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# THE APPLICATION OF CONSTITUTIVE PRESCRIPTIONS: AN ADDENDUM TO JUSTICE CARDOZO\*

MYRES S. MCDUGAL\*\*

It is a very great honor to be permitted to join with you in tribute to the memory of Justice Cardozo. Many of your prior speakers have been able to recall extensive personal association with the Justice. I was not so fortunate. When, in the Twenties, I was a beginning student at the University of Oxford, Justice Cardozo's writings were a great inspiration, not merely to the emerging American legal realists, but to many others. In the course of preparing this lecture, I discovered that the first prize money I won as a law student was spent upon a set of his books. Later, in 1932, it was my privilege, as a young law teacher at the University of Illinois, to join with most other law teachers in this country in a petition to President Hoover to appoint the then Judge Cardozo to the Supreme Court. My only acquaintance with the Justice was to read his books and opinions, and to shake his hand. I yield to none, however, in my appreciation of his contribution and in deference to his memory.

A principal concern of Justice Cardozo in all his writing was the central problem of any jurisprudence aspiring to be realistic: that of how decisions are made and of how their making in the common interest can be improved. At the very beginning of his first and most influential book, *The Nature of the Judicial Process*, he posed the problem thus:

What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, how do I reach the rule that will make a precedent for the future?<sup>1</sup>

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<sup>1</sup> B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 10 (1921) [hereinafter cited as *JUDICIAL PROCESS*].

Drawing upon his rich experience as a judge, he sought to identify and describe "the forces to be obeyed and the methods to be applied" in the evaluation and application of the "beaten track" of past decisions.<sup>2</sup> The relevant methods he described as follows:

The directive force of a principle may be exerted along the line of logical progression; this I call the rule of analogy or the method of philosophy; along the line of historical development; this I will call the method of evolution; along the line of the customs of the community; this I will call the method of tradition; along the lines of justice, morals, and social welfare, the *mores* of the day; and this I will call the method of sociology.<sup>3</sup>

In this first book and in subsequent writings, he spelled out in detail what he meant by each of these methods of decision and called for the disciplined and eclectic application of all four methods as might be required by the varying features of the particular contexts in which choice had to be made. Though he put forward this "four-fold division" of methods of decision as relevant for all cases, it may be, as friendly critics have suggested, that in general the Justice underestimated the range of instances open for the use, in creative and innovative decision, of his fourth method, that of justice or sociology.<sup>4</sup> In the domain of constitutional law, however, the Justice certainly found, as he later sought to exemplify, ample scope for creativity. He wrote:

The great generalities of the constitution have a content and a significance that vary from age to age. The method of free decision sees through the transitory particulars and reaches what is permanent behind them. Interpretation, thus enlarged, becomes more than the ascertainment of the meaning and intent of lawmakers whose collective will has been declared. It supplements the declaration, and fills the vacant spaces, by the same processes and methods that have built up the customary law.<sup>5</sup>

The methods of decision described and recommended by Justice Cardozo have been criticized for imprecision in reference, lack of homogeneity and comprehensiveness, and vagueness in purpose.<sup>6</sup> The Justice himself found his categorizations "overlapping" and of

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<sup>2</sup> See B. CARDOZO, *THE GROWTH OF THE LAW* 62 (1924) [hereinafter cited as *GROWTH*].

<sup>3</sup> B. CARDOZO, *JUDICIAL PROCESS*, *supra* note 1, at 30.

<sup>4</sup> See Patterson, *Cardozo's Philosophy of Law* (pts. 1-2), 88 U. PA. L. REV. 71, 84, 156, 159 (1939).

<sup>5</sup> B. CARDOZO, *JUDICIAL PROCESS*, *supra* note 1, at 17.

<sup>6</sup> See, e.g., Patterson, (pt. 2), *supra* note 4, at 160-65.

somewhat ambiguously differentiated role; yet, he insisted that, "for purposes of rough classification," they were "helpful and perhaps sufficient."<sup>7</sup> In a lecture dedicated to the memory of the Justice it may not, therefore, be inappropriate, however difficult the task, to continue to address ourselves, as others have sought, to the important, central problem that he posed. It may be possible to build upon, even to systemize, some of the many clarifying insights he so magnificently expressed.

Some ten years ago two colleagues, Professors Harold D. Lasswell and James C. Miller, and I wrote a book, *The Interpretation of Agreements and World Public Order*,<sup>8</sup> in which we sought to bring some of the lessons of modern communications studies to bear upon the interpretation and application of international agreements. When we examined the cases and literature, we discovered a pervasive confusion about what was being interpreted, about the goals of interpretation, about the interrelations of interpretation and the other intellectual tasks involved in the application of an agreement, and about the role and potentialities of inherited principles in making particular applications. Among the indispensable steps toward clarity we recommended were the explicit and systematic specification of the various processes of communication comprised in the making, performance, and termination of an agreement, and the postulation and clarification of a comprehensive set of community goals in the application of agreements. The application of an international agreement, we found, was commonly a highly complicated process which moved from a preliminary exploration of potential facts and potential policies through to a final characterization of facts and a choice among clarified policies. The exploration of potential policies included the several tasks of *interpretation*, in the sense of a search for the closest possible approximation to the genuine shared expectations of the parties, of *supplementing*, in the sense of completing omissions and ambiguities in accordance with basic community policies, and of *integrating*, in the sense of evaluating and policing even shared expectations for their compatibility with overriding community policies, such as are today described as *ius cogens*. The appropriate function of principles of interpretation and application, in promotion of rational decisions in the semantic sense of an economic relation between means and end, was, we found, not that of shielding the applier from

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<sup>7</sup> B. CARDOZO, GROWTH, *supra* note 2, at 61.

<sup>8</sup> M. McDUGAL, H. LASSWELL & J. MILLER, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER* (1967).

overt consideration of policy and of appearing, illusorily, to dictate decision, but rather that of guiding an applier's attention to features of the processes of agreement and decision, and of their larger context relevant to the tasks of identifying the parties' expectations and of clarifying basic community policies.

The theme I propose to explore this evening, in an effort to build upon Justice Cardozo's recommended methods of decision, is whether theories and procedures, comparable to those we proffered in relation to international agreements, might not be devised to facilitate the application, in particular instances of controversy, of our internal, national constitutive prescriptions. The reasons why I say application and constitutive, rather than interpretation and constitutional, will, I believe, become apparent as we proceed.

