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# The Place of Form in the Fundamentals of Law\*

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ROBERT S. SUMMERS\*\*

*Abstract.* The author explains that there is scope for a general theory about the nature and place of form in the fundamentals of law. Form organizes the institutions, rules and other varieties of law, and the system as a whole. All such constructs have non-formal elements, too, but form unifies each construct and provides its criteria of identity. Appropriate form makes a system of law possible. It also tends to beget good content in the law. It is indispensable to the basic needs of a legal system, and when such an end is organizational, as with democracy, liberty, and the rule of law, form is end as well as means.

## 1. Introduction

Law is indispensable to civilized life. It is also susceptible to serious abuse. Its fundamentals, therefore, should be understood rather fully. The theoretical study of the place of form in the fundamentals of law promises to advance our understanding in major ways. Yet legal theorists have neglected this subject. Most lamentably, they have failed to give due credit to form for its contributions to law. This is surprising, because law is a major humanistic enterprise, and other humanists have made the theoretical study of form a central focus in fields related, and not so related to law. Forms of government, forms of social and economic organization, forms of architectural design, and forms of literary and musical composition, have all long been objects of systematic theoretical inquiry. At this

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point, a skeptic might say: But in the case of law there is so much else for the theorist to concentrate on besides form, whatever that is. There are legal institutions. There are basic values such as legitimacy, justice and liberty. There are all the various policies law serves. There are types of legal personnel such as judges and legislators.

There are court cases and statutory rules, and more. One response to the skeptic is that the study of form is required for an adequate theoretical understanding of all of these. Moreover, form is foundational. It organizes each functional unit of a system of law, and provides the criteria for identifying what it is. It organizes the relations between such units. It organizes the system as a whole. Appropriate form is also essential if law is to serve as means to policy and other ends. It even interacts with and shapes those ends.

Since the early 1980's, I have spent much of my research effort on various aspects of legal form. It was then that Professor Patrick Atiyah of the University of Oxford and I began our book, *Form and Substance in Anglo-American Law* (Atiyah and Summers 1996). In this book, we compared the different styles of the American and English systems in terms of their formality. The book I am currently writing on form and the fundamentals of law is theoretical rather than comparative. Professor Atiyah and I had, in our book, compared and explained the quite different levels of formality in the English and American systems of law, but we did not address a number of major theoretical questions. There is scope here for a general theory about the place of form in the fundamentals of law. The very nature of every major type of legal institution can even be illuminatingly portrayed as a union of form with non-formal elements.

The systematic study of form in law poses many obstacles. Several are what might be called conceptual bogs. Other thinkers have also met up with some of these bogs. Max Weber (1977, 79) once said: "There is no expression more ambiguous than the word 'formal,' and no dichotomy more ambiguous than the distinction between form and content."

For some time I tried to define form to mean whatever is "independent of content." This approach overworks the contrast between form and content, and leaves us without an affirmative conception of what counts as formal. The approach also invites one to think, falsely, that because rules have content, institutions must have content in the same sense.

The form-substance contrast that Professor Atiyah and I invoked had been useful, especially in contrasting authoritative legal reasons for decisions—what we called formal reasons, with substantive reasons (moral, economic or other social considerations). But in my present, more theoretical work, the form-substance contrast caused trouble early on. I was frequently tempted merely to treat as form whatever is not substance. Again, this approach leaves us with no affirmative conception of form. Moreover, the non-formal elements, especially in institutions, are far too heterogeneous to be

subsumed under any such category as “substance.” As I have said, these elements include personnel, material resources, “means-end” knowledge, and more.

The form-substance contrast also may lead one to think that whatever duality may exist here, it must be in tension or conflict. Yet this is not at all so. The rule form, for example, is commonly used quite straightforwardly to codify principles of justice, basic liberties, policies, and other values. Moreover, the formal and the non-formal in a legal institution are generally correlative and interdependent, and comprise an integrated whole.

The common remark of lawyers, law professors, and even lay persons to the effect that something is “all form and no substance” can be misleading here as well, for it necessarily treats form pejoratively. So, too, the view that equates the formal with rigidity, with mechanical jurisprudence, and with the formalistic. It is simply incoherent to collapse the distinction between formal and formalistic, a favored pastime in some quarters.

Pejoratives aside, there is also the “realist” view that the true place of form in the law is quite minor compared to such non-formal elements as trained personnel. This type of distorted perspective was perhaps never expressed more eloquently than in the words of the poet, Alexander Pope (1965, line 303), who said: “For forms of government let fools contest, whate’er is best administer’d is best.” Beauty, however, is not always truth.

These, then, comprise but a sampling of sources of difficulty in thinking about form and the formal in law. I now turn frontally to the most fundamental question in what I am going to call the general theory of legal form, namely: What counts as form, and as formal, for purposes of the theory?

## 2. Definitions of “Form” and “Formal”

In the general theory of legal form, each type of institution or other basic functional unit of a legal system takes a distinctive form. I define “form” here in affirmative terms as a noun that means the organization of the institution or other functional unit. There is much support for this definition in the leading lexicons of the English language. Such organization is a purposive systematic arrangement. Most centrally, it systematically organizes who is to occupy what roles to do what, when, how, and with what means. Such an arrangement—such an organized form, typically has several general dimensions, and these, in turn, have various features. Thus a court has, among others, an organized structural dimension, and an organized procedural dimension. Among the still more specific formal features within the dimensions of a court is the tripartite nature of its structure and the dialogic nature of its procedure. Structural and procedural form do not exhaust all the formal dimensions of such an institution. There are other major ones, and what links all these uses of the words form and formal is their organizational character.

On this view, the adjective “formal” means: “of or pertaining to (1) the organizational arrangement of the institution or other functional unit, or (2) an organized dimension, or (3) an organized feature.” Thus, we might summarize concisely as follows: Form means organizational arrangement, and formal pertains to organizational form, organized dimension, or organized feature. Moreover, institutional form may be further analyzed in terms of such types of form as structural, procedural, methodological, compositional, and more.

I will now briefly differentiate what I will call the *basic* organizational arrangement of an institution or other functional legal unit from its *overall* organizational arrangement. The basic organizational arrangement is the form the institution must take if it is to qualify, even if only minimally, as an instance of a determinant general type of arrangement, such as a court. A court, as an organizational type, is identifiable by reference to this minimal unifying form, which includes only its minimally essential dimensions or features. To qualify as a court, an institution must, in its basic organization, at the very least provide for an authoritative and impartial decision-maker, and provide in its procedural dimension for each side to participate, with decision based on applicable law and fact. The form of such an institution, however, is typically organized beyond the minimum required for its classifiability as an instance of that type. For example, the overall form of a court typically has elaborate procedures well beyond the minimum requiring some party participation in the process.

