 1960s with the widespread adoptions of Article 2 of the Uniform Commercial Code, “the sales article of the most successful codification in American law.”¹⁴⁷ Along the way to that, however, he also encountered the powerful forces that might block legislative reform. In 1940 and 1941, Llewellyn proposed, as part of his new law of sales, a manufacturer’s implied warranty that its products would be free from dangerous defects.¹⁴⁸ This

140. *Id.* at lxi.

141. *Id.* at lxi (quoting JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 30 (1938)).

142. LANDIS, *supra* note 141, at 34.

143. Eskridge & Frickey, *Historical Introduction*, *supra* note 9, at lxi–lxii.

144. *Id.* at lxi.

145. Green, *supra* note 50, at 271.

146. *See, e.g., id.*

147. Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 466 (1987); *see also* NOLAN & URSIN, *supra* note 24, at 82–83.

148. Wiseman, *supra* note 147, at 507.

warranty would impose an “absolute liability . . . on manufacturers for injury ‘in person or property’ incurred by anyone ‘in the ordinary course of use or consumption . . . by reason of the defect’ in the goods.”¹⁴⁹ Llewellyn’s proposed sales law was considered in the 1940s by the National Conference of Commissioners on Uniform State Laws.¹⁵⁰ At the 1941 Conference, after Merchants’ representatives voiced opposition, Llewellyn dropped the warranty provision entirely. When asked about the deletion at the 1943 meeting, “Llewellyn replied that ‘every time we tried to draw’ the rule, it [so] ‘scare[d] everybody that they saw it pea green.’”¹⁵¹ Llewellyn thus knew both the theoretical advantages and practical difficulties of legislative solutions.

Esckridge and Frickey write that “[b]etween 1938 and 1958, most of the ground-breaking work [of legal process scholars] was accomplished in the form of teaching materials.”¹⁵² Hart, with co-authors Abe Feller and Walter Gellhorn, produced *Materials on Legislation*, a mimeographed set of materials for use beginning in the 1941–42 academic year. It was primarily used in Legislation courses at Harvard, Yale, and Columbia.¹⁵³ The first chapter of these materials, “the centerpiece of the course,”¹⁵⁴ was designed “to make explicit comparisons among the three main sources of law: common law, statutes, and private ordering.”¹⁵⁵ The focus of the chapter was Chief Justice Lemuel Shaw’s 1854 opinion in *Norway Plains Co. v. Boston & Maine Railroad*.¹⁵⁶

In *Norway Plains*, Shaw limited the liability of common carrier railroads for damage to goods once they are unloaded onto the railroad platform. In correspondence with Hart and Feller, quoted by Esckridge and Frickey, Gellhorn wrote that the issue of common carrier liability revealed “the lack of adaptation of judicial machinery for acquiring insight into the social and economic data upon which ‘policy’ judgments rest.”¹⁵⁷ In addition to a greater ability of legislatures to make well-informed policy judgments, legislatures had “machinery the courts do not possess,” including the ability to delegate tasks to agencies and a greater “arsenal of sanctions.”¹⁵⁸

By that date, World War II had drawn Hart into governmental service in the Office of Price Administration and then in the Office of Economic Stabilization, as Associate General Counsel and General Counsel, respectively.¹⁵⁹ Hart returned to teaching his Harvard Legislation course in the 1946–47 academic year and began the course with an examination of Shaw’s

149. *Id.*

150. *Id.* at 478–80.

151. *Id.* at 523–24 n.255.

152. Esckridge & Frickey, *Historical Introduction*, *supra* note 9, at lxxviii.

153. *Id.* at lxxiv.

154. *Id.* at lxxv.

155. *Id.*

156. 67 Mass. (1 Gray) 263 (1854).

157. Esckridge & Frickey, *Historical Introduction*, *supra* note 9, at lxxv.

158. *Id.* (quoting Letter from Walter Gellhorn, to A.H. Feller, Professor, Yale Law School, and Henry M. Hart, Professor, Harvard Law School (Jan. 29, 1941)).

159. *Id.* at lxxviii.

opinion in *Norway Plains*. According to Hart's notes on this course, quoted by Eskridge and Frickey, he used *Norway Plains* "to develop a theory of appropriate judicial lawmaking . . ." ¹⁶⁰ Hart "aggressively criticized Shaw's opinion, for 'making a judgment as to what would be a good rule,' rather than making a 'reasoned application . . . of basic principle to the case.'" ¹⁶¹ Hart found Shaw's approach to be "unacceptable, not because it was judicial lawmaking (inevitable in the case), but because it was lawmaking beyond the capability of a court." ¹⁶² In Hart's view, "[a] court in making law is bound to base its action not on free judgment of the relative social advantage, but on a process of reasoned development of authoritative starting points (i.e., statutes, prior judicial decisions . . .)." ¹⁶³ Legislatures, in Hart's view, have comparative advantages over courts in setting "starting points." "The function of legislatures is to ascertain 'legislative facts' about society in order to determine what rule or principle of law the country should adopt, and courts should defer to the legislature's findings." ¹⁶⁴ Eskridge and Frickey write that Hart returned to this "theory of adjudication" at the end of the course.

Of course, two years prior to this, in his *Escola* concurring opinion, Justice Traynor unabashedly made a judgment as to what would be a good rule in proposing that his court adopt a strict liability rule in cases involving defective products. ¹⁶⁵ And he openly based this rule on a judgment of social advantage, writing that the overwhelming misfortune to a person injured by a defective product was "needless[,] . . . for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business." ¹⁶⁶

Similarly, Holmes's view of Shaw could not be more different from that of Hart. Like Hart, Holmes analyzed a Shaw decision limiting defendant liability. In *Brown v. Kendall*, Shaw had rejected both the possibility of adopting a strict liability (under the writ system) and the imposition of a duty of extraordinary care (as the trial court had done). Instead, Shaw held that plaintiffs must prove a lack of due care by defendants in order to recover. ¹⁶⁷ Holmes *applauded* Shaw for making a judgment as to what would be a good rule. And Shaw was praised precisely because he made a judgment of the relevant social advantage. Holmes wrote that "the strength of that great judge lay in an accurate appreciation of the requirements of the community." ¹⁶⁸ Indeed, "few have lived who were his equals in their understanding of the grounds of public policy to which all laws must ultimately be referred. It was this which made him . . . the greatest *magistrate*

160. *Id.* at lxxix.

161. *Id.*

162. *Id.*

163. *Id.* at lxxix–lxxx.

164. *Id.* at lxxx.

165. *Escola v. Coca-Cola Bottling Co. of Fresno*, 150 P.2d 436, 440–41 (Cal. 1944) (Traynor, J., concurring).

166. *Id.* at 441 (Traynor, J., concurring).

167. *Brown v. Kendall*, 60 Mass. (6 Cush.) 292, 296 (Mass. 1850).

168. OLIVER WENDELL HOLMES, *THE COMMON LAW* 106 (1881).

which this country has produced.”¹⁶⁹ Along these lines it is useful to remember that *Brown v. Kendall*, along with other Shaw-created doctrines of contributory negligence and assumption of risk, formed the framework for the tort law governing accidental injury.¹⁷⁰

In 1952, Albert Sacks, a former graduate student of Hart’s, joined the Harvard faculty. In 1953 or 1954, Hart and Sacks began their collaboration on what would become *The Legal Process*, which would retain Shaw’s *Norway Plains* opinion as a central focus when it appeared in the “tentative” (but final) edition in 1958.

C. LEGAL PROCESS JURISPRUDENCE AND ENTERPRISE LIABILITY

As previously noted, Lemuel Shaw had been seen as a model judge by Charles Gregory, who hoped for a generation of Shaw-like judges writing the enterprise liability theory into law. In contrast, Shaw was far from a model judge for Hart and Sacks. Shaw’s opinion in *Norway Plains* retained its central place when *The Legal Process* materials appeared in 1958. In the view of Hart and Sacks, a Shaw-like court would have been exercising an impermissible “discretionary power” if it had limited railroad liability in an effort to shield the infant railroad industry from a broader liability that might stifle its growth.¹⁷¹ In their view, policies like the promotion of economic growth should be left to legislatures which, unlike courts, are subject to electoral and political checks and are able to assemble and evaluate the social and economic data required for this type of lawmaking.¹⁷² Courts in contrast, should base their decision making on “a power of reasoned elaboration” from “existing arrangements,” such as the determination of common expectations in commercial transactions.¹⁷³

Robert Keeton and Henry Wellington sought to place similar limitations on judicial lawmaking in the common law.¹⁷⁴ Wellington argued that courts properly rely on principles in their decision making, such as the principle that a wrongdoer should not profit from his own wrong. The use of policies, or

169. *Id.*

170. *See Brown*, 60 Mass. (6 Cush.) at 296; *Farwell v. Bos. & Worcester R.R.*, 45 Mass. (4 Met.) 49, 54 (Mass. 1842).

171. HART & SACKS, *supra* note 7, at 1398.

172. *Id.* at 397–98. Hart and Sacks were speaking of Shaw exempting the railroad industry from the “special liability as insurer of the safe carriage of goods” applied to other common carriers because applying that rule to the infant railroad industry would “operate as a deterrent to the growth of the industry.” *Id.* at 397. They wrote that “a large mass of information [would need] to be gathered and taken into account,” as well as “the opinions and preferences of railroad men, shippers, and other interested persons.” *Id.* at 398. They suggest that a court is not “as well equipped as a legislature to [collect such information and] find out what those opinions and preferences are.” *Id.* Moreover, “judgments of this kind call for the political check of the ballot box.” *Id.* These reasons would seem even more applicable to abolishing the special liability of *all* common carriers.

173. *Id.* at 398. The format that Hart and Sacks adopted to present this view was one of “leading questions” rather than clear, declarative statements. Hart and Sacks, however, did not regard their “questions” as *merely* questions. A leading question later becomes “the point earlier made.” *Id.* at 400; *see also* Wellington, *supra* note 31, at 222–26 (stating that policy of subsidizing infant industry is inappropriate for judicial lawmaking).