When we examine the cases and literature about what is commonly called constitutional interpretation, we find a confusion entirely comparable to that observable in the application of international agreements. There is great diversity of opinion about what is being interpreted and applied, that is, about what the Constitution is; about the appropriate goals of interpretation and application; about the different intellectual tasks and choices involved in the application of constitutive prescriptions in particular instances of controversy; and, finally, about the role and potentialities of many different principles in aid of application. It is confessed that I view these materials, not from the perspective of a specialist in the field, but with the eyes of a visiting anthropologist. It may be that important clarifying contributions have escaped my vision or understanding.<sup>9</sup>

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<sup>9</sup> Professor Louis Lusk's recent book, *BY WHAT RIGHT? A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION* (1975), did not come to my attention until after this lecture was in draft. His conception of "implied power," *id.* at 85-95, would appear, however, to offer but a very preliminary notion of the Constitution as a continuing process of communication and to afford little guidance for a particular decision.

The literature upon which the generalizations in the text are based is vast. *See, e.g.*, P. BREST, *PROCESSES OF CONSTITUTIONAL DECISION-MAKING* (1975) (for an immense storehouse of references); Arnold, *Professor Hart's Theology*, 73 *HARV. L. REV.* 1298 (1960) (contains Thurman Arnold's own inimitable appraisal of some of this literature). An extensive sampling of this literature gives one a sense best described in one of Arnold's metaphors as that of "eating hay endlessly."

An interesting assessment is offered by Garvey:

The traditional activity of constitutional interpretation is best described in the essentially untranslatable French word *bricolage*. *Bricolage* is a process of fabricating "make-do" solutions to problems as they arise, using a limited and often severely limiting store of doctrines, materials, and tools—the way a household handy-man must respond to a novel "fix-it" task, relying only on his ingenuity and a small kit bag of mending tools.

G. GARVEY, *CONSTITUTIONAL BRICOLAGE* 5 (1971). It would appear that *bricolage* might well be translated as *incrementalism*.

The most primitive approach to constitutive application is, of course, that which identifies the Constitution as the document of 1789, insists that the appropriate, even obligatory, goal of application is the original intent of the founding fathers, and finds the principal, sometimes exclusive, indicia of that intent in the words of the document.<sup>10</sup> Fragments and implicit assumptions of deference to this approach are observable in much contemporary writing.<sup>11</sup> Sometimes its major emphases are made utterly explicit, as in Professor Maurice Merrill's article, *Constitutional Interpretation: The Obligation to Respect the Text*.<sup>12</sup> Professor Merrill attacks "personal interpretation" and, though recognizing that there are "broad grants of power" sometimes "couched in spacious generalities," insists upon maintenance of "the integrity of the Constitution as a document."<sup>13</sup> He concludes: "To respect the Constitution as a document is an essential part of discharging our debt to those who established our polity as an institution and of availing ourselves of the benefit of the improvements thus made."<sup>14</sup> A renowned scholar at the University of Chicago, W. W. Crosskey, once wrote two large volumes designed to present "the historic and intended meaning of the underlying constitutive document, the Constitution of the United States" and dedicated to the belief that "the historic intentions of the founding fathers ought to govern the interpretation given to the language of the Constitution by modern decision makers."<sup>15</sup> A familiar official pronouncement is that of Justice Sutherland:

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<sup>10</sup> See ten Broek, *Admissibility and Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction* (pts. 1-3), 26 CALIF. L. REV. 287, 437, 664 (1937) (for an abundance of references).

The observation by Tiedeman is apt: "It is a noteworthy fact that in the earlier stages of development of a system of jurisprudence, when the knowledge of the meaning of words is crudest and least certain, greater stress is laid in interpretation upon the letter of the law than in the more advanced judicial age." C. TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES* 145 (1890).

<sup>11</sup> The book by R. BERGER, *GOVERNMENT BY JUDICIARY* (1977), published after the oral presentation of this lecture, suggest that this description is a gross understatement. The ancient faith in the power of words engrossed upon a parchment is still very much alive. See also Berger, *The Imperial Court*, N.Y. Times, Oct. 9, 1977, § 6 (Magazine), at 38. For a more realistic historical perspective, see Brest, Book Review (R. BERGER, *GOVERNMENT BY JUDICIARY*), N.Y. TIMES, Dec. 11, 1977, § 7, at 10.

<sup>12</sup> Merrill, *Constitutional Interpretation: The Obligation to Respect the Text*, in *PERSPECTIVES OF LAW: ESSAYS FOR AUSTIN WAKEMAN SCOTT* 260 (R. Pound, E. Griswold & A. Sutherland eds. 1964).

<sup>13</sup> *Id.* at 267.

<sup>14</sup> *Id.* at 285.

<sup>15</sup> Crosskey, *Preface* to W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* at vii (1953). For appraisal, see, e.g., Bartosic, *The Constitution, Poli-*

A provision of the Constitution, it is hardly necessary to say, does not admit of two distinctly opposite interpretations. It does not mean one thing at one time and an entirely different thing at another time.

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The whole aim of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent of its framers and the people who adopted it. . . . The necessities which gave rise to the provision, the controversies which preceded, as well as the conflicts of opinion which were settled by its adoption, are matters to be considered to enable us to arrive at a correct result. . . . The history of the times, the state of things existing when the provision was framed and adopted, should be looked to in order to ascertain the mischief and the remedy. . . . As nearly as possible we should place ourselves in the condition of those who framed and adopted it. . . . And if the meaning be at all doubtful, the doubt should be resolved, wherever reasonably possible to do so, in a way to forward the evident purpose with which the provision was adopted.<sup>16</sup>

More recently, Justice Black stated his faith as follows:

Our written Constitution means to me that where a power is not in terms granted or not necessary and proper to exercise a power granted, no such power exists in any branch of the government—executive, legislative or judicial. Thus, it is language and history that are the crucial factors which influence me in interpreting the Constitution—not reasonableness or desirability as determined by justices of the Supreme Court.<sup>17</sup>

The recognition is, however, increasingly widespread that all these demands for so extreme a fidelity to past intentions and words are both chimerical and irrational. Thus, in the very case in which Justice Sutherland spoke as above, Chief Justice Hughes, for the majority, answered:

If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great

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*tics and Professor Crosskey*, 46 KY. L.J. 556 (1958); Fairman, *The Supreme Court and Constitutional Limitations on State Governmental Authority*, 21 U. CHI. L. REV. 40 (1953); Lasswell, Book Review, 22 GEO. WASH. L. REV. 383 (1953).