In addition to its overall form, a functional institution has such non-formal elements as personnel, material resources, means-end technology, and more. It is fallacious to think that the form of an institution cannot be isolated and identified as having a distinct and describable reality apart from its non-formal elements. The form of an institution, its organization, its purposive systematic arrangement, even continues to exist in an intelligible sense as social reality when the correlative non-formal elements required for it to be operational are not present. Thus, it is familiar that an institutional arrangement may cease to be operational for an interval, as with an adjourned court awaiting a new term, or an adjourned legislature awaiting the election of a new membership. In such instances, the organizational arrangement—the form, exists as social reality, even though personnel, or material resources, or still other non-formal elements are not present to make it operational. The form exists because it is socially accepted as such, and is duly spelled out in valid constitutive rules. (It is also fallacious to think that the reality of form in an operational institution cannot be disentangled from its corollary non-formal elements for separate study.)

I will now seek further to clarify the distinctness of the formal and the non-formal in an institutional or similar type of functional legal unit. Let us imagine that we alter its basic organizational arrangement—alter its form, yet keep the personnel, material resources, and other non-formal elements

more or less the same. In merely altering the form, we might even create a wholly new institution. For example, we could convert what is an operational court into a mere administrative agency! Thus, we can see that the basic organizational arrangement of an institutional or other type of functional legal unit—its basic form, has primacy in making it the type of legal institution or other unit that it is. This is all the more plain if we also imagine that we keep the basic organizational form the same, e.g., that of a court, yet substitute for its personnel and its other non-formal elements still other like elements. We would still have the same institution—a court. Even a change in the person serving as judge does not itself bespeak a change of basic institutional construct.<sup>1</sup> Thus, it is form that provides the identity criteria for the construct, and so for all such constructs.

It is also possible to present parallel accounts of form and the formal in legal rules, and in the legal system viewed as a whole.

### 3. Pervasiveness of Forms and the Formal in Law

The next question in the general theory of legal form is this. Given the foregoing definitions of form and formal with respect to institutional and other phenomena, what is the potential scope of our subject—of form in law? The answer is: Form pervades the law. It is not narrowly confined to what others call formal requirements for the validity of wills, contracts or the like. Nor is it narrowly confined to the types of encapsulatory form for rules such as statutory form or common law form. Nor is it narrowly confined to the various modes of expressional form in rules.

<sup>1</sup> When I refer to personnel, material resources, etc., as non-formal elements of an institution, I mean they are non-formal as compared with the basic organizational form, dimensions, and features of the institution itself. I do not mean that none of these non-formal elements themselves takes an organized form of any kind. A judge, for example, is a human being, and a human being takes a natural form that my brother, a doctor, tells me is itself highly organized! A courthouse has an organized architectural form, too. But the natural organization of a human being, and the architectural organization of a courthouse are not the same as the basic organizational form of a court as such. Thus, although the individual who is the judge, is *qua* human being, naturally organized, this does not constitute an organized dimension or feature of the institutional form of a court. Thus, this human being cannot be said to be formal “compositionally,” for this is a dimension of basic court organization specifying the conditions of eligibility for judicial office and manner of appointment, a formal dimension. Nor is the individual who is also the judge authoritatively formal, for this mode of organization refers to the powers of judicial office, which is another formal dimension of court organization. And so on. Thus while personnel and various material resources are, or may be, organized in their own ways, they are, relative to legal organizational forms, merely non-formal constituents thereof. What I call a non-formal element, then, is not absolutely non-formal, or not non-formal in every respect, but is non-formal in comparison with the form—the organizational arrangement—of the institution in question. The organizationally formal which I single out and concentrate on here pertains to legal organizational forms, not natural forms (as in the case of human beings who are also judges), and not architectural forms (as in the case of a courthouse), and so forth. Indeed, the organizationally formal in law may be said to have its own (in light of relevant values) distinctive rationality, in contrast to the rationality of human form—its anatomy, or in contrast to the rationality of architectural form, for example.

All types of functional units of a system of law, institutional and other, take distinct basic forms, and have further formal dimensions and features. This truth applies to courts, legislatures, administrative bodies and offices, and all other forms for the creation and implementation of state-made law. It applies to similar phenomena for the creation and implementation of privately made law such as contracts and property interests. It applies to entities such as private citizenship and to corporate and other bodies. It applies to basic forms of legal precepts such as rules. It applies to interpretive and other applicational methodologies. It applies to formal legal reasons.

The legal system as a whole also takes a distinctive form. It is structurally formal and is also methodologically formal in its operational techniques. These techniques include the penal, the grievance remedial, the administrative regulatory, the public benefit conferring, and the private arranging. These "technique forms" incorporate, integrate, and co-ordinate institutional and other functional units into operational wholes. The legal system as a whole is also formal in its degree of conformity to system-wide principles of the rule of law. The system as a whole is formal in its overall coherence of content, as well. In sum, basic legal forms and other formal aspects are to be found all over the law, in all of its institutional, methodological, preceptive, systemic and other reality.

#### **4. Major Questions in the Theory of Legal Form**

So far, I have identified five major questions in the theory of legal form. These are (1) what counts as form, and as formal, in institutions and other types of functional legal units? (2) What are the major varieties of formal dimensions and features and their inter-relations? (3) What is the nature of the reality of legal form, and how is its separate existence to be determined, isolated, and described? (4) What is the potential scope of the subject itself? and (5) Why concentrate on form? These five questions are preliminary to all further questions in the theory. The general theory of legal form introduces a whole set of relatively new questions into legal theory, questions that await systematic and comprehensive treatment. The main further questions are:

(6) How are basic forms of legal institutions and other functional units to be studied systematically?

(7) How is it that forms are essential to the very existence of legal institutions and other functional units? How far do these forms provide the identity criteria for such units?

(8) How do purposes, functions, ends, and values shape these forms and the formal? What other types of factors explain the shape of basic forms and the formal in law? How do the forms and the formal shape the ends and values that law serves?

(9) In what ways do the forms and the formal in legal institutions and other functional units shape or otherwise affect non-formal elements

such as personnel? What interdependencies and other relations are there here?