174. *See Ursin*, *supra* note 16, at 1302, 1304–07; Ursin, *supra* note 70, at 296–98.

instrumental justifications, is more problematic.¹⁷⁵ Wellington asserted that the use by courts of a policy to justify a common rule is “legitimate only if two conditions are met.”¹⁷⁶ First, the “policy must be widely regarded as socially desirable”¹⁷⁷ Also, the policy must be “relatively neutral.”¹⁷⁸ As to the latter, a court should not use a policy if it imposes disproportionate burdens on a particular group (as contrasted with the population generally), unless there are special reasons that can be adduced for imposing those burdens.¹⁷⁹ A policy of subsidizing infant industry would fail this test.¹⁸⁰ Likewise, the promotion of collective bargaining, even if seen as socially desirable, “cannot serve as a justification for common law rules, for it fails of neutrality It is too partisan.”¹⁸¹ Wellington concluded that “[s]ince many policies which might serve as justification for rules fail of neutrality in that they are too partisan, common law courts, if they are to exercise power legitimately, are drastically limited in their capacity to implement policies.”¹⁸²

Robert Keeton also sought to place constraints on judicial lawmaking in the common law. He wrote that although both courts and legislators are lawmaking bodies, their capabilities and lawmaking roles differ.¹⁸³ In his view, factors that militate against judicial lawmaking in specific situations include the “major and pervasive character” of a proposed action, its “controversial nature,” and its political nature.¹⁸⁴ Keeton wrote that, as a practical matter, “[t]he more pervasive the scope” of a proposed change, “the harder it is to persuade courts the change is one they can properly make.”¹⁸⁵ Courts, in his view, have an “obligation to act nonpolitically.”¹⁸⁶ Although Keeton recognized that the distinction between what is “political or nonpolitical . . . is not one that . . . is likely to be formulated with precision,”¹⁸⁷ he wrote that courts appropriately assess the degree to which proposed reforms “affect or become involved in

175. Wellington, *supra* note 31, at 222–26, 262.

176. *Id.* at 236.

177. *Id.*

178. *Id.*

179. *Id.* at 238.

180. *Id.* at 226. Wellington’s example of a subsidy to infant industries is drawn from strict products liability. He writes that if a court had adopted this doctrine, it “could not justify a rule which granted an exemption from such liability to manufacturers of a newly developed product on the ground that the protection of infant industries is in the state’s economic best interest.” *Id.* This is because the granting of such a subsidy would be “at the expense of other groups—injured plaintiffs and established industries producing relatively substitutable products” and thus “fails of neutrality.” *Id.* at 226, 228. Wellington concludes that “[a]uthority to create a special class and redistribute income to it resides in the legislature.” *Id.* at 226. The clear implication is that a policy of loss distribution would also fail of neutrality because it favors injured plaintiffs “at the expense of other groups,” namely manufacturers. *See id.* at 226.

181. *Id.* at 239.

182. *Id.* at 241.

183. KEETON, *supra* note 30, at 92.

184. *Id.* at 43.

185. *Id.* at 45.

186. *Id.* at 93.

187. *Id.*

current political controversy” and “abstain from initiating reforms that . . . would be generally regarded as essentially political in nature.”¹⁸⁸ Citing Wechsler, Keeton wrote of the “obligation of the court[s] to reach principled decisions—decisions that not only are reasoned but also are grounded on premises of nonpartisan character.”¹⁸⁹

These constraints may seem nebulous and vague. Their purpose, however, was made clear in a pair of articles Keeton published in 1959 and 1962. It was to place jurisprudential obstacles in front of his nemesis, the agenda of the 1956 Harper and James tort treatise. In that treatise, Harper and James had proclaimed that they believed that

in accident cases . . . compensation and some form of social insurance (like workmen’s compensation) [is] . . . desirable and that until this can be had, every aspect of the present system which produces some of the benefits of social insurance should be fostered, and every aspect which thwarts those benefits should be minimized.¹⁹⁰

Keeton recognized that Harper and James were among those who had “urged with increasing vigor that a loss should be shifted from plaintiff to defendant if defendant is a more efficient loss distributor.”¹⁹¹ For Keeton, this raised “the specter of runaway social engineering with ill-considered emphasis on risk-spreading capacity.”¹⁹² In response, Keeton wrote that “a sharp change in our system of compensation of accidental injuries, shifting from the present system with its premise of liability based on fault to a system based on a premise of loss distribution or insurance, is beyond the sphere of desirable judicial creativity.”¹⁹³

The word that bears emphasizing in that last sentence is *judicial*, for Keeton and co-author Jeffrey O’Connell embraced just such a sharp change by legislation. In their 1965 book, *Basic Protection for the Traffic Victim*, Keeton and O’Connell addressed the problem posed by automobile accidents.¹⁹⁴ Here, Keeton embraced the solution whose origins lay in enterprise liability scholarship dating back at least as far as Leon Green. That was the proposal for no-fault automobile compensation plans. Keeton and O’Connell wrote that “the burden of a minimum level of protection against measurable economic loss . . . [should] be treated as a cost of motoring.”¹⁹⁵ Absent was the rejection

188. *Id.* at 92.

189. Robert E. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 467 (1962) (citing Wechsler, *supra* note 19, at 19).

190. 2 HARPER & JAMES, JR., *supra* note 61, at 1069 n.5.

191. Keeton, *supra* note 33, at 405. Keeton recognized that risk spreading had some influence on tort law. *Id.* at 407. He argued, however, that notions of “individual blameworthiness” are the basis of tort law developments. *Id.* at 443–44.

192. *Id.* at 444.

193. Keeton, *supra* note 189, at 508.

194. ROBERT E. KEETON & JEFFREY O’CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE* 268 (1965).

195. *Id.*

of the loss spreading policy, as Keeton and O'Connell wrote that the "cost would be distributed generally . . . without regard to fault."¹⁹⁶

It was a different story, however, when it came to the enterprise liability proposal for courts to adopt a doctrine of strict products liability, based in part on the loss spreading policy.¹⁹⁷ This was an example of a proposal for courts to initiate "a sharp change . . . from the present system . . . [premised] on fault to a system based on a premise of loss distribution or insurance."¹⁹⁸ Thus, Keeton might have explained why, on legal process grounds, such a change "is beyond the sphere of desirable judicial creativity."¹⁹⁹ Instead, Keeton focused on one strand of argument made by enterprise liability scholars, that the food products cases provided the stepping stone to a broader strict products liability premised on the loss spreading policy. Writing in 1959, Keeton rejected the contention "that the grocer's capacity for risk spreading is the basis of his liability [because] such [a similar] liability is not imposed on retailers of other products though a similar and often superior capacity for risk spreading exists."²⁰⁰ He wrote that he found the "prima facie ground of liability . . . difficult to grasp because of the difficulty of finding material distinctions between selling food and selling some other product which, if defective, is likely to cause harm."²⁰¹ He concluded that

sound prediction and sound development of the scope of liability . . . rests less on comparison of the relative capacities of plaintiff and defendant, or classes including them, to insure or otherwise spread the risk, than upon identifying other grounds for liability in [the case of] the sale of food.²⁰²

The next year, in 1960, however, the New Jersey Supreme Court, in *Henningsen v. Broomfield Motors, Inc.*, demonstrated that food was not unique as it extended strict liability to the manufacturers and retailers of automobiles.²⁰³ Keeton's reaction to his own failure of prediction? He all but ignored that landmark case. Writing in 1962, Keeton buried *Henningsen* in a list of fourteen "precedents overruled in decisions of very recent vintage,"²⁰⁴ such as precedents dealing with immunities, mental suffering, and prenatal injuries, referring to it merely as "extensions of strict liability."²⁰⁵ A footnote simply cited *Henningsen*.²⁰⁶

196. *Id.*

197. See, e.g., Fleming James, Jr., *General Products—Should Manufacturers Be Liable Without Negligence?*, 24 TENN. L. REV. 923, 923–24 (1957).

198. Keeton, *supra* note 189, at 508.

199. *Id.*

200. Keeton, *supra* note 33, at 443.

201. *Id.* at 442.

202. *Id.* at 443.

203. 161 A.2d 69, 100–01 (N.J. 1960).

204. Keeton, *supra* note 189, at 484–86.

205. *Id.* at 486.

206. *Id.* at 486 n.60. Keeton's list of precedents overruled includes "privity." *Id.* at 486. A footnote cites *Henningsen* with the parenthetical "suit by automobile purchaser's wife against manufacturer and retailer." *Id.* at 486 n.59.

A clear example of the application of legal process-like thinking is provided in a 1965 article by Richard Speidel, whose academic specialty was the law of sales. Speidel compared the approach to strict liability under the Uniform Commercial Code with that under tort law. In doing so, he raised objections to judicial adoption of strict products liability which could well have come out of the legal process playbook. “In essence,” he wrote, “through ‘strict liability’ the judicial process achieves a form of regulation over the recurring and nationwide relationship between the more powerful business enterprise and the less powerful individual user or consumer.”²⁰⁷ In imposing strict liability, the courts had chosen “to intervene on behalf of the consumer.”²⁰⁸ In doing so, they have “weighed the interest of the enterprise as a legislature would, and found it wanting.”²⁰⁹ However, adoption of this new legal regime “by its nature, requires an elaborate procedure for factual investigation and evaluation,” which unlike a legislature, courts are unable to undertake.²¹⁰ Thus, he wrote, “one can doubt the long-range feasibility of having the large premises involved in a public law approach to products liability created by common-law judges whose thinking is enmeshed with all the common-law distinctions.”²¹¹ “[W]hen courts take the bold step toward imposing and justifying strict products liability without legislative authorization and assistance, a . . . legitimate basis for criticism exists.”²¹²

As previously discussed, James had launched an “assault on the citadel of fault”²¹³ as he applauded expansive liability doctrines within the fault system and urged the limitation of doctrines, such as assumption of risk, that thwarted recovery even when negligence was present. His goal was to attain the “benefits and values of social insurance . . . under [the fault system].”²¹⁴ Keeton rejected the view of some (with a footnote to Harper and James) whose preference was for “candid reliance on a principle of loss distribution” but who supported “manipulation of doctrine over adherence both in result and in reasoning to liability based on fault.”²¹⁵ This approach “often [had] impl[ied] that it is appropriate for a decision reached under the influence of the [loss distribution] . . . principle to be explained in the judicial opinion solely on another ground, unrelated to that principle save in the coincidence that both lead to the same result in the particular case.”²¹⁶

207. Richard E. Speidel, *The Virginia “Anti-Privity” Statute: Strict Products Liability Under the Uniform Commercial Code*, 51 VA. L. REV. 804, 845 n.103 (1965).

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 846 n.103.