<sup>16</sup> *Home Bldg. & L. Ass'n v. Blaisdell*, 290 U.S. 398, 448-49, 453 (1934) (Sutherland, J., dissenting), quoted in Beth, *Technical and Doctrinal Aids to Constitutional Interpretation*, 18 U. PITT. L. REV. 108, 113-14 (1958). Cf. C.A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 39-51 (1969) (for a discussion of the contrasting opinions in *Blaisdell*).

<sup>17</sup> H. BLACK, *A CONSTITUTIONAL FAITH* 8 (1968).

clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation.<sup>18</sup>

In a most refreshing essay, styled *The Constitution as an Institution*, the late Professor Karl Llewellyn insisted that our Constitution is a living institution which "completes, alters, . . . and overrides the Document."<sup>19</sup> He wrote:

There is the notion that the primary source of information as to what our Constitution comes to, is the language of a certain Document of 1789, together with a severely select coterie of additional paragraphs called Amendments. Is this not extraordinary? The Document was framed to start a governmental experiment for an agricultural, sectional, seaboard folk of some three millions. Yet it is supposed to control and describe our Constitution after a century and a half of operation; it is conceived to give basic information about the government of a nation, a hundred and thirty millions strong, whose population and advanced industrial civilization have spread across a continent.<sup>20</sup>

In reviewing the Crosskey volumes, Professor Ernest Brown noted that "meaning-hunting may be as difficult and perilous as snark-hunting" and outlined the many difficulties that inhere in a genuine search for original intentions.<sup>21</sup> A more friendly reviewer, Walton Hamilton, began his appraisal in echo of Chief Justice Hughes:

It is inevitable that judges should substitute doctrines of their own for these which the Fathers set down in the original document. And such a rewriting of the law—even of the enduring principles of the higher law—is as necessary as it is inevitable. For the values which fix the objectives of public policy must change as the aspirations of men are broadened with the process of the suns; and, even as ends endure, they must be newly instrumented amid the changing circumstances of a dynamic culture or they will be betrayed.<sup>22</sup>

A former clerk to Justice Black and now famous author, Charles Reich, for final illustration, accounts for the Justice's activism by de-

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<sup>18</sup> 290 U.S. at 442-43.

<sup>19</sup> Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 2 (1934).

<sup>20</sup> *Id.* at 3.

<sup>21</sup> Brown, Book Review, 67 HARV. L. REV. 1439, 1442 (1954) (W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953)).

<sup>22</sup> Hamilton, *The Constitution—Apropos of Crosskey*, 21 U. CHI. L. REV. 79, 79 (1953).



scribing him as faithful to the standards of the Constitution, though giving such standards meaning in contemporary terms.<sup>23</sup> The Justice's approach, Reich insists, is "functional in nature":

He asks what a given provision of the Bill of Rights was designed to accomplish—what evils it was intended to prevent. Then he seeks to give the provision a meaning which will, in the contemporary setting, accomplish the same general purposes and prevent the same kind of evils.<sup>24</sup>

The most ambitious, and influential, recent effort to afford guidance for constitutive application is Professor Wechsler's now classic *Toward Neutral Principles of Constitutional Law*.<sup>25</sup> In this essay Wechsler seeks to formulate "the minimal criteria of a defensible interpretative judgment."<sup>26</sup> He equates concern for "immediate" results with "naked power" decisions and finds that "this type of *ad hoc* evaluation is, as it has always been, the deepest problem of our constitutionalism, not only with respect to judgments of the courts but also in the wider realm in which conflicting constitutional positions have played a part in our politics."<sup>27</sup> For distinguishing *ad hoc* manipulation from judicial decision, he submits that "the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."<sup>28</sup> Though he recognizes that courts must decide only the cases before them, he asks:

But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply? Is it not the very essence of judicial method to insist upon attending to such other cases, preferably, those involving an opposing interest, in evaluating any principle avowed?<sup>29</sup>

More affirmatively, he concisely summarizes: "A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and neu-

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<sup>23</sup> Reich, *The Living Constitution and the Court's Role*, in HUGO BLACK AND THE SUPREME COURT 133, 148-49 (S. Strickland ed. 1967).

<sup>24</sup> *Id.* at 139.

<sup>25</sup> Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959), reprinted in H. WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 3 (1961).

<sup>26</sup> H. WECHSLER, *supra* note 25, at xi.

<sup>27</sup> *Id.* at 17.

<sup>28</sup> *Id.* at 21.

<sup>29</sup> *Id.*

trality transcend any immediate result that is involved.”<sup>30</sup> In the introduction to the book reprint he offers further clarification:

[I] certainly do not deny that constitutional provisions are directed to protecting certain special values or that the principled development of a particular provision is concerned with the value or the values thus involved. The demand of neutrality is that a value and its measure be determined by a general analysis that gives no weight to accidents of application, finding a scope that is acceptable whatever interest, group, or person may assert the claim.<sup>31</sup>

Unhappily, neither Professor Wechsler nor any of his innumerable commentators has ever been able to suggest any criteria, other than syntactic,<sup>32</sup> for distinguishing between principles of adequate and inadequate generality and neutrality. What are described as the “accidents” of “interest, group, or person” may be among the factors most relevant to decision. A rational concern for long-term interests in the real world commonly includes, further, a concern for the next steps, or immediate consequences. The effective accommodation of opposing interests must require, beyond verbal abstractions, the balancing and integration of value demands in social process.<sup>33</sup>

The most uncompromising contemporary proponent of principled decision, only in measure after the fashion of Wechsler, is Professor, quondam Solicitor-General, Bork. In an article, *Neutral Principles and Some First Amendment Problems*, Professor Bork explores the implications of Wechsler’s concept and finds a deeper base for the requirement of principled decision in “the resolution of the seeming anomaly of judicial supremacy in a democratic society.”<sup>34</sup> The power

<sup>30</sup> *Id.* at 27.

<sup>31</sup> *Id.* at xiii-xiv.

<sup>32</sup> The distinction between “syntactic,” and “semantic” references is concisely set forth by Lasswell:

A distinction must be kept in mind between the internal relationships of a family of statements (which can be established “by definition”) and the external “referents” of a statement (which must be demonstrated “by observation”). Walter Wheeler Cook stamped this fundamental point, the difference between what may be called “syntactics” and “semantics,” into American legal literature.