(10) How, and to what extent, do the form and the formal in a legal institution or other functional unit co-contribute with the non-formal, and with still other phenomena, to what law achieves?

(11) What basic types of choices of appropriate form are reflected in the institutional and other functional units of a system? What basic types of choices of appropriate form recur in the ongoing operations of law? Is it possible to devise rational methodologies for making these choices?

(12) What are the various fundamental priorities of the law, and how does appropriate form figure in these? In particular, what is the role of form in the peremptoriness of legal rules and the reasons that arise under them?

(13) What is the pathology of legal form? That is, what major types of formal flaws are there and how do they differ?

(14) What are the limits of form and the formal in law? Is it true that form alone can achieve nothing?

To address these questions systematically just is to deploy a distinctive methodology. (I call this methodology “form-oriented” analysis.) These questions intersect with many traditional problems of legal theory, and introduce a relatively new approach to some of these problems. The approach promises to advance our understanding of the fundamentals of law, and to enable us to see what credit should be given to form in law’s achievements. A large part of what there is to understand about the fundamentals of law consists of the forms of its institutions and other functional units, the forms of its basic types of law—state-made and privately created, and the basic form of a legal system as a whole. Of course, there is more to law than form. We must understand the non-formal elements, too, and how they interact with form. And still more. But it is form that has been most neglected.

For some time now, I have been attempting to apply form-oriented analysis to law. I will now share several general conclusions—ones that carry us beyond my earlier writings and which will appear in the book I am writing. In doing what I can in the space allowed, I will seek, above all, to give due credit to legal form and to the formal aspects of law, as they co-contribute, along with law’s non-formal elements, to the achievements of law. What follows now consists of highly abbreviated answers to several of the major questions I have just posed about form.

## **5. Appropriate Form Is Essential to Legal Institutions, Law, and a Legal System**

If we are to understand the fundamentals of law, we must understand what is required for the creation and implementation of law. Appropriate form is essential to any legal institution. Institutions and similar functional units are

required for the regular and effective creation and implementation of law. Therefore, appropriate form is required for the regular and effective creation and implementation of law. I will clarify what I am saying here by means of a single example, that of appropriate form in a law-creating institution. Without such form, there can be no law-creating institutions, and so no law and no system of law.

For illustrative purposes, I will briefly consider the type of institution known as a legislature, and thus the creation of a basic type of law made by the state. What then, are the conditions of the possibility, as Kant (1965) might have put it, of valid legislative law? This is a fundamental question of legal theory. *One* type of condition has to do with form. As Jhering (1923, 479) said, “[...] while law can survive with total formalism, it cannot live with total formlessness.” A formless institution for creating and recognizing valid legislative rules simply could not exist, and so could not contribute to civilized life. Without the relevant minimal unifying form, there could be no valid legislatively created rules. How is this so? There are at least two related explanations.

First, it is plain that minimal unifying form is required for a body such as a legislature to exist at all. A legislature just is one kind of official body authorized to create law. Obviously, a mere group of people sitting in a room discussing possible rules and expressing their preferences for one rule over another, could not, without more, be a duly organized legislature. Such a “body” would, without more, lack the authority, composition, structure, and procedures, and thus the identity, of a legislature. All of these are formal dimensions that figure in the minimal form of a legislature. Such “a mere group” simply could not constitute an authoritative source of valid rules of law. This may seem obvious. But it was Justice Holmes (1921, 292) who emphasized that what we sometimes need is education in the obvious, or at least to be reminded of the obvious. To be a legislature, the body must have the form of a legislature, and be duly constituted as a legislature. This is something we take for granted, given that our legislatures have been in place for so long, but the form of a legislature is not a simple matter. The general theory of form provides a general account of such complexity. Further, it is not merely that distinctive and determinate form is indispensable to the character of a legislative body. The more appropriate that form, overall, the better the legislative body, too. Likewise for other legal institutions.

Second, without the relevant organizing dimensions of the minimal form of a legislature, citizens could not tell when the body has exercised its authority to make law. The minimal authority and procedure for making valid law are formal dimensions of the institution. It is only by reference to these, and to purported actions of the body, that we can tell whether the power to make law has been validly exercised, and thus differentiate law from non-law. When Thomas Hobbes’ monarch says “Pass the salt,” it is

only by reference to authorizational and procedural form that the king's subjects can tell whether this is a mere social request rather than a lawful order. The same applies to putative rules and other putative law. The authority to make law, and the exercise of that authority, cannot be an *ad hoc*, unorganized, and informal affair. Where citizens cannot reliably determine whether the power to make law has been exercised, there can be no rule of law. Form is indispensable to the identifiability of valid law.<sup>2</sup> We all understand these things, yet many tend not to recognize form here in its working clothes.

In sum, if we are to give due credit to form, then we must take account of how form is indispensable to the existence and operation of institutions required for the very creation and recognizability of rules that are valid law. The same is true with respect to the place of form in implementive institutions, too.<sup>3</sup>

## 6. Appropriate Institutional Form Is an Indispensable Means to Fundamental Political Values

It is not enough to have a legal system that merely exists in some minimalist fashion. It is not enough for it to exist merely as a source of laws that it then implements. At least all developed Western societies aspire to far more. They also aspire to the existence of systems that express, symbolize, and seek to secure fundamental political values. That is, they aspire to be legitimate, democratic, rational, just, limited in power, and protective of liberty. They aspire to law-like governance in accord with principles of the rule of law. A legal system exists primarily in and through its institutions. Choices of appropriate form in such institutions are required for their very legitimacy. Thus, a major source of the legitimacy of law-making and law-implementing institutions is public acceptance, acquiescence and assent. These are more likely when institutional power to act is explicitly authorized, and located in duly circumscribed institutional roles that are highly

<sup>2</sup> Perhaps most fundamentally, without form we could not have the rule-form, and without the rule-form, we could not have rules, and without rules, we could not prescribe in constitutional or related law dimensions and features of a legislature at all, and if we could not prescribe these in constitutive rules, we could not have determinant legislatures, courts, or any legal institutions at all, either for the creation or the implementation of law. Here, too, the better the rule-form, the better the constitutive rules, and the better the institutions. On this, more later.