212. *Id.*

213. James, Jr., *supra* note 62, at 374.

214. James, Jr., *supra* note 32, at 552; *see also* James, Jr., & Dickinson, *supra* note 32, at 782–94.

215. Keeton, *supra* note 189, at 465.

216. *Id.* Once again, the position of Harper and James is in sharp contrast. 2 HARPER & JAMES, JR., THE LAW OF TORTS, *supra* note 61, at 1069–70 n.5 (“[I]n accident cases we believe compensation and some form of social insurance (like workman’s compensation) to be desirable and that until this can be had, every aspect of

III. JUSTICE ROGER TRAYNOR, ENTERPRISE LIABILITY, AND LEGAL PROCESS JURISPRUDENCE

A. JUSTICE ROGER TRAYNOR AND ENTERPRISE LIABILITY

As we have seen, Charles Gregory, writing in 1951, had called for a generation of Shaw-like judges to step up to the task of reforming tort law. Perhaps unknown to Gregory, such a judge had been a member of the California Supreme Court for a decade at that point. That judge, of course, was Roger Traynor whose 1944 *Escola* proposal for strict products liability placed him firmly in the enterprise liability camp.²¹⁷

In a 1965 article which appeared shortly after his opinion for a unanimous court in *Greenman v. Yuba Power Products Inc.* had written his *Escola* proposal into law,²¹⁸ Traynor made clear that strict products liability was part of his broader embrace of the enterprise liability theory.²¹⁹ Like James, Traynor saw strict products liability as part of a broader “enterprise liability or social insurance,”²²⁰ which included the imposition of strict liability “for industrial injuries covered by workmen’s compensation, and for injuries caused by ultra-hazardous activities.”²²¹ In Traynor’s view, these developments “presage[d] the abandonment of longstanding concepts of fault in accident cases. The significant innovations in products liability may well be carried over to such cases.”²²² Thus, he wrote, “[t]he cases on products liability are emerging as early chapters of a modern history on strict liability that will take long in the writing. There is a wealth of analogy yet to be developed.”²²³ Of course, this wealth of analogy might be developed by courts as suggested by the products cases. But it might also be developed by legislatures.²²⁴ Thus, Traynor wrote that “in time the

the present system which produces some of the benefits of social insurance should be fostered, and every aspect which thwarts those benefits should be minimized. Further, we believe that fault is an outmoded criterion of liability in this field, so that any attempt to pursue fault more effectively is at best a barking up the wrong tree. And if the more rigorous pursuit of fault tends to block some of the already attainable benefits of social insurance . . . then we think it would be like spending good money for fool’s gold.”)

217. *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440–41 (1944) (Traynor, J., concurring).

218. See *Greenman v. Yuba Power Products Inc.*, 377 P.2d 897 (Cal. 1963) (adopting strict products liability).

219. See Traynor, *supra* note 34.

220. *Id.* at 376.

221. *Id.* at 375.

222. *Id.* Looking to the future, Traynor recognized the looming problem of giving content to the defect requirement, writing that “[n]o single definition of defect has proved adequate to define the scope of the manufacturer’s strict liability in tort for physical injuries.” *Id.* at 373. After surveying the various tests that had been proposed, he wrote that “[t]he complications surrounding the definition of a defect suggest inquiry as to whether defectiveness is the appropriate touchstone of liability.” *Id.* at 372.

223. *Id.* at 376. Here, also, Traynor’s approach resembled that of James who, in 1957, wrote that where existing areas of strict liability “lend themselves to natural and easy extension . . . courts should make the extension.” James, Jr., *supra* note 197, at 924.

224. Of particular concern to Traynor was the problem of the auto accident where “the need for compensating victims regardless of fault is most urgent.” Traynor, *Ways and Meanings*, *supra* note 34, at 375. This urgency was driven by the fact that “[o]n the highways . . . injury and slaughter are not occasional events, but the order of the day . . . sooner or later there is bound to be more rational distribution of their costs than is

accident problem [might be] . . . solved through some compensation scheme that covers the basic economic losses of accident victims”²²⁵

Traynor’s focus on basic *economic* losses reflected the fact that he, like James, recognized that the expansion of liability had implications for the damages to be awarded. Thus, Traynor wrote, “Any system of enterprise liability or social insurance designed to replace existing tort law as the means for compensating injured parties should provide adequate but not undue compensation.”²²⁶ This meant that “once adequate compensation for economic loss is assured, consideration might well be given to establishing curbs on such potentially inflationary damages as those for pain and suffering. Otherwise the cost of assured compensation could become prohibitive.”²²⁷

If the enterprise liability vision expressed in Traynor’s *Escola* opinion and the Harper and James treatise was to be achieved by the rewriting of tort law by courts, jurisprudential obstacles would have to be overcome. Of course, there would be the objections of legal process scholars. But these objections would not surface until the late 1950s. In the real world of judges and lawyers, however, a more formidable obstacle was posed by the firm grip that legal formalism held on the profession. Judges, in this view, are not lawmakers and policy does not and should not play a role in their decision making. This was likely to have been the view of the rank and file of lawyers and judges in the 1950s and 1960s. Indicative of the hold that legal formalism held on the profession was the previously discussed prominence of Warren Seavey’s writings in the 1967 edition of the Harvard Law Review’s *Essays on the Law of Torts*.²²⁸ Seavey’s *Principles of Torts* was selected to be the opening article in the collection.²²⁹ This highly formalistic treatment of “fundamental” tort principles suggested that tort law had by then crystallized and could be restated as immutable principles. The implication was that which Seavey stated in his piece on Cardozo: the task of the lawyer or judges was “to see the plan and pattern underlying the law and to make clear the paths which had been obscured by the undergrowth of illogical reasoning.”²³⁰

now possible under the law of negligence.” *Id.* It is likely, however, that Traynor did not see the judicial imposition of strict liability as the answer to this problem. See *Maloney v. Ruth*, 445 P.2d 513 (Cal. 1968) (refusing to apply a strict liability rule in cases of automobile accidents, but holding that a vehicle owner could not delegate the statutory duty to maintain safe breaks). Perhaps coincidentally, the same year that *Ways and Meanings* appeared, the landmark Keeton O’Connell automobile no-fault proposal was published. See KEETON & O’CONNELL, *supra* note 194.

225. Traynor, *supra* note 34, at 376. Should this occur, Traynor wrote that the question would be “whether the law of negligence as we know it today . . . will atrophy or will survive in a diminished role to afford additional compensation to victims whose injuries are caused by actual fault on the part of others.” *Id.*

226. *Id.*

227. *Id.* (footnote omitted).

228. HARV. L. REV. ASS’N, *ESSAYS ON THE LAW OF TORTS* (1962).

229. *Id.* at 1; see Seavey, *Principles of Torts*, *supra* note 71.

230. Seavey, *supra* note 48, at 372.

B. JUSTICE TRAYNOR'S LEGAL PRAGMATISM

Although Traynor's academic career prior to his appointment to the California Supreme Court in 1940 had featured notable scholarship, he had published no extrajudicial works during his first decade and a half on the court. Beginning in 1956, however, Traynor began to publish regularly—with his primary subject being the role of courts in making law. Two articles, in particular, stand out, each apparently a response to an important jurisprudential event.

The first, *Law and Social Change in a Democratic Society*,²³¹ appeared in 1956, two years after the United States Supreme Court's then-controversial decision in *Brown v. Board of Education*.²³² Surely, this was a time for a prominent judge to address the topic of law, social change, and the lawmaking role of courts in a democratic society. Especially so when that judge was Roger Traynor, author of his court's landmark 1948 decision in *Perez v. Sharp*.²³³ This decision overturned his state's anti-miscegenation legislation, a position that the Warren Court would hesitate to take until nearly two decades later.²³⁴

In all likelihood, when Traynor wrote *Law and Social Change*, he had in mind both formalists and critics of the constitutional decisions of the United States Supreme Court. *Law and Social Change* shows no concern with academic writing on the subject of judicial lawmaking. Indeed, Traynor was probably unaware of the legal process-type thinking that had been developing during the first half of the twentieth century. As previously noted, most of the groundbreaking work in this area had appeared in the form of teaching materials, not in scholarly publications that would have made it widely available. Nevertheless, Traynor's legal pragmatism stands as an implicit rebuttal to the full-blown legal process viewpoint that would soon emerge.

Things changed with the 1959 publication of Hebert Wechsler's *Toward Neutral Principles of Constitutional Law* and Henry Hart's *The Time Chart of the Justices*.²³⁵ The appearance of these cornerstones of legal process jurisprudence appears to have prompted the second of the two articles on which

231. Traynor, *supra* note 18.

232. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

233. 198 P.2d 17 (Cal. 1948). Like Holmes, Traynor believed that courts generally should defer to legislative judgments. He would later write, quoting the United States Supreme Court, that "it is not for [courts] . . . to pass judgement on the wisdom of legislation." Traynor, *supra* note 18, at 240. Traynor, however, lived in a different age than Holmes (or, for that matter, Cardozo and the legal realists), an age of increasing sensitivity to issues of racial justice. And he stood at the forefront of this new age. In 1948, six years before *Brown v. Board of Education*, Traynor wrote the opinion in *Perez v. Sharp* holding California's anti-miscegenation statute unconstitutional, preceding the United States Supreme Court's similar decision by twenty years. *Perez*, 198 P.2d at 29. Just as *Escola* marked the movement of a major enterprise liability theory from the realm of academic writing to the opinions of jurists, so *Perez v. Sharp* hinted at an era in which laws which discriminated on the basis of race would come under constitutional scrutiny. At the time they were written, these opinions were revolutionary—and the revolution would eventually succeed.

234. *Loving v. Virginia*, 388 U.S. 1 (1967).