H. LASSWELL, *THE FUTURE OF POLITICAL SCIENCE* 195 (1963). Cf. C. MORRIS, *SIGNS, LANGUAGE, AND BEHAVIOR* 219 (1946) (“[s]emantics deals with the signification of signs in all modes of signifying; syntactics deals with combinations of signs without regard for their specific significations or their relation to the behavior in which they occur.”)

The continuing popularity of the “principled decision” approach suggests that Lasswell measurably overstates the achievement of Cook.

<sup>33</sup> Wechsler is somewhat obscure about procedures for differentiating particular policies in terms of their relation to common interest.

<sup>34</sup> Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1,2 (1971).

of the Supreme Court is, according to Bork, undemocratic, and our society has consented to be "ruled undemocratically" only "within defined areas by certain enduring principles believed to be stated in and placed beyond the reach of majorities by the Constitution."<sup>35</sup> This dilemma, Bork alleges, "imposes severe requirements upon the Court":

For it follows that the Court's power is legitimate only if it has, and can demonstrate in reasoned opinions that it has, a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom. If it does not have such a theory but merely imposes its own value choices, or worse if it pretends to have a theory but actually follows its own predilections, the Court violates the postulates of the Madisonian model that alone justifies its power. It then necessarily abets the tyranny either of the majority or of the minority.<sup>36</sup>

Bork, not surprisingly, has some difficulty in identifying and specifying an appropriate theory for the Court. He insists that "the determination of 'social value' cannot be made in a principled way"<sup>37</sup> and that "the choice of 'fundamental values' by the Court cannot be justified."<sup>38</sup> He summarizes: "Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights."<sup>39</sup> Bork makes his dependence upon syntactic derivation explicit. "Logic" he writes, "has a life of its own, and devotion to principle requires that we follow where logic leads."<sup>40</sup> He adds:

We have not carried the idea of neutrality far enough. We have been talking about neutrality in the *application* of principles. If judges are to avoid imposing their own values upon the rest of us, however, they must be neutral as well in the *definition* and the *derivation* of principles.<sup>41</sup>

The time was when professors in the Yale Law School were somewhat more dubious about the possibilities of obtaining new truth by syntactic derivation and were more wary of permitting themselves, or re-

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<sup>35</sup> *Id.* at 3.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 29.

<sup>38</sup> *Id.* at 8.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 6.

<sup>41</sup> *Id.* at 7.

quiring others, to be coerced by such logic. The corridors still echo with Thurman Arnold's homely wisdom that he who snaps at a gnat does not necessarily have to swallow a camel. The blunt contraposition, further, of majority and minority interests minimizes the potentialities of genuine integration in common interest, and the notion that man can make no reasoned choice of values both indicates a barren conception of reason and underestimates man.

The most articulate and most productive of the proponents of principled decision was of course my late, and much respected, colleague, Professor Alexander Bickel. In a huge flow of books and articles he plead, most eloquently, for the "passive virtues" and judicial restraint.<sup>42</sup> He shared the misconception that constitutional review is undemocratic and described "constitutional judgment" as "a high policy-making function performed in a political democracy by an institution that has to be regarded as deviant."<sup>43</sup> Thus, he insisted that the "process of the coherent, analytically warranted, principled declaration of general norms alone justifies the Court's function."<sup>44</sup> Yet, in many moving passages he admitted defeat in his efforts to draw more than an imprecise line between principled and unprincipled decision, and in his appraisal of particular decisions his mellow humanity commonly seeped through syntactic constraints to a genuine concern for the value consequences of decision. In his most important book, *The Least Dangerous Branch*, he stated that by "principle" he meant "general propositions," that is, "organized ideas of universal validity in the given universe of a culture and a place, ideas that are often grounded in ethical and moral presuppositions."<sup>45</sup> "Principle, ethics, morality," he added, "these are evocative, not definitional terms; they are attempts to locate meaning, not to enclose it."<sup>46</sup> In his peroration in this book, in attempting to indicate what Justice Frankfurter meant by "fundamental presuppositions," he retreated, finally, to the words of a literary critic. This critic wrote that the superiority of one writer over another (Faulkner over J.P. Marquand)

cannot be proved, [but] it can be demonstrated, a quite different operation involving an appeal—by reason, analysis, illustration,

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<sup>42</sup> E.g., Bickel, *The Supreme Court, 1960 Term, Foreward: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

<sup>43</sup> A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 82 (1970).

<sup>44</sup> *Id.* at 96.

<sup>45</sup> A. BICKEL, *THE LEAST DANGEROUS BRANCH* 199 (1962).

<sup>46</sup> *Id.* at 199.

and rhetoric—to cultural values which critic and reader have in common, values no more susceptible of scientific statement than [*sic*] are the moral values-in-common to which Jesus appealed but which, for all that, exist as vividly and definitely as do mercy, humility, and love.<sup>47</sup>

In some of his later work, Bickel did not always seem to realize that the values upon which judges might draw for guidance in decision need not be confined to religious or metaphysical absolutes (whether Whig or Lockean) but could include the very secular demands of members of a particular community, and that such secular demands could be appraised, as decision-makers have immemorially appraised them, in terms of their relation to common interest.<sup>48</sup>

The thrust of so much emphasis upon allegedly *principled* decision has, as might have been expected, stimulated powerful counter-calls for *unprincipled* decision. Thus, Judge Charles E. Clark, surpassed in practical wisdom by few, noted that “after all these years of legal realism, frankly, even brutally, stripping the process of all illusion, there appears to be rising a new wave of mysticism to bemuse the scholars, confuse the judges, and intrigue us all.”<sup>49</sup> In an article explicitly styled *A Plea for the Unprincipled Decision* he indicated that he had found “it difficult to make the distinctions” putatively based upon neutrality, certainty, and principle “work in practical judicial life.”<sup>50</sup> In another article, especially written for an issue of the *Yale Law Journal* commemorating the fortieth anniversary of the publication of Justice Cardozo’s *The Nature of the Judicial Process*, Judge Clark and an associate chided Professor Karl Llewellyn for rejecting “the notion of judicial *freedom* which was the starting point for Cardozo’s fourth method of decision—the method of social value, or the judge as a legislator.”<sup>51</sup> In reaction against too much emphasis upon “tradition,” they urged:

There should be a sterner and more forthright exercise of judicial talent to look steadily and with balance to the consequences to be expected from the judicial act and to its effect as a precedent on

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<sup>47</sup> *Id.* at 237 (quoting Macdonald, *The Triumph of the Fact: An American Tragedy*, 2 ANCHOR REV. 113, 124 (1957)).