<sup>3</sup> Is what I say here no more than a tautology? Do I say merely that a legislative body must take the form of a legislative body? No. The theory of legal form offers systematic accounts of the forms, and the formal dimensions and features, of institutions such as legislatures, and of other operational legal phenomena. The theory thus offers accounts of (1) the various formal dimensions required for such bodies to exist, (2) the types of actions required for them to exercise their authority to make law, and (3) the corollary criteria of validity. In short, form organizes the creation and the identification of valid law. What is required for this process can hardly be deduced merely from assertions that X is a legislature and X is partly formal. Through an analysis of what a legislature is, we can come to understand the form of a legislature. The form of this body must be established if it is to be a determinant source of one kind of valid law.

determinate. This enables the locus of true authority to be sufficiently identifiable and constant in time to become the object of genuine acceptance, acquiescence, and assent. Appropriate choices of formal organization are required for this. Institutional roles must be defined and otherwise organized. Conferral of power must be explicit and otherwise organized. What counts as the exercise of this power must be specified and otherwise organized.

Another major source of legitimacy, but also of significance in its own right, is the democratic election and accountability of the legislature and the executive. Elections require appropriate organization. Accountability of the elected requires public knowledge of debates, public voting by lawmakers on proposed laws, and periodic voting on the lawmakers themselves by the electorate. Hence, choices of appropriate compositional and procedural form are required.

Rationality of deliberation in all law creating and law implementing institutions is likewise another source of legitimacy, and also of significance in its own right. This too requires choices of appropriate procedures. Without choices of appropriate form in legal institutions, these institutions could not serve fundamental political values such as legitimacy, democracy, and rationality. All this is familiar, too. What may not be so familiar is that we are now explicitly recognizing various types of appropriate form as means to legitimacy, democracy, rationality, and other fundamental political values.

## **7. Appropriate Preceptive Form Is Essential to Rules, Which Are Indispensable to Institutions, Law, and A System of Law**

My next two basic propositions are that appropriate form is essential to rules, and rules are indispensable to law. Without appropriate form, there could be no rules, and without rules there could be no institutions, no law, and no system of law.

Actually, in regard to the preceding topic, institutional form, I have already implicitly invoked rules partly as means to ends. We use rules to prescribe the form—and the formal dimensions and features—of the institutions required if state-made, and privately created, laws are to be possible, and if such institutions are to serve fundamental political values. (This is not to say that institutions are reducible to rules.)

The uses of rules are, however, far more extensive than this. We also use them to prescribe the form of implementive institutions, the form of basic entities such as general citizenship and corporate bodies, the form of interpretive and other methodologies, the form of the relations between all these, and of still more. Indeed, we use rules to prescribe the form of the system as a whole—the very dimensions and features that give the system its structure and unity. One might summarize so far by saying that we use

rules to prescribe the constitutive forms of institutional and other functional legal units.

But beyond all these institutional and related uses, we use rules most widely to serve as means to many types of regulatory, penal, and other policy ends. If we did not have rules and people did not have the capacity to apply them on their own by classifying facts as falling within the rules, what we now call law simply could not exist. We not only could not have institutions for the creation and application of state-made and privately made law, institutions which also thereby serve fundamental political values. We also could not have rules as means to policy ends, and to the rule of law itself.

Now just what is a rule? How does form figure in rules? If we understand, even in a general way, what a rule is and what form in a rule is, we may then go on to ask how form contributes to the ways a rule may serve policy. We shall then come to see that when rules are effective to serve policy, some credit must be given to form here, too.

The nature, functions and limits of rules is one of the most fundamental of all topics within the field of legal theory. (Yet even such giants as Hans Kelsen, H. L. A. Hart, Karl Llewellyn and Lon Fuller neglected form in rules.) What I offer now can only be the barest summary. The general form of a legal rule is a distinct type of preceptive organizational arrangement, one incorporating subject-matter content. All rules have form and content, and for most rules, the subject-matter of the content is not itself formal. Rather, it consists of what might be called policy or other value content.

The basic form of a legal rule organizes dimensions and features into a unified whole consisting of form and content. What is this basic form? That is, what are the minimal unifying features of the "rule-form"—the features that make a legal rule a rule? A legal rule:

- 1) is expressed or expressible in a linguistic formulation,
- 2) that directly or indirectly permits, requires, prohibits, or otherwise guides action,
- 3) is general in one or more of its dimensions,
- 4) is definite in some degree,
- 5) is at least minimally complete in its parts for the type of rule it is,
- 6) structures relations between these parts, and
- 7) is designed explicitly or implicitly to serve policy or other ends of law.

Let us call this a general sketch of the minimal unifying form of a rule. In the case of rules, too, minimal unifying form is not equivalent to overall appropriate form. For example, a formulation of a purported rule may be sufficiently definite to count, minimally, as a rule, yet not be definite enough to serve its policy at all adequately, as with a speed limit rule for a major highway expressed *merely* in terms of a general admonition to "drive carefully."

A rule is also formal in two further ways. It has an expressional form that organizes its overall formulation into language (explicitness, extent written,

extent expressed in special vocabulary, degree of compactness, rigor, etc.). A rule also takes some recognized encapsulatory form (statutory, common law, customary, etc.), all of which are also special organizational modes.

There are many varieties of rule within the foregoing rule-form. That is, the rule-form is itself highly commodious. The construction of institutions aside, the most frequent use of the rule-form in state-made law is to serve various policy ends such as safety on the highways, protection of property, regulation of the quality of food and drugs, reinforcement of the family, protection of civil rights, and on and on. We constantly make and implement such rules as these in a modern legal system.