235. Wechsler, *supra* note 19; see also Hart, Jr., *supra* note 19.

I focus: the 1961 *No Magic Words Can Do It Justice*.²³⁶ Unlike *Law and Social Change*, *Magic Words* directly addressed not only the Wechsler and Hart articles, but also other contemporary writings on the subject of judicial lawmaking.²³⁷

Traynor began his 1956 *Law and Social Change* with the theme of social change, writing that we have “left . . . the silent plains of the nineteenth century when *laissez faire* commanded easy acceptance.”²³⁸ The social policies of “*laissez faire* had ceased to be acceptable by the [D]epression years.”²³⁹ As a consequence of the Great Depression and two World Wars, the nation had been “compelled . . . to realize that each of us has a direct responsibility for the general welfare.”²⁴⁰ It was thus inevitable that “some part of that obligation had to be made legally enforceable by a society given the opprobrious term of ‘welfare state’ by those who would have it remain static.”²⁴¹ The Great Depression and the New Deal legislation that followed had made clear that “[m]ore than ever social problems [had found] . . . their solution in legislation.”²⁴² Nevertheless, Traynor wrote, “[e]ndless problems remain . . . which the courts must resolve without [the] benefit of legislation.”²⁴³ It followed that “[c]ourts have a creative job to do when they find that a rule has lost its touch with reality and should be abandoned or reformulated to meet new conditions and new moral values.”²⁴⁴ Their task thus was to “hammer out new rules that will respect whatever values of the past have survived the tests of reason and experience and anticipate what contemporary values will best meet those tests.”²⁴⁵ In this embrace of what we would identify today as legal pragmatism, Traynor followed in the footsteps of Holmes, Cardozo, Green, and Llewellyn—and anticipated Judge Posner’s writing more than three decades later on this subject.²⁴⁶

“In the pragmatic search for solutions,” Traynor wrote, “the law professor . . . has a special task.”²⁴⁷ In Traynor’s view, judges could “benefit [from the] . . . seasoned reflection on a particular subject that marks the work of the scholar.”²⁴⁸ “The demolition of obsolete theories . . . leaves [courts] . . . free to weigh competing policies without preconceptions that purport to compel the

236. Traynor, *supra* note 19.

237. *Id.* at 623–25.

238. Traynor, *supra* note 18, at 231.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.* at 232.

243. *Id.*

244. *Id.*

245. *Id.*

246. Judge Posner writes that “judges in our system are legislators as well as adjudicators,” and policy plays an important role in their lawmaking. See POSNER, *supra* note 13, at 118, 238.

247. Traynor, *supra* note 18, at 232.

248. *Id.* at 233.

decision but in fact do not.”²⁴⁹ A judge, he wrote, “has a better chance to arrive at the least erroneous answer if the scholars have labored in advance to break ground for new paths.”²⁵⁰ The law professor has the privilege of perspective that enables him to make “prophetic generalization from the host of cases . . . to [chart a] . . . course” for courts to follow.²⁵¹

As if written to order, the Harper and James tort treatise appeared the same year that *Law and Social Change* was published. Harper and James translated the values of the welfare state into a tort agenda, charting a course for courts to follow—much as Traynor’s own *Escola* concurring opinion had done.

With his court’s revolutionary tort decisions still a few years in the future,²⁵² Traynor focused on the law of divorce as one example of the need for courts to “hammer out new rules” to meet contemporary values.²⁵³ The “vigorous growth” of the law, he wrote, would be impeded if courts perpetuated “nice rules that fail to meet the problems of real people.”²⁵⁴ Such had been the case in California divorce law in the 1950s. At that time, divorce was governed by the “withered dogma that divorce can be granted only for marital fault,” such as adultery.²⁵⁵ Moreover, the law was “rendered . . . [even] more irrational by the widespread rule that recrimination,” such as adultery on the part of the other party, was “an absolute defense.”²⁵⁶ The consequence of the failure to meet the problems of real people had been that “[r]ules insensitive to reality [had] . . . been cynically circumvented by litigants and attorneys with the tacit sanction of the courts.”²⁵⁷ The result, Traynor wrote, was a “discrepancy between law in dogmatic theory and law in action, evading dogma by fiction and subterfuge.”²⁵⁸

However, in an opinion by Justice Traynor, the California Supreme Court demonstrated that courts were not completely powerless to replace fiction and subterfuge with overt doctrinal change by a “reinterpretation” of the governing statute. It did so by ruling that divorce courts have discretion to grant or deny a divorce as the public interest indicated.²⁵⁹ But this was only a first step. As Traynor wrote in *Law and Social Change*, “[e]ven with this major change,” fault-based divorce law remained “a formidable antique around which people

249. *Id.* at 234.

250. *Id.* Long before “law-and” scholarship became fashionable among legal academics, Traynor called on law professors “to draw on pertinent extralegal knowledge of scholars in other fields” so that courts might also draw on such knowledge. *Id.* Traynor noted that “[m]edicine and business [had] . . . long since put to good use our growing knowledge of human behavior,” but he lamented the fact that “many of the rules of evidence still rest on lay assumptions of how people react under various circumstances.” *Id.* at 235.

251. *Id.* at 232.

252. *But see* *Malloy v. Fong*, 232 P.2d 241 (1951) (abolishing charitable immunity).

253. Traynor, *supra* note 18, at 232.

254. *Id.* at 236.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *De Burgh v. De Burgh*, 250 P.2d 598, 603–08 (Cal. 1952).

step warily.”²⁶⁰ Thus, Traynor asked rhetorically, “Is it not time for lawyers to rouse themselves from their inertia and work actively for legislation in this field that will make the integrity of the law a meaningful phrase?”²⁶¹ Following Traynor’s lead, the California legislature, in fact, enacted the nation’s first no-fault divorce law. Traynor’s recrimination opinion has been widely credited with laying the foundation for this legislation.²⁶²

Halfway through *Law and Social Change*, Traynor turned to issues of constitutional law, and while judicial lawmaking in the area of constitutional law is not the focus of the present Article, discussion of this subject is essential to an understanding of Traynor’s relationship to legal process thinking. In *Law and Social Change*, Traynor wrote that judges are “bound . . . to recognize that the task of law reform is that of the legislators, which is to say that it is primarily that of the people.”²⁶³ Thus, “[h]owever sensitive judges become to the need for law reform to match our spectacular growth, they must necessarily keep their dispassionate distance from that ball of fire that is the living law, and hope for wisdom to give it coherent direction when it spins their way.”²⁶⁴ The last phrase in that credo is the key one because courts at the time had found that the ball of fire often spun their way.

Traynor thus wrote that he was “bound to be aware of the signs that we may cross new frontiers in constitutional law.”²⁶⁵ Prominent among these new frontiers, of course, was *Brown v. Board of Education*,²⁶⁶ which was being denounced at the time as unprincipled judicial activism. Especially strident were white Southerners who “charged the Court with ignoring precedent, transgressing original intent, indulging in sociology, infringing on the reserved rights of states, and usurping legislative authority.”²⁶⁷ A particularly notable critic was a prominent Southern newspaper editor, James J. Kilpatrick, who wrote that

in May of 1954, that inept fraternity of politicians and professors known as the United States Supreme Court chose to throw away the established law. These nine men repudiated the Constitution, sp[*a*]t upon the [T]enth [A]mendment, and rewrote the fundamental law of this land to suit their own gauzy concepts of sociology.²⁶⁸

Similarly, the conservative *National Review* denounced *Brown*, calling it “an act of judicial usurpation,” one that ran “patently counter to the intent of the

260. Traynor, *supra* note 18, at 236.

261. *Id.*

262. FIELD, *supra* note 13, at xiv, 64–65.

263. Traynor, *supra* note 18, at 239.

264. *Id.*

265. *Id.* at 237.

266. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

267. Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 487 (2005).

268. *Id.* (quoting *Court Order Gets Varied Reaction from Region’s Newspaper*, SO. SCH. NEWS (Nashville), June 8, 1955, at 8, 9).

Constitution,” and was “shoddy and illegal in analysis, and invalid as sociology.”²⁶⁹

In contrast to this heated rhetoric, Traynor reported in a matter-of-fact tone that “changes in public opinion on race discrimination have compelled reinterpretation of the [F]ourteenth [A]mendment, itself a product of violent social change.”²⁷⁰ Moreover, he continued, “[i]t is now widely, if not universally, accepted that there is no rational basis in any law for race discrimination, that it is an insidiously evil thing that deprives the community of the best of all its people as it deprives individuals and groups to give of their best.” Thus, “[i]t has long been accepted that discriminatory state action [such as segregation in public schools] must yield to the [F]ourteenth [A]mendment.”²⁷¹ So, what was a “shoddy and illegal analysis” for the *National Review* editors was, for Traynor, simply a statement by the Supreme Court of the “widely, if not universally, accepted [view] that there is no rational basis in any law for . . . the insidiously evil thing” of race discrimination.²⁷²

Noting, however, that the United States Supreme Court had “stated that it is not for them to pass judgment on the wisdom of legislation,” Traynor wrote that the California Supreme Court had “accepted that thesis.”²⁷³ Of course, there was a

qualification to this general thesis articulated by Justice Jackson in *Board of Education v. Barnette*: “The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”²⁷⁴

Thus, Traynor wrote, courts have an “active responsibility in the safeguard of those civil liberties that are the sum and substance of citizenship.”²⁷⁵

Here, Traynor parted company with Judge Learned Hand, perhaps the most respected judge of the time, who in his essay, *The Spirit of Liberty*, had suggested that “we . . . rest our hopes too much upon constitutions, upon laws, and upon courts.”²⁷⁶ “These are false hopes,” Hand wrote.

Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.²⁷⁷

269. See William Voegeli, *Civil Rights and the Conservative Movement*, in *LIFE, LIBERTY, AND THE PURSUIT OF HAPPINESS: TEN YEARS OF THE CLAREMONT REVIEW OF BOOKS* 96 (2012) (quoting National Review following the *Brown* decision).

270. Traynor, *supra* note 18, at 237.

271. *Id.*

272. *Id.*

273. *Id.* at 240.

274. *Id.* at 241 (footnote omitted); see also *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

275. Traynor, *supra* note 18, at 241.

276. *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 189–190 (Alfred A. Knopf, Inc., 1st ed. 1952).

277. *Id.* at 190.

But, Traynor countered:

Is it not precisely because it lies there that it has declared itself in a constitution to be invoked by the courts insistently, unfailingly, against those in power, in legislatures or out of them? . . . The judges whose job it is to apply [the Constitution] must carry liberty in their hearts even when other men have ceased to.²⁷⁸

C. JUSTICE TRAYNOR'S REJECTION OF THE "MAGIC WORDS" OF LEGAL PROCESS JURISPRUDENCE

Law and Social Change appears to have been addressed to judges and lawyers, and to academics who might offer substantive suggestions to courts to improve areas of law in which they specialized. It shows no real concern with academic writing on the subject of judicial lawmaking. Traynor's focus changed in his 1961 *No Magic Words Can Do It Justice*,²⁷⁹ which was written in response to the now-famous 1959 articles by two iconic legal process scholars: Herbert Wechsler's *Neutral Principles*,²⁸⁰ and Henry Hart's *The Time Chart* articles.²⁸¹ An examination of *Magic Words* thus offers the best way to understand Traynor's relationship to legal process jurisprudence. Here, Traynor's focus was legal scholarship on the subject of judicial lawmaking—and not just the articles by Hart and Wechsler, but also articles by two of their (and Traynor's) contemporaries, Thurman Arnold,²⁸² and Kenneth Culp Davis,²⁸³ plus an article by Kenneth Karst,²⁸⁴ a member of a younger generation and, indeed, a former student of Hart's.