<sup>48</sup> See A. BICKEL, *THE MORALITY OF CONSENT* 1-6 (1975).

<sup>49</sup> Clark, *The Limits of Judicial Objectivity*, 12 AM. U.L. REV. 1, 1 (1963). See also Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

<sup>50</sup> Clark, *A Plea for the Unprincipled Decision*, 49 VA. L. REV. 660, 663 (1963).

<sup>51</sup> Clark & Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 YALE L.J. 255, 256 (1961).

the growth of the law. Escape from this hard task by reliance on neutrality and certainty to avoid forthrightness is itself a decision, albeit one of negation.<sup>52</sup>

They added: "It is difficult to formulate principles to guide this judicial freedom or to provide simple maps through the maze of value-choices presented by any significant case. But it will not do to deny that the freedom exists or that the choices must be made."<sup>53</sup> Similarly, Professor (long-time Dean and quondam Under-Secretary) Eugene Rostow has, in a series of articles, later published in book form, written an eloquent, and powerful, defense of the democracy of constitutional review. In one summation, he states:

The American Constitution is an evolving pattern of usage governing the exercise of public authority. The written Constitution which went into effect in 1789, and its amendments, are an integral part of the living Constitution. But they are by no means all of it. And in the interpretation of the written Constitution—as in the development of the unwritten one—political and social experience, history, custom, and memory play a role far more important than the syntactic analysis of sacred words.<sup>54</sup>

The democracy of constitutional review he appropriately finds in the continuing expectations of the American people about how best to balance power for the preservation of freedom. The basic assumption underlying the argument of the proponents of "principled" decision he gives short shrift:

But universal manhood suffrage does not imply, in theory or in fact, that policy can properly be determined in a democracy only through universal popular elections, or that universal popular elections have or should have the capacity to make any and all decisions of democratic government without limits or delays of any kind. Representative government is, after all, a legitimate form of democracy, through which the people delegate to their elected representatives in legislatures, or in executive offices, some but not necessarily all of their powers, for a period of years. Neither the town meeting nor the Swiss referendum is an indispensable feature of democratic decision-making.<sup>55</sup>

In a similar vein, Professor Charles Black has written brilliantly, in refutation of many positions taken by the proponents of principled

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<sup>52</sup> *Id.* at 271.

<sup>53</sup> *Id.* at 275.

<sup>54</sup> E. ROSTOW, *THE SOVEREIGN PREROGATIVE* at xix (1962).

<sup>55</sup> *Id.* at 119.

decision, most importantly in relation to the lawfulness of constitutional review itself and the racial desegregation decisions.<sup>56</sup> He observes that the "precision of textual explication is nothing but specious in the areas that matter"<sup>57</sup> and bases his own recommended applications primarily upon "the total structure that the text has created."<sup>58</sup> He employs what others might call interpretation by "major purposes" in common interest and builds upon a "general consensus" in a continuing process of communication.<sup>59</sup>

A more recent response to the advocates of principled decision is that of Judge Skelly Wright in his comprehensive and insightful article, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*.<sup>60</sup> Judge Wright offers a telling description of the ambiguities and inconsistencies in the appeals for principled decision and concludes that its advocates cannot hope by sheer exercises in syntactic logic to achieve the ends to which they aspire. He notes that Bickel admits "his doubt that the Court has ever fully met the Wechslerian standards and recognizes that he does not know whether the Warren Court fell any further short than its predecessor" and inquires whether Bickel should not have "hesitated somewhat longer . . . to ask whether he is not demanding the nearly impossible." He writes that: "If past Courts have also systematically failed to meet the requirements of principled decision-making, does this not suggest that the requirements themselves—at least as applied by the scholarly critics—are fatally unrealistic?"<sup>61</sup> He adds: "How are we to evaluate the 'neutrality' of line-drawing except by reference to some sort of value choices?"<sup>62</sup> On the constructive side, Judge Wright insists that many of the important value choices that an applier must make are already made in the basic flow of constitutive communication, but he offers no very precise recommendations about how these important choices can be specified and applied in particular instances.<sup>63</sup> One of the authors upon whom Judge Wright builds, Professor Jan Deutsch, offers an even more devastating review of the inadequacies of the

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<sup>56</sup> C. BLACK, JR., *THE PEOPLE AND THE COURT* (1960); C. BLACK, JR., *PERSPECTIVES IN CONSTITUTIONAL LAW* (1963).

<sup>57</sup> C. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 29 (1969).

<sup>58</sup> *Id.* at 15.

<sup>59</sup> The difficulty with Professor Black's presentation is that he compresses a number of potentially useful principles of interpretation into the one complex concept of "structure."

<sup>60</sup> J. Skelly Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 *HARV. L. REV.* 769 (1971).

<sup>61</sup> *Id.* at 778.

<sup>62</sup> *Id.* at 780.

<sup>63</sup> *Id.* at 784-85.

principled decision illusion and suggests a solution of the difficulties through the employment of "precedent" in context.<sup>64</sup> The flow of precedents is, however, but one component of the total flow of constitutive communication and commonly speaks with an especially ambiguous and forked tongue. A rational performance of the application function must require procedures for evaluating precedents, along with other communications, in terms of probable future consequences and for relating complementary precedents to specific choices in the context in which such choices have to be made.

It would, of course, require an immense staff, employment of the most sophisticated methods of content analysis, and a large computer to achieve a summary of the genuine attitudes through time of the Supreme Court itself toward the difficult problems that inhere in the application of constitutive prescriptions. The historic gross changes in basic orientation by the Court, as its membership has changed, and a broad sampling of opinions in the foreign affairs and human rights areas would suggest that the members of the Court have enjoyed a diversity of views, fully as generous as that of commentators and critics, about the nature of the Constitution, the goals of application, the intellectual tasks involved in application, and the potentialities and importance of different principles of application.<sup>65</sup> The multiple opinions in the *Pentagon Papers* case<sup>66</sup> and in *Furman v. Georgia*<sup>67</sup> exhibit, for illustration in miniature, a particularly broad spectrum of views on all these points. The enormous freedom of decision that, under these conditions, the Court in fact enjoys, and sometimes perceives itself as enjoying, is concisely indicated by Justice Byron White in his dissenting opinion in *Miranda v. Arizona*:<sup>68</sup>

That the Court's holding today is neither compelled nor even strongly suggested by the language of the Fifth Amendment, is at odds with American and English legal history, and involves a departure from a long line of precedent does not prove either that the Court has exceeded its powers or that the Court is wrong or unwise in its present reinterpretation of the Fifth Amendment. It does, however, underscore the obvious—that the Court has not

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<sup>64</sup> See Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169 (1968); Deutsch, *Precedent and Adjudication*, 83 YALE L.J. 1553 (1974).