## 8. Appropriate Form in Rules as Means to Policy and Fundamental Political Values

Let us now consider how appropriate form in rules serves as means to policy and other ends. Assume that we are to be creators of a written rule of law. On analogy to a worker who reshapes hot steel on an anvil to make horseshoes, we might imagine we are legislators who are to reshape a proposed general policy on the “anvil of the rule-form.” It is not enough merely to adopt a general policy—merely to authenticate it in a general formulation, for example: “There shall be safety on the highways.”<sup>4</sup> We must go beyond adoption of a general precatory policy. No policy worthy of legal implementation even leaps fully formed from the forehead of its proponent. Moreover, even when we have a policy sound in general conception, this can be no guarantee of appropriate legal form. Even an agreed and sound general policy always requires some reshaping—requires some choices to put it into appropriate form, including:

- 1) choice of an appropriate rule form, ranging from a narrow precise rule to a broader, and less precise one, depending on the problem,

<sup>4</sup> Actually there is a deep fallacy about form here—one today entertained in certain academic quarters but not among lawyers generally. It was familiar to the early Greeks, too. It is that we can dispense with policy serving *rules* and merely have a system of law consisting of dispute settlers—in modern terms, government by judiciary, in light of authoritative policies. On this view, we may have pre-adopted general policies but these are always to be weighed case by case against whatever other policies emerge in dispute, with the dispute settler deciding *ad hoc* case by case. This view largely dispenses with law in the form of rules—dispenses with the rule-form, and is a profound fallacy, for four reasons. First, even if we always had the wisest of all possible judges, which we could never have, citizens would still need for many matters the advance guidance that only the rule form can provide—guidance that *ad hoc* government by judiciary after the fact cannot provide. Second, even if precatory rules were to emerge from judicial *ad hocery*, the general power of judges in such a system to depart from the rules in particular cases depending on the weight of reason would undermine the necessary reliability of these very rules. Third, often the merits of disputes do not clearly point to one outcome over another, and certainly not one generalizable outcome. The idea of the regularly determinable wise result in every particular case is chimerical. We must simply have a rule, one way or the other for *many* matters. Fourth, government by judiciary lacks legitimacy.

- 2) choices of specific features within the rule form such as degrees of definiteness, generality, and completeness,
- 3) choices of internal structure,
- 4) choices of expressional form, and
- 5) choices of encapsulatory form.

Now, I do not offer a calculus for making the choices required for good and effective rules, though I do believe some useful efforts have recently been made in this direction by economists and by lawyers interested in applying economic analysis (though usually without giving due credit to form as such). What I want to emphasize is the role of appropriate form, and especially that we must give credit to form in what we accomplish through the use of rules. For illustrative purposes, it is enough if I confine myself merely to form in rules adopted by a legislature.

Choices of appropriate form in the course of creating legislative rules may co-contribute to at least five major types of effects. (1) The further realization of fundamental political values, (2) the reshaping or other improvement of policy content, (3) the narrowing or even abandonment of a proposed policy, (4) the enhancement of policy efficacy, and (5) the realization of "rule of law" values.

First, the choices of appropriate form which transform a general policy statement into a policy duly expressed in rule-form will co-serve fundamental political values such as rationality, democracy, and legitimacy in the course of consideration and adoption by the law-making body. What is an appropriate rule-form will vary with the issues at stake. Let us assume that the issues do not call for conferral of broad discretion. Thus, we are to transform a general policy statement, for example, one favoring "safety on the highways" into a more specific rule-form for statutory adoption. Let us assume, initially, that we are to have a form of statutory rule addressed to drivers that at least prohibits "speeding." The legislators can understand such a proposed law—a rule form, more fully than they can a mere generalized policy statement favoring safety on the highways. They can focus more effectively on its merits and demerits as means to ends. They can determine better what amendments, if any, are desirable. Overall, legislators can better deliberate on a rule-form than on a policy statement.

The very prospect that any proposed draft rule will be subjected to such a rational deliberative process will influence the persons responsible for drafting its initial version. The legislative drafter will not only draft the proposal in the form of a rule, but will seek to draft any rule for the guidance of behaviour in a definite form which its addressees can apply on their own (with or without legal advice as required). The drafter of, for example, a speed limit rule in a society where this is taken seriously, will prefer to say, "Drive no faster than 70 mph," rather than "Drive reasonably," or "Do not speed." Any such definite form will, in turn, enable legislators to focus,

deliberate, and revise even more effectively. In sum, (1) the choice of a rule-form over a general statement of policy, and (2) the choice of a more definite over a less definite feature constitute choices of form that render the proposed law a more fit object for legislative deliberation. In turn, this co-serves fundamental political values of rationality, democracy, legitimacy, and processual fairness to affected parties. Again, these truths are familiar. What some fail to recognize is that the realization of these fundamental political values is attributable partly to the shaping effects of choices of appropriate form in the very rules proposed for adoption. Of course, any realization of such values is also partly attributable to how the legislature is organized, too—its institutional form, as discussed in section VI.

Second, in transforming a general policy statement into a statutory rule-form, and in transforming a less definite into a more definite rule, thereby serving the fundamental political values I have just mentioned, legislators at the same time position themselves to focus upon, scrutinize, and so improve the detailed policy content of the proposed rule. Indeed, this is the primary aim of the exercise, with the realization of fundamental political values as an incidental, though highly important concomitant. This process, then, may lead to amendments that modify and improve the proposed policy. In my speed limit illustration, such amendments, may, for example, change the proposed rate of speed from one that is too high, or one that is too low, to one that represents the best rule, all things considered. Any choice of a proposed rate of speed that is definite also is sure to provoke more careful consideration of the question whether the proposed speed is approximately correct. This truth also applies more generally. Because definiteness so contributes, it may be said that choices of appropriate form in a rule, though they do not guarantee good policy content, tend to beget good policy content. It was Plato (1970, 181) who first articulated here what might be called a basic “law of due form”: other things equal, law should be highly definite.

But this is not all. The policy content of a proposed rule may be reshaped and thus improved, in light of attention to appropriate generality, another formal feature of a rule. A law in the form of a rule requires appropriate generality—requires the careful formulation of a precept that by its terms generally treats all similarly situated persons in like fashion. Thus, law-makers duly drafting a proposed law in the form of a rule necessarily incur the discipline of thinking through the degree of generality of rule required by sound policy, and by the principle of treating like cases alike. Thus, for example, when it is seen that a type of instance falls within the terms of the proposed rule and its policy, yet a further type of instance falls outside the rule as drafted, but is not rationally distinguishable, the generality of the draft will, without more, have to be adjusted to include this further type of instance. Here, too, an appropriately formal feature—generality, tends to beget good overall policy content, is efficient, and at the same time treats like cases alike (on which, more later).

Third, attention to the formal feature of generality in a draft rule can also reveal a bad policy and thereby lead law makers to abandon the draft altogether. A proposed rule may, on the surface, seem sound in policy, or at least not objectionable. Yet legislators may even abandon the proposal altogether when they see that the disposition of an instance falling under the draft rule simply could not be generalized to cover relevantly similar instances and still be a sound general policy. One may cite examples of proposed laws advocated by special interests that fail this test. (Some constitutions even explicitly prohibit “special” laws.) The defect of unjustified favoritism of a special interest under a draft rule can seldom be revealed more starkly than when the draft is generalized to cover all truly similar instances. Consider, for example, a proposed rule advanced by a major trucking lobby to allow its trucks, identified in the draft merely by numerical dimensions, to travel faster on the roads than other vehicles! Thus the content of a proposed rule may not only be improved, but also even be abandoned on the anvil of generality—of legal form. All this is familiar to lawyers. What is not so familiar is that here, too, we are giving some credit for what occurs in legislative thought and action to appropriate form. Here we at least have an interplay between the formal and the non-formal.