Traynor can be seen as dividing this scholarship into two camps. The first, consisting of Arnold, Davis, and Karst, recognized that courts are lawmakers, encouraged them to be more active on this front, and suggested ways of improving the process of judicial lawmaking. The second camp, consisting of Hart and Wechsler, wrung their hands over judicial lawmaking and questioned rulings of the United States Supreme Court, including *Brown v. Board of Education* in Wechsler's case. More generally, these scholars sought to impose limitations on judicial lawmaking, such as an insistence that lawmaking must satisfy criteria such as being based on "neutral principles."

Traynor quickly signaled which camp he sympathized with by beginning his analysis with the assertion that there had "been too much idle disputation" over whether the judiciary or the legislature "is the primary or ultimate . . . or most appropriate[] . . . source of law"²⁸⁵ This question, of course, was a

278. Traynor, *supra* note 18, at 241.

279. Traynor, *supra* note 19.

280. Wechsler, *supra* note 19.

281. Hart, Jr., *supra* note 19.

282. Thurman Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298 (1960).

283. Kenneth Culp Davis, *The Future of Judge-Made Public Law in England: A Problem of Practical Jurisprudence*, 61 COLUM. L. REV. 201 (1961).

284. Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75 (1960).

285. Traynor, *supra* note 19, at 616.

central concern of the legal process scholars. In contrast, Traynor was scornful of those who were “wont to view with alarm any judicial lawmaking, such as has gone on for centuries, as an encroachment on the legislative function” and whose “curious reasoning” asserted that “judicial lawmaking must now atrophy because statutory lawmaking is growing apace.”²⁸⁶

To drive home this view, Traynor next focused on what American courts should *not* do, drawing on Davis’s examination of the state of judicial lawmaking in England. “The prevailing belief,” Davis had written, was “that the task of judges is limited to the application of previously existing law, and does not extend either to a reexamination of case law with a view to improving it or to the making of policy choices in giving meaning to silent or unclear statutes.”²⁸⁷ Taking issue with Lord Justice Devlin and Sir Arthur Goodhart, two prominent English authorities, Davis had bemoaned this “counterrevolution against all that was accomplished” by the great Lord Mansfield, the renowned Eighteenth century English judge who modernized that country’s commercial law.²⁸⁸ At least, Traynor wrote, we in America have moved beyond this “law-is-law’ formalism.” But in Traynor’s view, not far enough.²⁸⁹

Judges, Traynor wrote, have “the major responsibility for lawmaking in the basic common-law subjects.”²⁹⁰ As to the idea that overhauls in the common law should be left to the legislature, he insisted that courts “[o]ften . . . have no choice but to undertake [this lawmaking] . . . in view of legislative indifference or . . . legislative involvement in investigation and lawmaking on other fronts.”²⁹¹ Indeed, courts should undertake this task, in part because of “legislative sensitivity to political considerations [The] very situation [of the legislature] compels expedient compromises that have a way of showing [up] even in laws that are euphemistically labelled as model.”²⁹² So much for the idealized legislative process of the legal process scholars.

But what of the fear that overly zealous judicial lawmaking requires the articulation of limits, lest courts stray into territory best left to the legislature? For Traynor, this specter raised the “riddle [of] . . . what should be the outer limits of judicial lawmaking, whether with regard to constitutional questions, statutory interpretation, or the traditional common-law subjects.”²⁹³ Traynor wrote that if we can agree that judicial lawmaking “should not shrink too much, as it is apparently doing in England, and that it should not stretch too much, as it seems far from doing anywhere, how should we establish its appropriate range?”²⁹⁴

286. *Id.*

287. Davis, *supra* note 283, at 202.

288. *Id.* at 213.

289. Traynor, *supra* note 19, at 617 (quoting Davis, *supra* note 283, at 213).

290. *Id.* at 618.

291. *Id.*

292. *Id.*

293. *Id.* at 620.

294. *Id.*

Since judicial lawmaking was far from stretching too much, it followed that expending scholarly energy to develop formulas to limit that lawmaking resulted only in the sort of “idle disputation”²⁹⁵ that Traynor deplored. It was *idle* disputation because “[a]fter some twenty years on the bench, [Traynor had found] . . . little ground for worry that judges . . . will become zealous to reach out for more responsibility than they now have.”²⁹⁶ This is because “[j]udicial office has way of deepening caution, not diminishing it.”²⁹⁷ In Traynor’s view, the “danger is not that [judges] . . . will exceed their power, but that they will fall short of their obligation.”²⁹⁸

Too many courts, in fact, had fallen short of this obligation. The real danger, Traynor wrote, was “not that judges might take off onward and upward, but that all too many of them have long since stopped dead in [their] . . . tracks.”²⁹⁹ These judges spoke in “the appealing language of stability in justification of specious formulas.”³⁰⁰ These formulas, Traynor wrote, were nothing more than “a cover . . . for the sin the Bible calls sloth and associates with ignorance.”³⁰¹

In a transition fraught with implications about his view of legal process scholarship, Traynor then turned his attention to the “Magic Words” of his title. Traynor first wrote that the “age-old search for magic words becomes increasingly desperate, particularly among students at examination time who search for them in anguish among the mounting stacks . . .”³⁰² With no intervening text, Traynor then wrote that “[m]odern equivalents decorate the law journals, such as Professor Herbert Wechsler’s ‘neutral principles.’”³⁰³ Traynor seems to invite the reader to view Wechsler as the adult equivalent of a desperate law student at examination time, hopelessly searching among the stacks for magic words.

In his *Neutral Principles* article, Wechsler had demanded that in deciding on the constitutionality of legislation, courts issue “principled decision[s],” decisions “that rest[] on reasons . . . that in their generality and their neutrality transcend any immediate result that is involved.”³⁰⁴ Where no such reasons “can be assigned for overturning value choices of the other branches . . . those choices must [stand].”³⁰⁵ So could an opinion based on neutral principles be written to strike down the school segregation legislation involved in *Brown v. Board of Education*? Wechsler wrote—five years after *Brown*—“I should like to think

295. *Id.* at 616.

296. *Id.* at 620.

297. *Id.*

298. *Id.*

299. *Id.* at 621.

300. *Id.*

301. *Id.*

302. *Id.* at 623.

303. *Id.*

304. Wechsler, *supra* note 19, at 19.

305. *Id.*

[so] . . . but I confess that I have not yet written the opinion.”³⁰⁶ This stands in stark contrast to what Traynor had written three years prior to *Neutral Principles*. In *Law and Social Change*, Traynor had written that it had “long been accepted” that discriminatory state action such as school segregation laws “must yield to the [F]ourteenth [A]mendment.”³⁰⁷ Indeed, Traynor wrote, “It is now widely, if not universally, accepted that there is no rational basis” for the “insidiously evil thing” that is “any law for race discrimination.”³⁰⁸

In *Magic Words*, Traynor wrote, “What Professor Wechsler wants, as most of us do, is a principled decision ‘that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.’”³⁰⁹ As thus stated, “[n]eutral principles sound pure and simple.”³¹⁰ However, for Traynor, that is not a virtue but a vice because “a judge . . . confronts problems ridden with impurities and complications.”³¹¹ And thus, Traynor asked, “What did Professor Wechsler have in mind beyond magic words?”³¹²

Traynor proposed two answers to this question, each suggesting that Wechsler’s quest for neutral principles was a bunch of academic nonsense. First, Traynor asked, “Is [Wechsler’s] . . . vision of sweet reasonableness a pictorial one, in which judges make deft transitions from the past through the instant case to the future perfect along the curvy, narrow path that artful or clumsy adversaries trace out in a bog of facts?”³¹³ Or, in the alternative, “[i]s it an abstraction of embryonic syllogisms about adversary values that swirl in the judicial mind until at last, all values have disappeared but one contained within the luminous logic that lawyers and judges describe as inescapable when at last, it no longer escapes them?”³¹⁴ Obviously, neither of these suggestions were meant to be taken seriously. And, in this vein, Traynor wrote that “[t]wo scholars

306. *Id.* at 34.

307. Traynor, *supra* note 18, at 237.

308. *Id.*

309. Traynor, *supra* note 19, at 623–24 (quoting Wechsler, *supra* note 19, at 19).

310. *Id.* at 624.

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

Judges must somehow walk out of themselves into thin air and record a distilled impersonal judgment yet stay close enough to common people to gain their acceptance and hence its own durability.

. . . .

The composite ideal of the professors, if I abstract it aright, is a judge who, after marshalling an impressive array of relevant facts, can write an opinion that gives promise of more than a three-year lease on life by accurately anticipating the near future, who respects established folk patterns by not anticipating the too distant future, and who walks a tightrope of logic to the satisfaction of a team of collective thinkers as well as to the plaudits of the philosophers.

Id. at 624–25.

roundly declare that the proposed standard for judicial review is an illusion, cruelly adding that ‘it merely restates the question.’”³¹⁵

Traynor’s dissatisfaction with Wechsler’s search for magic words was matched by his impatience with Henry Hart’s *Time Chart of the Justices*.³¹⁶ Hart, Traynor wrote, was “disturbed to find upon painstaking analysis that Supreme Court opinions fall short of optimum workmanship and that too often a case falls into the limbo of a per curiam decision.”³¹⁷ Hart “charitably [laid] some blame [on] . . . ‘The Time Chart of the Justices.’”³¹⁸ His remedy thus “call[ed] for an easier schedule that would promote the articulation of what he calls ‘impersonal and durable principles.’”³¹⁹

Once again, Traynor seems to have viewed this as academic nonsense, writing that “Thurman Arnold storms at what he called ‘Professor Hart’s Theology,’ gleefully chewing up such phrases as ‘fully focused and functioning intellectual effort’ and deriding as unrealistic any vision of pearly unanimous decisions that purportedly would emerge from the ‘maturing of collective thought.’”³²⁰ Arnold had “[d]eplor[ed] uniformity as unbecoming times of revolutionary change, [and had] . . . unkindly suggest[ed] that it might lamentably ensue ‘if the Supreme Court were selected from a single law school whose faculty was recruited from like-minded dialecticians.’”³²¹ Reinforcing Arnold’s point, Traynor observed that “[a] mere judge listening in on such persuasive adversaries is bound to speculate on how collective thought about neutral principles would mature were they ever to be brothers on the bench.”³²²

Traynor’s fundamental objection to what he called the “academic tintinnabulation of enduring principles”³²³ was not only that such a preoccupation would stifle needed judicial creativity, but that it did nothing to improve the substance or process of judicial lawmaking. On the substantive front, Traynor wrote that “[j]udges hospitable to the idea of being reasonable would welcome also some usable standards.”³²⁴ Wechsler (and Hart), however, had “ignored the abundant opportunities available to a scholar with hindsight to compose a symphony of neutral principles that would improve on [judicial efforts that lack] . . . adequate transcendental shine.”³²⁵ Thus, the judge “is usually the gem-cutter of enduring principles by default.”³²⁶ Such principles will seldom be found in briefs submitted by “lawyers [who] rarely make their fees

315. *Id.* at 624 (quoting Arthur S. Miller & Ronald F. Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 663 (1960)).