<sup>65</sup> The range of these views can be observed in any of the frequently used casebooks in constitutional law. See, e.g., P. BREST, *supra* note 9.

<sup>66</sup> *New York Times Co. v. United States*, 403 U.S. 713 (1971).

<sup>67</sup> 408 U.S. 238 (1972).

<sup>68</sup> 384 U.S. 436 (1966).



discovered or found the law in making today's decision, nor has it derived it from some irrefutable sources; what it has done is to make a new law and new public policy in much the same way that it has in the course of interpreting other great clauses of the Constitution. This is what the Court historically has done. Indeed, it is what it must do and will continue to do until and unless there is some fundamental change in the constitutional distribution of governmental powers.<sup>69</sup>

The important question now, for those of us concerned with the quality of constitutive process and public order, is whether it is possible to suggest intellectual strategies or procedures which might aid, not merely the Court but all community members, in making and evaluating the difficult value choices required in the rational application of constitutive prescriptions in particular instances. In antiquity, before people were clear about the difference between the syntactic and semantic dimensions of the reference of words, it was perhaps excusable to seek new truth and rational decision by syntactic derivation; today, given our contemporary knowledge of the limitations of such derivations when employed alone, it can only be highly irrational, tending toward the suicidal, for the Court and others to make and evaluate important value choices without careful examination of the experience acquired in comparable decisions in the past, of the factors and constraints affecting the decision in hand, and of the differing consequences in social process of alternative choices. It is my belief, indeed thesis, that by the systematic and disciplined employment of a number of interrelated intellectual strategies, a framework of inquiry might be created which could reduce the arbitrariness and increase the rationality of application and its appraisal.<sup>70</sup> The main components of such a framework of inquiry, the principal strategies, we would recommend would include at least the following:

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<sup>69</sup> 384 U.S. at 531. (White, J., dissenting) (footnote omitted).

One of the more dramatic examples of free creation by the Court, without adequate relation to basic community policies, is found in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). See Forrester, *Are We Ready for Truth in Judging?*, 63 A.B.A.J. 1212 (1977), where the broadside indictment by the author would appear modestly to exaggerate the freedom of decision which the Court in fact asserts and to underestimate the freedom which it must inescapably enjoy.

<sup>70</sup> In the recommendations that follow, I build upon M. McDUGAL, H. LASSWELL & J. MILLER, *supra* note 8 and McDougal, *Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies*, 14 VA. J.I.L. 387 (1974) [hereinafter cited as *Principles of Content and Procedure*].

I draw also upon collaborative work, both published and unpublished, with various associates, including, in addition to Harold Lasswell and James Miller, Michael Reisman, Lung-chu Chen, Mary Ellen Caldwell, and Catherine Sullivan.

- I. The clear establishment of observational standpoint, in identification with the whole community, and with explicit projection of the overriding goal of a genuine clarification of common interest.
- II. The more careful delimitation of the general problem involved in the application of any constitutive prescription, including:
  - A. a conception of the Constitution as a comprehensive, continuing process of communication and collaboration that establishes the basic features of authoritative decision;
  - B. the differentiation of particular claims for the application of constitutive prescriptions in terms of factual categories that facilitate the clarifying of policy; and
  - C. explicit recognition that the intellectual tasks required in application include, not merely genuine interpretation, but also supplementing and integration.
- III. The location of particular problems in application in their larger community context, which calls for the relatively explicit postulation of a comprehensive map of basic community policies about both (a) the shaping and sharing of particular demanded values, and (b) the features of constitutive process.
- IV. The systematic employment of a comprehensive set of principles of application, making reference to both content and procedure, for the examination of constitutive prescriptions and particular problems in their larger context.

A brief exposition may indicate what might be developed more fully with respect to each of these recommendations.

#### I. THE ESTABLISHMENT OF OBSERVATIONAL STANDPOINT AND GOAL

The observational standpoint with which we are concerned is that of any individual community member, official or other, who participates in, or seeks to evaluate, the making of constitutive decisions. In our relatively democratic processes of decision, a huge number of individual community members, both official and non-official, participate, in differing measure and in many varying modalities, in the comprehensive constitutive process by which our community clarifies and secures its basic policies. The special function of the Supreme Court in this process is that of making a more detailed clarification and specific application of constitutive prescriptions in particular instances of interaction and claim. The deference that the Supreme

Court should accord decisions by other branches of the government in making its applications is but another problem in the shaping and management of constitutive process, requiring itself an appropriate framework of inquiry for its rational clarification. The need for an improved theory about application is not merely a need of the Court, but of all branches of the government that participate in making applications in particular instances, and of all individual community members who seek to evaluate such applications.

The overriding goal for the application of constitutive prescriptions we recommend is of course, as indicated above, that immemorially sought by law—the clarification and implementation of common interest.<sup>71</sup> “The final cause of law,” as Mr. Justice Cardozo put it pithily, “is the welfare of society.”<sup>72</sup> “The aspiration of an applier who represents a community whose basic constitutive process projects a comprehensive public order of human dignity, and who is himself genuinely committed to this goal, should be,” we recommended in an earlier statement, “to make his every particular application of authoritative prescription contribute toward this goal.”<sup>73</sup> By way of caution, we added:

This is, it may be emphasized, no recommendation that an applier assume the license to impose his own unique, idiosyncratic purposes upon the community. It is, on the contrary, a demand that he identify with the whole of the community he represents and that he undertake a disciplined, systematic effort to relate the specific choices he must make to a clarified common interest, in terms of overriding community goals, for which he personally can take responsibility.<sup>74</sup>

It is believed that an appropriate conception of the historic process of clarifying common interest, through the accommodation and integration of differing particular interests, would remove some of the difficulties that the advocates of principled decision have encountered both in distinguishing short-term and long-term interests and in finding acceptable criteria for the evaluation and balancing of competing particular interests. A genuine effort to clarify common interest requires that the members of a community, and their official represen-

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<sup>71</sup> The ancient origin of this goal is discussed in E. HAVELOCK, *THE LIBERAL TEMPER IN GREEK POLITICS* 390 (1957).