I turn, fourth, to the proposition that these illustrative choices of form—the transformation of a general policy statement into a rule-form, the transformation of an indefinite rule into a more definite one, and the transformation of a rule into an appropriately general one—will frequently not merely lead to the fuller realization of fundamental political values, not merely to improvements in the quality of the policy content of the proposed law, or not merely to the abandonment of bad proposals. These and other choices of form may also improve the efficacy of the rule. For example, the efficacy of a rule frequently depends upon the capacity of its addressees for self-direction under the rule, without any official “on the spot” guidance. The general conditions for addressee self-direction (with or without legal advice, depending on the nature of the rule) include, for most such rules, the following:

- (1) advance notice of the rule,
- (2) “learnability” of the rule,
- (3) ready ascertainability of the facts to which the rule applies,
- (4) sufficient ease of compliance,
- (5) peremptoriness.

None of these conditions can be satisfied without appropriate form. Moreover, the better the choice of form, the greater the efficacy. It follows not only that the possibility that such rules can be effective depends significantly on form. It also follows that the degree of such efficacy is significantly dependent on the degree of appropriateness of form. (Of course, efficacy also depends on the soundness of the means-end hypothesis in the rule, and on still other factors as well.)

I will now illustratively demonstrate the truth of the foregoing propositions with reference to the example of highway speed regulation (in a society where this is taken seriously). Plainly, vehicle users must have advance notice of any rule governing rates of speed. This requires organized dissemination of the content of the relevant regulatory rules, i.e., rules of promulgation, as well as the relevant regulatory rules themselves. This is not solely a matter of resort to the rule-form. These promulgative rules also involve choices that are procedural in the broad sense, and so are formal in this regard, too.

What I call ready "learnability" of the regulatory rule itself is also a basic condition of citizen self-direction, and this, too, depends partly on choices of appropriate form. Plainly, the addressees of a rule must understand and learn the *meaning* of the rule before they can apply it, and thus engage in self-direction. All of the minimal unifying features constitutive of a rule contribute to learnability: definiteness, completeness, generality, simplicity of rule structure. A speed limit rule requiring that drivers on certain roadways not exceed 70 mph is duly definite, relatively complete (in this regard), general, and relatively simple in structure. Definiteness has a dual role here. It renders the rule "learnable." It is also essential to the prioritization or synthesis of any conflicting considerations (e.g., safety vs. efficiency of traffic flow).

Choices of appropriate expressional form contribute here, too. This illustrative rule is explicit and written, as must be the case if it is to be effectively disseminated and also effectively learnable. Likewise, given the nature of the class of its addressees, it is duly expressed in lay terms rather than technical terms. Here, choices of expressional form go beyond definiteness and other constitutive features in contributing distinctively to the determinateness, and so the learnability, of the rule.

Relatedly, the conditions for efficacious citizen self-direction under rules require also that the choices of form in the rule leave relatively little scope for issues of interpretation to arise. The conditions for learnability generally delimit scope for such issues. Thus, the very same formal factors in our 70 mph rule example that make the rule readily learnable also delimit scope for interpretive issues. There is also need for a determinate interpretive methodology for those issues that do arise, and form plays a role in such a methodology.

A further general condition of efficacious citizen self-direction under rules, to which choices of appropriate form contribute here, is the ready ascertainability of the facts to which the rule applies. The rule applier, the vehicle driver in our example, must not only be able to determine the meaning of the rule and learn it, but must also be able to identify and classify the factual circumstances as ones that satisfy or fall under the rule in light of its meaning. Here, two of the formal features of the rule are of special importance, namely definiteness, and simplicity of internal structure.

In our example, the choice of a bright line in a particular rate of speed, i.e., 70 mph is both definite and simple, and, along with requisite odometer technology, greatly facilitates the fact-finding required of the rule-applier. These factors take on even more importance where the behavior being regulated is co-ordinative in character, as in my highway example.

Another condition of effective citizen self-direction under a rule to which a choice of appropriate form contributes is that the rule be peremptory. In our example, many motives may arise for a vehicle user to evade the requirements of the rule, and this applies more generally. Thus, if the rule is to be effective it must generally pre-empt all these other considerations. If the rule drafters have chosen to make the rule definite, clear, and general in scope, drivers should see it to be generally peremptory, too, and realize that absent stated exceptions or extensions, the rule is to be followed as formulated.

In light of the foregoing analysis, choices of appropriate form have a further basic significance. They not only contribute to the conditions for addressee self-direction and so enhance the overall efficacy of the policy expressed in the rule (assuming that the means-end hypothesis in the rule is itself soundly conceived). Citizen self-direction has special values of its own. It is highly efficient compared to a system in which citizens are merely to act on orders. It is also more dignified than such a system.

Of course not all addressees of the law consist of general citizens. Many rules are addressed to specialized officials. Here, too, the conditions for *official* self-direction under law must be secured. Thus, choices of appropriate form are frequently of major importance to the efficacy of the law here, too. Much official action in a modern legal order is rule-governed, even closely so. This applies not merely to administrative officials, but also to legislators and judges.

## 9. Form, Rules, and “Rule of Law” Values

We earlier saw that policy effectiveness is not the only type of value that shapes the form of a rule. Thus, appropriate form in rules is required to serve fundamental political values such as legitimacy, rationality, and democracy. For example, a more definite rule is usually also one that better serves legitimacy because lawmakers and citizens can be more certain just what power is being exercised, one that better serves rationality because the rule can be subjected to more telling scrutiny in the legislative process, and one that better serves democracy not only for these reasons but also because such a discrete rule is something for which legislators can be held accountable with more certainty.