316. Hart, Jr., *supra* note 19.

317. Traynor, *supra* note 19, at 624.

318. *Id.* (quoting Hart, Jr., *supra* note 19).

319. *Id.* (quoting Hart, Jr., *supra* note 19, at 99).

320. *Id.* at 624–25 (footnote omitted) (quoting Arnold, *supra* note 282, at 1313).

321. *Id.* at 625 (quoting Arnold, *supra* note 282, at 1313).

322. *Id.*

323. *Id.* at 627.

324. *Id.* at 624.

325. *Id.*

326. *Id.* at 625.

contingent upon finding them”³²⁷ Moreover, “they are not always to be found in textbooks, for the scholars who long for them are under no urgency to declare what they are.”³²⁸

Moving beyond the quest for the “ideal decision,” Traynor wrote that he, and other judges, were “sharply aware of how much need there is to improve the effectiveness of the judicial process.”³²⁹ And here, Traynor reported that there *had* been useful scholarly work, much of it pioneered by Kenneth Culp Davis. An example, Traynor wrote, was the work of Kenneth Karst, who had “advanced beyond the academic tintinnabulation of enduring principles to the concrete suggestion that . . . courts must sometimes ‘be informed on matters far beyond the facts of the particular case.’”³³⁰ An examination of a pair of Supreme Court decisions had led Karst to conclude that greater consensus might emerge on the court by “intensifying [the] . . . examination of data surrounding a controversy that may be essential to its understanding.”³³¹

To resolve a hard case, Traynor wrote, why should courts “not inquire . . . into what Professor Kenneth Davis calls ‘legislative facts,’ or what we might call the environmental data, as distinguished from . . . litigated facts presented to the court.”³³² And, Traynor asked rhetorically, “When hard cases make good law, is it not usually because the judges had before them the data requisite for an informed judgment?”³³³ Of course, “only a small fraction of cases are of a complexity that calls for inquiry beyond the facts about the parties and available precedents,” but these cases “may be of major significance in the development of the law.”³³⁴

Traynor’s message, in a nutshell, was that there had “been too much idle disputation” over whether the courts or legislatures are “the primary or ultimate . . . or most appropriate[] . . . source of law.”³³⁵ Legal scholars should turn away from the “academic tintinnabulation of enduring principles.”³³⁶ Instead, they should focus, as Harper and James had done, on “[t]he demolition of obsolete theories,” in order to “break ground for new paths,”³³⁷ and, when necessary, follow Davis’s advice to “inquire . . . [into] ‘legislative facts’” to inform their lawmaking.³³⁸

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.* at 627 (quoting Karst, *supra* note 284, at 77).

331. *Id.* at 626.

332. *Id.* at 627 (citing KENNETH C. DAVIS, 2 ADMINISTRATIVE LAW TREATISE § 15.03 (1958)).

333. *Id.*

334. *Id.*

335. *Id.* at 616.

336. *Id.* at 627.

337. Traynor, *supra* note 18, at 234.

338. Traynor, *supra* note 19, at 627.

For Traynor, the “real concern [was] . . . not the remote possibility of too many creative opinions but their continuing scarcity.”³³⁹ In his view, the “growth of the law, far from being unduly accelerated by judicial boldness, is unduly hampered by a judicial lethargy that masks itself as judicial dignity with the tacit approval of an equally lethargic bar.”³⁴⁰ “[J]udicial responsibility . . . [entails] the recurring formulation of new rules to supplement or displace the old [and the] choice of one policy over another.”³⁴¹ Thus, Traynor called on courts to rewrite the law “to meet new conditions and new moral values,” which he linked to the New Deal response to the Great Depression, in a “society given the opprobrious term ‘welfare state’ by those who would have it remain static.”³⁴² In tort law, these were the values expressed in the Harper and James treatise, and thus an affront to legal process jurisprudence.

IV. ENTERPRISE LIABILITY AND LEGAL PRAGMATISM IN THE CALIFORNIA SUPREME COURT

A. ALTERED NORMS OF JUDICIAL LAWMAKING

When Justice Traynor was appointed to the California Supreme Court in 1940, the idea that courts could rewrite the law to reflect the policies and agenda of the enterprise liability scholars would have seemed fanciful at best. At the time, arguments for the loss distribution policy and the enterprise liability agenda would have been seen as not only substantively undesirable, but even inappropriate for judicial consideration. They would have been derided as “sentimental,” as opposed to “legal justice,” inconsistent with the very concept of “a court of law.”³⁴³ A quarter century later, legal formalism still exerted its hold on many lawyers and judges, buttressed by then with concerns over the lack of political accountability of courts and their lack of competence to engage in large-scale, policy-based reform of tort law.

Attitudes toward the possibility that courts might adopt a doctrine of comparative negligence illustrate the firm grip that such thinking had in mainstream legal thought well into the 1960s.³⁴⁴ The contributory negligence doctrine, which was the law in most states, deprived an injured plaintiff of recovery from a negligent defendant if the plaintiff also had been negligent. The harsh effect of this rule had long been apparent.³⁴⁵ It left the entire loss on an

339. Roger J. Traynor, Comment, *Comment on Courts and Lawmaking*, in LEGAL INSTITUTIONS TODAY AND TOMORROW: THE CENTENNIAL CONFERENCE VOLUME 48, 52 (Monrad G. Paulsen ed., 1959).

340. *Id.*

341. R. J. Traynor, *The Courts: Interweavers in the Reformation of Law*, 32 SASK. L. REV. 201, 213 (1967).

342. Traynor, *supra* note 18, at 231–32.

343. See Seavey, *supra* note 48, at 373.

344. See Ursin, *supra* note 70, at 238–42.

345. See 2 HARPER & JAMES, JR., THE LAW OF TORTS, *supra* note 61, at 1193–1209, 1236–41; Leon Green, *Illinois Negligence Law*, 39 ILL. L. REV. 36, 36 (1944); Wex S. Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151, 164–77 (1946); A. Chalmers Mole & Lyman P. Wilson, *A Study of Comparative Negligence*, 17 CORNELL L.Q. 333, 333, 604, 606–07, 621, 643–45, 651–52 (1932); Cornelius J. Peck,

injured party, even though he was only slightly negligent, and relieved a negligent defendant of liability however much he may have contributed to the injury. A rule of comparative negligence, in contrast, would apportion damages according to the relative negligence of the two parties. Moreover, where insurance is common, as in the case of automobile accidents or accidents associated with business enterprises, a rule of comparative negligence would better serve the goals of compensating negligently injured persons and widely distributing accident losses.

The prospect of judicial adoption of a comparative negligence rule could, however, be seen to raise concerns over the lack of competence and political accountability of courts. First, reform would involve more than merely replacing contributory negligence with a comparative negligence rule. Adoption of the comparative negligence principle would leave numerous unresolved problems, including problems concerning set-offs, joint and several liability, and the status of doctrines such as last clear chance and assumption of risk.³⁴⁶ Moreover, as was observed at the time, because insurance companies would initially bear liability costs in the majority of instances, “[j]udicial reform would . . . affect the whole complicated—and partly regulated—structure of insurance rates.”³⁴⁷ In addition, comparative negligence is precisely the sort of issue that is certain to “affect or become involved in current political controversy” and thus beyond the reach of judicial action.³⁴⁸ Harry Kalven described the situation in 1968: “[B]ills have been introduced without success in many state legislatures. We have then a situation in which legislation is possible, and has indeed been tried, but in which there is clearly no legislative consensus in favor of the reform.”³⁴⁹ The issue of comparative negligence can thus be seen as dragging politics into the judicial system by requiring courts to decide the sort of issue that legal process writers would eschew.

Writing from the legal process perspective,³⁵⁰ and reflecting these concerns, Paul Mishkin and Clarence Morris wrote in 1965 that it should come as no surprise that “there is no substantial likelihood that any court will act today . . . to [adopt] . . . comparative negligence.” Mishkin and Morris went even further, observing that “lawyers will not even consider arguing this possibility to a court.”³⁵¹

Comparative Negligence and Automobile Liability Insurance, 58 MICH. L. REV. 689, 690 (1953); William L. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 469 (1953).

346. Robert A. Lefflar, Comment, *Comments on Maki v. Frelk—Comparative v. Contributory Negligence: Should the Court or Legislature Decide*, 21 VAND. L. REV. 918, 920–21 (1968).

347. Wolfgang Friedmann, *Legal Philosophy and Judicial Lawmaking*, 61 COLUM. L. REV. 821, 841 (1961).

348. See KEETON, *supra* note 30, at 92.

349. Harry Kalven, Jr., Comment, *Comments on Maki v. Frelk—Comparative v. Contributory Negligence: Should the Court or Legislature Decide*, 21 VAND. L. REV. 897, 899 (1968).

350. Mishkin and Morris wrote that their “explicit references to Professors Hart and Sack’s book fall far short of how much we learned from them. . . . [H]aving once traveled over much ground with them as guides, we can no longer see the landscape free from their influence.” PAUL J. MISHKIN & CLARENCE MORRIS, *ON LAW IN COURTS: AN INTRODUCTION TO JUDICIAL DEVELOPMENT OF CASE AND STATUTE LAW* xii (1965).

351. *Id.* at 256.