<sup>72</sup> B. CARDOZO, *JUDICIAL PROCESS*, *supra* note 1, at 66.

<sup>73</sup> McDougal, *The Ethics of Applying Systems of Authority: The Balanced Opposites of a Legal System*, in *THE ETHICS OF POWER: THE INTERPLAY OF RELIGION, PHILOSOPHY, AND POLITICS* 221, 230 (H. Lasswell & H. Cleveland eds. 1962).

<sup>74</sup> *Id.* at 230.

tatives, both articulate symbols of shared demand and employ all necessary intellectual procedures in a continuing exploration and assessment of potential decision outcomes for identification of those outcomes that promise greatest net advantage.<sup>75</sup> In the application of constitutive prescriptions, as in other activities in life, we must start from where we are, that is, with immediate interests, and proceed through middle-term interests toward any ultimate destination in long-term interest. Any suggestion that criteria in common interest cannot be identified for accommodating particular interests, whatever their temporal component, makes not merely constitutional law, but all law, a delusive cover for naked power and the aggrandizement of special interests.

A relatively explicit statement of appropriate goal, accompanied by modest recommendation of modalities toward its achievement, is again that of Justice White:

But if the Court is here and now to announce new and fundamental policy to govern certain aspects of our affairs, it is wholly legitimate to examine the mode of this or any other constitutional decision in this Court and to inquire into the advisability of its end product in terms of the long-range interest of the country. At the very least the Court's text and reasoning should withstand analysis and be a fair exposition of the constitutional provision which its opinion interprets. Decisions like these cannot rest alone on syllogism, metaphysics or some ill-defined notions of natural justice, although each will perhaps play its part. In proceeding to such constructions as it now announces, the Court should also duly consider all the factors and interests bearing upon the cases, at least insofar as the relevant materials are available; and if the necessary considerations are not treated in the record or obtainable from some other reliable source, the Court should not proceed to formulate fundamental policies based on speculation alone.<sup>76</sup>

## II. THE DELIMITATION OF THE GENERAL PROBLEM

An appropriate delimitation of the general problem of applying constitutive prescriptions in particular instances of controversy requires, as already suggested, clarity about three different components: the nature of constitutive process, the differentiation of claims,

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<sup>75</sup> See Lasswell, *The Public Interest: Proposed Principles of Content and Procedure*, in *NOMOS V: THE PUBLIC INTEREST* 54 (C. Friedrich ed. 1962). See also M. FOLLET, *CREATIVE EXPERIENCE* (1924); M. FOLLET, *DYNAMIC ADMINISTRATION* (1942).

<sup>76</sup> 384 U.S. at 531-32 (dissenting opinion).

and the specification of the different intellectual tasks involved in application. We consider these components *seriatim*.

### A. *The Nature of Constitutive Process*

Many of the current uncertainties about the nature of constitutive process are reflected in a recent article, *The Notion of a Living Constitution* by Justice Rehnquist,<sup>77</sup> who writes:

Once we have abandoned the idea that the authority of the courts to declare laws unconstitutional is somehow tied to the language of the Constitution that the people adopted, a judiciary exercising the power of judicial review appears in a quite different light. Judges then are no longer the keepers of the Covenant; instead they are a small group of fortunately situated people with a roving commission to second-guess Congress, state legislatures, and state and federal administrative officers concerning what is best for the country.<sup>78</sup>

From a different perspective, however, our Constitution can be observed to be not merely the document of 1789, however important, or a diffuse mass of contemporary expectations about the requirements of decision, but rather a continuous process of communication and collaboration, beginning before 1789 and coming down to date, which establishes and maintains the basic features of authoritative decision in the body politic.<sup>79</sup> It is the totality of this cumulative process of communication and collaboration, and not any single component, which identifies authoritative decision-makers, projects basic community policies, creates necessary structures of authority, allocates competences and balances effective power as between the different branches of government, authorizes procedures for the making of the different types of decisions, and thereby secures the flow of

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<sup>77</sup> Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

<sup>78</sup> *Id.* at 698.

<sup>79</sup> This is the conception of the Constitution that infuses Llewellyn's famous article, *The Constitution as an Institution*, *supra* note 19. See also C. TIEDEMAN, *supra* note 10; Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

The conception of a constitution as a continuous process of decision is of course much older than the conception which makes exclusive reference to a single important agreement or document. See Lasswell & McDougal, *Trends in Theories About Law: Comprehensiveness in Conceptions of Constitutive Process*, 41 GEO. WASH. L. REV. 1 (1972) [hereinafter cited as *Trends in Theories*].

Some of the history of conceptions within the United States is outlined in B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967). The older notion is referred to as that of "the constituted—that is, existing—arrangement of governmental institutions, laws, and customs, together with the principles and goals that animated them." *Id.* at 67.

prescriptions and applications which we commonly describe as constitutional law.<sup>80</sup>

Every feature of this process, including all the many different communicators and communicatees who participate in it at many different times, affect the content of the constitutive prescription emerging from the process. Thus, the Supreme Court has been described, by Professor Arthur S. Miller<sup>81</sup> and former Solicitor General Beck,<sup>82</sup> as a "continuing constitutional convention," but it is in truth the whole community, operating through many different official and private spokesmen in multiple channels of communication and influence, that constitutes the continuing constitutional convention. We need only to reflect upon the continuously changing, everyday relationships among the territorial and functional groups in the nation that give support to, or undermine, the expectations of conformity to, or deviation from, current constitutive prescriptions. Every participant in national life can realistically celebrate in some degree, however modest, a role in the making and unmaking of fundamental arrangements. A president, of course, is especially conspicuous, influential and aware of his part in the unending process. It may aid insight to recall President Truman's response when asked at a Yale Law Journal banquet whether he knew any constitutional law. Mr. Truman said: "Hell, I ought to; I made a lot."<sup>83</sup>

### B. *The Differentiation of Claims*

Comprehensively considered, any claim for the application of a constitutive prescription may be seen to include an assertion about

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<sup>80</sup> See C. FRIEDRICH, *CONSTITUTIONAL GOVERNMENT AND DEMOCRACY* (1968), wherein the author states:

The concept of a living constitution makes short shrift of such conventional notions as that of a recent text which suggests "The Constitution" to be a selection of the legal rules which govern the government of that country and which have been embodied in a document. Not only may the living constitution be embodied in many documents, but in good measure any functioning constitution is, like the living law of which it is a part, embodied in convention and customs, in ways of acting which may eventually become fixed, as did the pocket veto of the American President, or which remain "understood" without such fixation.