But beyond this general truth, appropriate form in rules also serves what I will call “rule of law” values. These values might also be considered a subclass of fundamental political values, but given their distinctive importance in law, I single them out for special treatment. Rule of law

values are realized to the extent that first order rules (or other law) conform to the second order principles of the rule of law. These second order principles include the principles that law should be made, so far as feasible, in the form of rules, that citizens should have fair advanced notice of the content of the law, that the application of the law should be predictable, that the consequences of failure to comply should be predictable, that officials should be required to stay within the law, that officials should apply the law consistently, i.e., justly from case to case, and that citizens should, in event of disputes, be entitled to “due process” and more.

When the content and administration of first order rules and other law conform to these second order principles of the rule of law, important “rule of law” values are served. The most fundamental of these is that citizens are given fair opportunity to conform their conduct to the requirements of the law. Many principles of the rule of law secure this basic value. A second fundamental rule of law value is that officials must not intervene without authority, and so must act within and according to known law. A third and related value is that citizens are afforded due process in the event of disputes with officials or others. A fourth is that officials not act arbitrarily. All of the foregoing together enable and facilitate efforts of citizens to rely on the law and to plan their lives accordingly. Moreover, all of the foregoing also, in turn, serve legitimacy.

The principles of the rule of law prescribe the organization of the content, operation, and administration of rules and other first order law, and so are formal. It is the adherence of first order law to these second order principles of appropriate form that serves the foregoing values. Indeed here, appropriate form not merely contributes, as means to the realization of these values; it is also constitutive of some of these values (on which, more later). I do not, however, claim that adherence to just any and all of these principles is necessarily right and good, overall. A rule that is well formed, for example, can still be a bad rule, as with a duly definite and general speed limit that is set too low, or too high. A rule bad in content can still be well formulated and consistently administered. Still, adherence to some of these principles is, itself, necessarily right and good. This is true, for example, with respect to fair notice of, and fair opportunity to conform one’s conduct to, the requirements of the law. Moreover, although adherence to a principle of the rule of law is itself no guarantee of the rightness or goodness of the content or the administration of first order rules, this adherence still tends to beget rightness or goodness. For example, the principle that *prima facie* favors having law in the form of rules thereby requires generality—a formal feature, and this tends to favor the formulation of precepts that treat like cases alike. The principle that requires lawmakers to publish their laws and requires officials to act by known rules minimizes scope for official arbitrariness. It also tends to induce lawmakers and others to subject proposed laws to public criticism. The tendency, in turn, is to beget better content.

It is also true that there is some overlap between the principles of the rule of law and the conditions for the efficacy of addressee self-direction under law. For example, advanced notice of the content of the law is required by both. So is the opportunity to conform to the law's requirements. But the value of enhanced policy efficacy is one thing, and rule of law values another. We may have one without the other and the other without the one, and the two may even conflict, thereby requiring some tradeoff. It is possible for a choice of form to enhance policy efficacy, while some requirement of the rule of law is missing. Thus a definite speed limit at the best approximate rate, say 70 mph, may be set, thereby enhancing policy efficacy through improved conditions of self-direction, yet in the event of disputes between drivers and officers, no provision be made for due process. Or due process may be provided for, but appropriate form for optimal self-direction still be lacking, as with an indeterminate "drive reasonably" rule.

### 10. The Drafting of Rules—Sacrifices of Policy on the Anvil of Legal Form

We have already seen that consideration of policy on the anvil of form may even lead rule-makers to abandon a proposed policy as bad altogether, as in my example of the proposed special rule for trucks. More often, such consideration leads to recognition of a conflict between two goods—between policy values and other values, and in turn, this *may* lead to some sacrifice of policy, or to a modification of policy to take due account of the conflicting values in an optimal way. It is simply not true that policy always "drives" form or is always the sole determinant of content. Considerations of form appropriate to non-policy values can lead to the adoption of rules that constrain, modify, and even sacrifice policy. I will now present an example in which rule of law values and still other values lead to sacrifice of policy.

The appropriate overall form of a rule—its appropriate generality and definiteness in particular—may not be that which carves out the most policy content for implementation. Rather, the appropriate overall form of a rule may be that which carves out somewhat less policy content for implementation in return for (1) more effectiveness with respect to that policy which it does carve out, and/or (2) fuller realization of values of the rule of law or of still other values.

Let us compare "Drive at a reasonable rate of speed" with "Drive no faster than 70 mph." Assume two policies are relevant: safety and efficient traffic flow. The content of the first of these rules could be said to carve out more policy, overall, for implementation than the second, and in two ways. First, in some circumstances, 70 mph will be faster than reasonable, and thus unsafe. Second, in some circumstances 70 mph will be a slower rate of speed than a reasonableness standard would allow. Still, the appropriate overall *form* may be the more definite 70 mph rule. This rule will, as we have seen, facilitate

co-ordinative citizen self-direction more fully than a drive reasonably rule and thus will enhance policy efficacy with respect to all those instances in which 70 mph is safe. Moreover, after this is taken into account, any remaining policy sacrifice that the 70 mph rule entails (i.e., over 70 is still safe) may be offset by various rule of law and other values that this rule secures but the other rule does not. For example, drivers under a bright line rule have clearer notice of when they are transgressing and thus a fairer opportunity to conform their conduct to the law. Also, such a determinate rule facilitates like treatment of like cases, and delimits scope for officials to interfere with free movement and to act arbitrarily. Here, then, we may see some justified sacrifice of policy, in the name of the rule of law and other values.

On the foregoing analysis, the “drive reasonably” rule would be doubly defective. It would be defective in form, for it lacks the definiteness of form appropriate to serve rule of law values. It would also be defective because it fails to satisfy the conditions for efficacious citizen self-direction.

### **11. Appropriate Form in Rules as Means to Liberty**

Often when law is used in any significant way to serve a policy, some issue or issues of liberty arise for the citizen, directly or indirectly. Thus, I also single out liberty as a fundamental political value, and now briefly treat how appropriate form in rules can serve as means to liberty.

The transformation of a policy proposal into rule form and its further transformation into an appropriately definite form, and into an appropriately general form, can, where liberty is significantly implicated, co-serve that liberty in two basic ways at the same time. I say co-serve because in all that I say here, I am assuming we are beginning also with what is, potentially at least, sound policy content, yet content that must still be transformed on the anvil of legal form. Thus, it is content and form together in the rule that co-serve the relevant values. I said that appropriate form in rules can co-serve liberty in two ways. Let us return to the example of the highways—freedom of movement if you will, a basic liberty. It is common to think of such formal rules here that say “Drive right” and “Do not exceed 70 mph” as solely restrictive. This is wrong. At least under modern conditions these rules, as formally determinate, and with sound content, organize and enlarge freedom of movement. Such formally determinate rules transform what would be chaos into liberty. They facilitate co-ordinative self-direction of citizens. Usable highways are in significant degree creations of appropriate legal form. Liberty here has to be affirmatively organized—has to be given a form, if you will. This general point may be obvious. Again, what may not be so obvious is the role of form, especially in affirmatively organizing the conditions for co-ordinative citizen self-direction (itself an elevated and far more dignified form of life than one in which the citizen is a mere object of official orders).