Nevertheless, lawyers in 1968 did ask the Illinois Supreme Court to adopt a doctrine of comparative negligence. The court, however, responded in the manner predicted by Mishkin and Morris, refusing in *Maki v. Frelk* to adopt that doctrine.³⁵² This refusal was not because the court favored the contributory negligence rule on the merits, but because the court believed that such a change was not within the appropriate role of the courts: “After full consideration we think . . . that such a far-reaching change, if desirable, should be made by the legislature rather than by the court.”³⁵³ The court’s reasons echoed the concerns of the legal process writers over political accountability and competence. The court wrote, “The General Assembly is the department of government to which the constitution has entrusted the power of changing the laws.”³⁵⁴ Because it found contributory negligence mentioned in several legislative enactments, the court concluded that “the legislative branch is manifestly in a better position than is this court to consider the numerous problems involved.”³⁵⁵

Maki might suggest that the legal process thinking had a firm hold on the American judiciary; indeed, scholars saw the *Maki* result as no surprise. As Kalven wrote:

[N]o technological or sociological change . . . made the doctrine now look different than it had in prior years [N]othing was producing any new insight about the rule nor was there any new reason for changing it that had not been fully evident to all those courts which for all those years had refused to make the change.³⁵⁶

And as late as 1971, William Prosser concluded that there was little likelihood of judicial adoption of comparative negligence.³⁵⁷

Kalven may have been correct that there had been no technological or sociological change or new insight about the rule that “had not been fully evident to all those courts which for all those years had refused to make the change.”³⁵⁸ Overlooked by Kalven, however, was the fact that there had been a *jurisprudential* change.

Judge Posner writes that the accepted norms of judging are an important influence on judges. He suggests that “the biggest internal constraints on . . . judging,” typically are “the desire for self-respect and for respect from other judges and legal professionals generally, which a judge earns by being a good judge.”³⁵⁹ Most judges “derive considerable intrinsic satisfaction from

352. *Maki v. Frelk*, 239 N.E. 2d 445, 447 (1968).

353. *Id.*

354. *Id.*

355. *Id.* at 448.

356. Kalven, *supra* note 349, at 898–99 (footnote omitted).

357. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 67, at 435 (4th ed. 1971). Prosser’s 1971 prognosis was based in part on the fact that most state legislatures at that date had refused to adopt comparative negligence. *Id.* A surge of legislative adoptions occurred during and after the late 1960’s. See John G. Fleming, *The Supreme Court of California 1974–1975—Foreword: Comparative Negligence at Last—By Judicial Choice*, 64 CALIF. L. REV. 239, 239–40 (1976).

358. Kalven, *supra* note 349, at 898.

359. POSNER, *supra* note 13, at 371.

their work and want to be able to regard themselves and be regarded by others as good judges.”³⁶⁰ And to be regarded “as a good judge requires conformity to the accepted norms of judging.”³⁶¹

The *Maki* decision and the assessments by Kalven and Prosser no doubt accurately reflected the norms of judging that dominated the first six decades of the twentieth century. But something jurisprudential had changed, although mainstream scholars—comfortable in their legal process assumptions—failed to recognize that change: the California Supreme Court, led by Justice Traynor, was marching to a different drummer.

Posner also writes that, in judging, “norms are contestable,”³⁶² and “[r]apid norm shifts are possible . . . because the products of th[is] activit[y] cannot be evaluated objectively.”³⁶³ In law it is the “innovative judges [who] challenge the accepted standards of their art [And these] innovators have the greater influence on the evolution of their field.”³⁶⁴ Posner cites Holmes, Brandeis, Cardozo, and Hand as “examples of judges who succeeded by their example in altering the norms of opinion writing.”³⁶⁵

Just that had happened in California. Led by Justice Traynor’s example and extrajudicial writings, by the early 1960s, the California Supreme Court had returned to the pragmatic jurisprudence of Holmes, Cardozo, and the Legal Realists—and many other state supreme courts soon would follow. In fact, two years after Prosser’s prognosis, the Florida Supreme Court instituted comparative negligence,³⁶⁶ and was quickly followed by the supreme courts of California and Alaska³⁶⁷—and then eventually by the Illinois Supreme Court itself.³⁶⁸

B. THE CALIFORNIA SUPREME COURT: THE LIBERAL ERA (1960–1985)

Beginning in the 1960s, the California Supreme Court left legal formalism and legal process jurisprudence in the rearview mirror as it embraced the jurisprudence of legal pragmatism and the agenda of the enterprise liability scholars.³⁶⁹ Under Traynor’s guidance, the California Supreme Court became an occasional—and in some fields frequent—legislator, with policy at the heart of its lawmaking. By the 1970s, Grant Gilmore wrote, the court had become “the

360. *Id.* at 62 (footnote omitted).

361. *Id.* at 61.

362. *Id.* at 63.

363. *Id.* at 64.

364. *Id.* at 12–13.

365. *Id.* at 63.

366. *Hoffman v. Jones*, 280 So.2d 431, 436–37 (Fla. 1973).

367. *See Kaatz v. State*, 540 P.2d 1037, 1049 (Alaska 1975); *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1242 (Cal. 1975).

368. *See Alvis v. Ribar*, 421 N.E.2d 886, 897 (Ill. 1981).

369. The court had also issued important decisions in the 1940s and 1950s. *See e.g.*, *Summers v. Tice*, 199 P.2d 1, 4 (Cal. 1948) (shifting burden of proof in cause in fact); and 1950s; *De Burgh v. De Burgh*, 250 P.2d 598, 601–03 (Cal. 1952) (bringing fault-based divorce in line with the values of the time and paving the way for the nation’s first non-fault divorce law); *see also infra* notes 259–262 and accompanying text).

most innovative court in the country.”³⁷⁰ The consequence of that innovation was, as the editors of the *Harvard Law Review* reported in 1970, a “dramatic renaissance of the common law,”³⁷¹ most notably in tort law.

The strict liability doctrine and its underlying policies were written into California law in the 1960s and 1970s. In its unanimous 1963 decision in *Greenman v. Yuba Power Products, Inc.*,³⁷² the court, in an opinion written by Justice Traynor, adopted the doctrine of strict tort liability of manufacturers for defective products. Then, guided by the policies of loss spreading and the creation of incentives for safety, the Court rapidly extended strict liability beyond manufacturers to include retailers,³⁷³ wholesalers,³⁷⁴ and lessors.³⁷⁵ These rulings, which were quickly followed by courts across the nation, represented “the most rapid and altogether spectacular overturn of an established rule in the entire history of the law of torts.”³⁷⁶

The agenda of the enterprise liability scholars met with similar success within negligence law.³⁷⁷ In 1968, for example, the California Supreme Court, in its landmark decision in *Rowland v. Christian*, wrote policy factors that can be traced to Leon Green into California tort law as it discarded the traditional landowner rules and replaced them with a general duty of due care.³⁷⁸

In deciding whether to retain, discard, or modify traditional no-duty rules in the future, the court would consider:

[T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.³⁷⁹

370. GILMORE, *supra* note 2, at 91.

371. *Editors’ Dedication*, *supra* note 6, at 1769.

372. See *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897, 900–01 (Cal. 1963); Ursin, *Great Judges*, *supra* note 16, at 1336.

373. See *Vandermark v. Ford Motor Co.*, 391 P.2d 168, 171–72 (Cal. 1964).

374. See *Canifax v. Hercules Powder Co.*, 46 Cal. Rptr. 552, 557 (Cal. Ct. App. 1965).

375. See *Price v. Shell Oil Co.*, 466 P.2d 722, 723, 726–27 (Cal. 1970).

376. PROSSER, *supra* note 357, § 97, at 654.

377. See Ursin, *supra* note 16, at 1337.

378. *Rowland v. Christian*, 443 P.2d 561, 564, 567 (Cal. 1968). *Rowland* adopted and augmented factors first articulated by the court in *Biakanja v. Irving*, 320 P.2d 16, 19 (Cal. 1958). *Biakanja*, in turn, drew on and augmented factors found in Prosser’s hornbook, see PROSSER, *supra* note 357, § 30, at 164–68, and the Harper and James treatise, see 2 HARPER & JAMES, JR., *supra* note 61, § 18.6, at 1052. Prosser’s factors were an adaptation of the duty factors Green had articulated in his *Duty Problem* articles. See Edmund Ursin, *The Missing Normative Dimension in Brian Leiter’s “Reconstructed” Legal Realism*, 49 SAN DIEGO L. REV. 1, 14, 34 n.280 (2012). *Rowland*’s duty factors would provide the framework for California decisions expanding the concept of duty in later years, and with a more conservative court in the past quarter century, they also provided the framework for cutting back liability. Compare *Isaacs v. Huntington Mem’l Hosp.*, 695 P.2d 653, 658–59, 661–63 (Cal. 1985) (emphasizing foreseeability and expanding landowner duty to protect against crime by third parties), with *Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207, 214–15 (Cal. 1993) (limiting *Isaacs*).

379. *Rowland*, 443 P.2d at 564.

The “fundamental principle,” the court wrote, is that liability generally should be imposed “for an injury occasioned to another by [a] . . . want of ordinary care or skill.”³⁸⁰

As with its landmark strict products liability rulings, the California Supreme Court’s approach to duty has proved influential with the nation’s courts, as illustrated by the *Restatement (Third) of Torts*.³⁸¹ Like California, the *Third Restatement* embraces a default rule that defendants owe a duty of reasonable care to avoid physical injury.³⁸² Also, like California, the decision that a no-duty rule should be adopted is a determination of policy. In the words of the *Third Restatement*, “[a] principle or policy [which] warrants denying or limiting liability.”³⁸³ About half of the nation’s courts have followed *Rowland* in establishing a unitary standard of care in premises cases, at least with respect to invitees and licensees.³⁸⁴ Moreover, the *Third Restatement* would adopt a unitary standard of care for all persons injured on a defendant’s premises, except for “flagrant trespassers.”³⁸⁵

C. THE CALIFORNIA SUPREME COURT: THE CONSERVATIVE ERA (1986–2019)

As a consequence of judicial appointments by Republican governors in the mid-1980s, the California Supreme Court became a conservative court. Yet the jurisprudence of this court remained that of its predecessor. It also was an avowedly lawmaking court, with (conservative) policies at the heart of its lawmaking. This court refined or cut back on—but in most cases did not abandon³⁸⁶—the enterprise liability doctrines put in place by its predecessor, while at times adopting new policy-based doctrines limiting defendant liability.³⁸⁷

380. *Id.* at 563–64.

381. 1 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 7 (AM. LAW INST. 2005).

382. *Id.*

383. *Id.* at 77.

384. See W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CALIF. L. REV. 671, 676 n.27 (2008) (citing RESTATEMENT (THIRD) OF TORTS; LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 51 reporters’ note to cmt. a (Council Draft No. 7, 2007)).

385. See 2 RESTATEMENT (THIRD) OF TORTS §§ 51–52 (AM. LAW INST. 2012). This exception can also be seen to resemble California law. Following *Rowland*, the California legislature enacted a limited number of exceptions to *Rowland*’s general duty of care, most notably for persons committing one or more enumerated felonies. See CAL. CIV. CODE § 847 (West 2020).

386. *But see* *Becker v. IRM Corp.*, 698 P.2d 116, 124 (Cal. 1985).

387. See, e.g., *Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207, 215–16 (Cal. 1993) (limiting duty of business premises owner to protect persons against violent third-party crime); *Knight v. Jewett*, 834 P.2d 696, 712 (Cal. 1992) (abolishing traditional consent-based defense of assumption of risk and establishing a new no-duty rule for co-participants in recreational sports); *Thing v. La Chusa*, 771 P.2d 814, 815 (Cal. 1989) (restricting recovery for negligent infliction of emotional distress). In 1999, Stephen Sugarman described the shift in the court’s posture in the post-1986 era by examining decisions for the fifteen years between 1984 and 1998. See Stephen D. Sugarman, *Judges as Tort Law Un-Makers: Recent California Experience with “New” Torts*, 49 DEPAUL L. REV. 455, 456 (1999).

An example of the conservative court creating a *new* policy-based no-duty rule is provided by the court's decisions involving participants and others involved in sporting activities.³⁸⁸ In 1975, five years after Traynor's retirement, the still-liberal California Supreme Court, in *Li v. Yellow Cab Co. of California*, abolished the doctrine of contributory negligence and adopted a system of pure comparative negligence.³⁸⁹ After *Li*, plaintiff negligence would no longer completely bar recovery in negligence suits; rather, damages would only be "diminished in proportion to the amount of negligence attributable to the person recovering."³⁹⁰

Li also had a second holding, this one involving the doctrine of assumption of risk. Prior to *Li*, a person who voluntarily encountered a specific known and appreciated risk (whether reasonably or unreasonably) would not recover when injured by a negligent defendant.³⁹¹ *Li* held that the assumption of risk defense is merged into the general scheme of assessment of liability in proportion to fault in instances in which the plaintiff unreasonably encountered a specific known risk created by a defendant's negligence.³⁹² Thus, it appeared, counterintuitively, that a non-negligent plaintiff might still be totally barred from recovery.

In his 1992 plurality opinion in *Knight v. Jewett*, which he later reaffirmed in a majority opinion for the court,³⁹³ Justice Ronald George, who later became the court's Chief Justice, effectively abolished the traditional defense of assumption of risk.³⁹⁴ In doing so, he also created a new policy-based limited duty doctrine favorable to defendants who are participants in sports. As his later majority opinion explained, to "impose liability on a coparticipant for 'normal energetic conduct' while playing—even careless conduct—could chill vigorous participation in the sport" and could "alter fundamentally the nature of the sport by deterring participants from vigorously engaging in activity."³⁹⁵ As "a matter of policy, it would not be appropriate to recognize a duty of care when to do so would require that an integral part of the sport be abandoned, or would discourage vigorous participation in sporting events."³⁹⁶ Accordingly, the court held that "a participant breaches a duty of care to a co-participant only if he or she 'intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the

388. See Edmund Ursin, *The California Supreme Court and Judicial Lawmaking—The Jurisprudence of the California Supreme Court*, 9 CAL. LEGAL HIST. 383, 387–88 (2014).

389. *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1243 (Cal. 1975); Ursin, *supra* note 70, at 254–59.

390. *Li*, 532 P.2d at 1243.

391. *Id.* at 1240.

392. *Id.* at 1240–41.

393. *Knight v. Jewett*, 834 P.2d 696, 697 (Cal. 1992). The views expressed in George's plurality *Knight* opinion were subsequently embraced by a majority of the court. See *Kahn v. East Side Union High School District*, 75 P.3d 30, 38 (Cal. 2003).

394. *Knight*, 834 P.2d at 714 (Kennard, J., dissenting). To maintain continuity with its *Li* decision, however, the *Knight* court retained the terminology of assumption of the risk. See Edmund Ursin & John N. Carter, *Clarifying Duty: California's No-Duty-for-Sports Regime*, 45 SAN DIEGO L. REV. 383, 390–91 (2008).

395. *Kahn*, 75 P.3d at 38 (citation omitted) (quoting *Knight*, 834 P.2d at 710).

396. *Id.*

sport.”³⁹⁷ Just as *Greenman* led to extensions of strict products liability beyond manufacturers, so *Knight* launched extensions of its no-duty rule beyond participants and sports.³⁹⁸

POSTSCRIPT

In 2011, California Governor Jerry Brown took office and would serve until 2019. During his tenure, Brown, a Democrat, made four appointments to the California Supreme Court, with the last appointee joining the court in 2019. Thus, today we have a “third iteration” of the court. The seven-member court consists of the four Brown appointees and three justices appointed by Republican governors. There is every reason to believe that the jurisprudence of the “Brown Court” will remain that of legal pragmatism. Evidence of this can be seen in *Kesner v. Superior Court*, a 2016 decision of a unanimous court consisting of three Brown appointees and four justices appointed by Republican governors.³⁹⁹ The court’s opinion in *Kesner* was written by Justice Goodwin Liu, a Brown appointee.

Kesner involved two cases alleging wrongful death and personal injury, with the court holding that employers and premises owners who use asbestos on their property owe members of a worker’s household a duty of care to prevent secondary exposure to asbestos caused when a worker who is directly exposed to the toxin carries it home on his or her person or clothing.⁴⁰⁰

The court’s opinion offered an insightful analysis and application of the *Rowland* factors. First, the court noted that the factors could be placed in two categories: foreseeability and public policy concerns.⁴⁰¹ The first “[t]hree factors—foreseeability, certainty, and connection between the plaintiff and the defendant—address the foreseeability of the relevant injury.”⁴⁰² The last four factors, “moral blame, preventing future harm, burden, and availability of insurance . . . take into account public policy concerns that might support excluding certain kinds of plaintiffs or injuries from relief.”⁴⁰³

As in past cases, the court noted that “[t]he most important factor to consider in determining whether to create an exception to the general duty to exercise ordinary care . . . is whether the injury in question [is] . . . foreseeable.”⁴⁰⁴ The court concluded that this factor was met.⁴⁰⁵ In a helpful observation, the court wrote that “the second *Rowland* factor, the degree

397. *Id.* at 32 (quoting *Knight*, 834 P.2d at 711).

398. *See e.g.*, *Kahn*, 75 P.3d at 32 (expanding tort law to also include the relationship of coaches and players); *see also* *Gregory v. Cott*, 331 P.3d 179, 181 (Cal. 2014) (expanding the rule to apply to in-home caregivers of Alzheimer’s patients).

399. *Kesner v. Superior Court*, 384 P.3d 283 (Cal. 2016).

400. *Id.* at 305.

401. *Id.* at 291.

402. *Id.*

403. *Id.*

404. *Id.*

405. *Id.*

of certainty that the plaintiff suffered injury, ‘has been noted primarily, if not exclusively, when the only claimed injury is an intangible harm such as emotional distress.’⁴⁰⁶ In any event, the court concluded that the deaths in these cases were “certain and compensable under the law.”⁴⁰⁷ As to “the third *Rowland* factor, ‘the closeness of the connection between the defendant’s conduct and the injury suffered,’” the court wrote that this factor “is strongly related to the question of foreseeability.”⁴⁰⁸ Again, this factor was met.⁴⁰⁹

As to the public policy concerns, the court wrote that “[n]egligence in [the] use of asbestos is morally blameworthy”⁴¹⁰ Regarding the burden factor, the defendants had argued that “[a]llowing tort liability for take-home asbestos exposure would dramatically increase the volume of asbestos litigation . . . and create enormous costs for the courts and community.”⁴¹¹ The court pointed out, however, that “the relevant burden in the analysis of duty is not the cost of compensating individuals for past negligence. . . . Rather, . . . duty analysis is forward-looking, and the most relevant burden is the cost to the defendants of upholding, not violating, the duty of ordinary care.”⁴¹² In this regard, defendants did not “suggest that preventing . . . exposure to asbestos [would have been] . . . unreasonably expensive to defendants”⁴¹³

“Defendants [had] further argue[d] that a finding of duty here [would] . . . result in increased insurance costs and tort damages, and ultimately impose a burden on consumers and the community.”⁴¹⁴ Quoting Justice Traynor’s *Escola* concurring opinion, the court countered that “the tort system contemplates that the cost of an injury, instead of amounting to a ‘needless’ and ‘overwhelming misfortune to the person injured’ will instead ‘be insured by the [defendant] and distributed among the public as a cost of doing business.’”⁴¹⁵ Then, turning to the policy of preventing future harms, the court wrote that the allocation of the cost of injuries contemplated by *Escola* “serves to ensure that those ‘best situated’ to prevent such injuries are incentivized to do so.”⁴¹⁶ In this regard, “[e]mployers and premises owners are generally better positioned than their employees or members of their employees’ households to know of the dangers of asbestos and its transmission pathways, and to take reasonable precautions to avoid injuries that may result from on-site and take-home

406. *Id.* at 293 (quoting *Bily v. Arthur Young & Co.*, 834 P.2d 745, 777 (Cal. 1992) (Kennard, J., dissenting)).

407. *Id.*

408. *Id.* (quoting *Cabral v. Ralphs Grocery Co.*, 248 P.3d 1170, 1174 (Cal. 2011)).

409. *Id.* at 294.

410. *Id.* at 296.

411. *Id.*

412. *Id.*

413. *Id.* at 297.

414. *Id.*

415. *Id.* (alteration in original) (quoting *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring)).

416. *Id.* (quoting *Escola*, 150 P.2d at 441 (Traynor, J., concurring)).

exposure.”⁴¹⁷ Finally, the court wrote that the “[d]efendants’ most forceful contention is that a finding of duty in these cases would open the door to an ‘enormous pool of potential plaintiffs.’”⁴¹⁸ The court disagreed, holding that the “duty to prevent take-home exposure extends only to members of a worker’s household.”⁴¹⁹

Thus, for more than six decades, the California Supreme Court has been a lawmaking court with policy at the heart of its decisionmaking. Whether adopting expansive enterprise liability doctrines in the liberal era or reining in those doctrines and adopting new restrictive doctrines in the conservative era, its jurisprudence has been that of legal pragmatism. *Kesner* suggests that legal pragmatism will remain the jurisprudence of the California Supreme Court for the foreseeable future.

417. *Id.*

418. *Id.*

419. *Id.* at 298.