Now, there is another, and related, way that appropriate form can serve liberty. A determinate rule, e.g., "Drive no faster than 70 mph," if properly administered, also liberates the citizen from official interferences. A driver who stays within the speed limit generally gives the police no grounds to interfere. It would generally be arbitrary and wrong for the police to intervene in such a case on grounds of speeding. And part of the appropriateness of determinate form here is precisely that it limits the power of officials to interfere with the exercise of liberty by citizens applying determinate rules to themselves. Form thus secures liberty not merely by organizing the conditions for citizen choice and self direction, but also by constraining official interference. Rudolf von Jhering (1923, 471) summed up both of these two basic ways that form functions here in the statement: Form is the "twin sister of liberty" and "the sworn enemy of the arbitrary." Of course, Jhering was, in this, assuming a content in the rules that is "liberty friendly."

Freedom of movement is only one kind of basic liberty. There are others in a well ordered society. Not only are the highways dependent on appropriate form for the liberty they afford. So, too, are many other liberties. Perhaps I may be allowed to single out liberty of contract. It is through that great legal facility, liberty of contract, that citizens may, within the limits of their resources, plan and construct their very lives. Without appropriate form, and to be sure, appropriate content, all this could not be. Contract, just like the highway, though on a far vaster scale, is a complex, organized set up that is facilitative of liberty and fundamentally dependent on determinate rules, methodologies of application, and duly designed institutions—all phenomena which simply could not exist without appropriate form. In this way, too, appropriate legal form contributes to the extension and enrichment, for citizens, of the general menu of possible goals and means of social life.

## **12. Form Shapes Ends and Values of Law**

It is usual for us to think of law, and especially of rules, as consisting solely of means to external ends and values. It is natural for us to think of legal form in the same way, for legal form is intrinsic to law. In this way of thinking, a choice of legal form is merely a choice of means, and not of ends or values. On this view, it may also be assumed the same form cannot be both means, and also end or value at the same time. It would follow that means cannot be the constituents of ends or values. Hans Kelsen (1945, 20) and many other theorists seem to have held this view.

This cluster of views falsifies social reality, and fails to capture a major function of form. Some ends and values are intimately dependent for their very definition, structure, and significance on organization—on a purposive systematic arrangement, on a choice of form. When this is so, the choice is justly characterizable as a choice of values as well as a choice of means to

their realization. We might also say that such a choice of form is to a large extent a choice of means that is partially constitutive of the values. Here, the values or ends are not external to the form as means, but are a part of, and are expressed in, this very form as means. The ends and values take much of their very reality from the organizational arrangements—the forms in which they are defined and expressed.

Let us now consider an example of how this is so. I will draw my example from the category of fundamental political values. The truth of my thesis here extends to most other major values in this category, as well. The truth is thus one of wide-ranging significance, and further demonstrates the profound importance of appropriate form in the law.

Consider the fundamental political value of democracy. This is a value or end that cannot even be formulated or described without at least some reference or allusion to an organizational arrangement, to an institutional form. If a society opts for democratic self-governance over autocratic rule, the society opts not just for an end but also, at least minimally, for an organizational arrangement of a given kind, for democracy just is a way of organizing political life to secure self governance. Of necessity, there are further choices here, such as between direct democracy and representative democracy. These are in part choices of form in which the alternatives consist either of decision through public referenda, or decision through elected representatives acting on behalf of the public. These choices of legal form are, at one and the same time, choices not only of legal means but of ends, of values to be realized in and through the operation of these forms. These forms are not merely means to an external end of democracy. *These forms are versions of that very end.* Indeed the differences between two such versions of democratic values cannot even be characterized without reference to differences in their organizational arrangements—their forms. Direct democracy is not some end or value external to its form, external to its mode of organization. Nor is representative democracy. Direct democracy and representative democracy *just are these forms.* Thus, these forms are, at one and the same time, means, and these means are also constituents of the ends. These ends take their very reality from the forms—the modes of organization defining and expressing these ends. Such forms have a dual significance. Choosing them rules out alternative ends, and at the same time organizationally constitutes the very ends and values that these forms embrace. Thus, the choice of a democratic form rules out autocratic forms, and also constitutes the very ends and values of democracy to be realized. Ferdinand La Salle (as quoted in Koestler 1941, 241) once expressed an aspect of this poetically:

Show us not the aim without the way.  
For ends and means on earth are so entangled  
That changing one, you change the other too;  
Each different path brings other ends in view.

In regard to democracy, legitimacy, rationality, processual fairness, basic liberties, the rule of law, and still other fundamental political ends and values, the very meaning of the ends and values at stake is very largely defined by the forms of legal organization in which they are expressed. This is not to say that ends and values are realizable solely through forms alone. The non-formal elements of forms are also required for forms to be operational.

The forms defining and expressing such values are worth having for their own sake. Even when not adopted or implemented, these forms still enable human beings to embrace the ends and values that these forms constitute, and to invoke these ends and values in criticism of existing practices and in advocacy of new ones. When duly implemented, these forms are, of course, worth having all the more.

It can even be said that the very concept of a value such as democracy is dependent for its formulation on the relevant organizational form. Such a value cannot even be adequately conceptualized without reference to some organizational form. Without form, the value would be organizationless, would be formless, and thus could not be a meaningful social end at all. Of course, even when it is possible to choose forms defining these values, choices of inappropriate form are still possible. Thus, it would still be possible to misunderstand or to underrate the organizational forms that best define and express the relevant values. Certainly inappropriate form cannot satisfactorily define, instantiate, and effectuate the values.

Due credit to form in the law requires, then, that we recognize the intimacy of the relation between appropriate form and the very nature of fundamental political values such as democracy, legitimacy, rationality, processual fairness, basic liberties, and the rule of law. The general point here was familiar to others, but it has never to my knowledge been developed in a way that gives due credit to form as such. Its full development certainly requires more than I can offer here.

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