*Id.* at 29-30.

<sup>81</sup> Miller, *Notes on the Concept of the "Living Constitution,"* 31 *GEO. WASH. L. REV.* 881, 885 (1963). Professor Miller exhibits some confusion about distinguishing "result orientation" and the rational calculation of the policy consequences of decision.

<sup>82</sup> J. BECK, *THE CONSTITUTION OF THE UNITED STATES* 221 (1928).

<sup>83</sup> A residue in the memory of one who was there.

It would appear that scholars and decisionmakers alike must make a personal commitment in their choice of a conception of the Constitution, as well as in relation to particular decisions.

certain facts in social interaction, a demand for the application of an alleged constitutive prescription or prescriptions, and a request for a remedy. Such claims are, further, commonly presented in, at the least, contraposed pairs. A framework of inquiry which is designed to facilitate employment of the intellectual tasks necessary to rational decision must find a way of describing, from third-party perspectives, the factual component of these claims in categories raising comparable policy issues.<sup>84</sup> Much of the mysticism and confusion that attends the contemporary discussion of the *De Funis*<sup>85</sup> and *Bakke*<sup>86</sup> cases might, for example, be removed if the claims in these cases were described in terms of factual differentiation, raising the policy issue of reasonableness in common interest, rather than in the question-begging terms of "discrimination" or "reverse discrimination."<sup>87</sup>

The claims that are put forward for the application of constitutive prescriptions range among both the component features of the constitutive process itself and the features of all the different community value processes protected by law. In the discussion above we indicated one way of specifying the basic features of constitutive process; and in studies of world public order, in collaboration with associates, we have suggested categories for describing in detail the characteristic features of any constitutive process.<sup>88</sup> Cultural anthropologists and other social scientists have bequeathed us modalities for the systematic and precise description of value shaping and sharing.<sup>89</sup> Elsewhere, we have sought to indicate how these modalities can be employed in a comprehensive description of the factual components in human rights claims, which, in fact, include most public order claims.<sup>90</sup> A sampling of casebooks and periodical literature suggests that inquiry about constitutive application is still characteristically organized in terms of ambiguous legal technicality.

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<sup>84</sup> It was the American legal realists who first emphasized the importance of explicitly and clearly formulating a framework of inquiry in terms of social process events, comparable through time and across community boundaries. See Lasswell & McDougal, *The Relation of Law to Social Process: Trends in Theories About Law*, 37 U. PITT. L. REV. 465 (1976).

<sup>85</sup> *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

<sup>86</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

<sup>87</sup> See A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 62-68 (1976).

<sup>88</sup> See McDougal, Lasswell & Reisman, *The World Constitutive Process of Authoritative Decision*, in 1 *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* 73 (C. Black & R. Falk eds. 1969).

<sup>89</sup> See Lasswell & McDougal, *Trends in Theories*, *supra* note 79 and sources cited therein.

<sup>90</sup> See McDougal, Lasswell & Chen, *Human Rights and World Public Order: Human Rights in Comprehensive Context*, 72 NW. U.L. REV. 227 (1977) [hereinafter cited as *Human Rights in Comprehensive Context*]; McDougal, *Principles of Content and Procedure*, *supra* note 70, at 406 app. I. (offers a concise tabular outline).

### C. *The Specification of the Tasks of Application*

The specific intellectual tasks required in the application of constitutive prescriptions are, in no small degree, to be understood as a function of the character of these prescriptions. The complementarities, ambiguities, and incompleteness of the prescriptions that emerge from, or are created by, constitutive process are matters of common knowledge.<sup>91</sup> In an all pervasive complementarity, grants of competence are balanced by limitations upon competence; thus, powers over war and peace must be exercised in accordance with a bill of rights. Similarly, the competence of the center, the federal government, is, in geographic allocation, balanced against that of the peripheries, the states. Again, in broad allocations of functional competences, "legislative," "executive" and "judicial" institutions are arrayed in vague, tri-polar equipoise. The ambiguities of the principal terms employed in all these complementary prescriptions, such as "treaties," "due process," "equal protection" and so on, are, further, more invitations to, than specifications of, decision.<sup>92</sup> The incompleteness in textual prescription about foreign affairs and basic human rights, for familiar examples, must require, if the nation is to endure, elaboration from other sources.<sup>93</sup>

In the light of all these difficulties, it is clear that the application in particular instances of constitutive prescriptions can be no simple automatic process, as Justice Roberts once perceived it, in which the applier merely interprets the literal words of some text, even a text as important as that of 1789.<sup>94</sup> In any particular instance an applier is

<sup>91</sup> These characteristics do not seem to be questioned even by the proponents of the most literal, textual approach. Any good casebook offers ample documentation.

<sup>92</sup> Professor Thomas Grey generalizes with respect to a number of areas:

In the important cases, reference to an analysis of the constitutional text plays a minor role. The dominant norms of decision are those large conceptions of governmental structure and individual rights that are at best referred to, and whose content is scarcely at all specified, in the written Constitution—dual federalism, vested rights, fair procedure, equality before the law.

Grey, *supra* note 79, at 707-08.

<sup>93</sup> See, e.g., McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy* (pts. 1-2), 54 YALE L.J. 181, 534 (1945) (indicates difficulties in ascertaining the content of our constitutive prescriptions as to the scope of the treaty power and as to the allocation of competence to make international agreements other than treaties); McDougal, Lasswell & Chen, *The Aggregate Interest in Shared Respect and Human Rights: The Harmonization of Public Order and Civic Order*, 23 N.Y.L. SCH. L. REV. 183 (1977) (discusses some of the necessary judicial supplementations with respect to human rights).

<sup>94</sup> It will be recalled that Justice Roberts said:

When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the Government has only one



commonly confronted both with competing claims by different parties about highly complex or obscure facts and with a vast body of allegedly relevant prescriptions. The range of intellectual activities required in the application of constitutional, as well as other, prescriptions we have elsewhere described as follows:

The responsible performance of the application function . . . may require a whole sequence of activities or choices, including: the exploration of the potential facts and their larger context; the exploration of the potential policies apparently relevant to the provisional focus upon the facts; the characterization of the facts and determination of their varying degrees of relevance; the selection from among the potential policies of those to be applied and the detailed relation of these policies to the facts regarded as relevant; and finally, the formulation and projection of the decision, with indication of measures appropriate to securing conformity. For an applier genuinely dedicated to the clarification and implementation of the common interest, the necessities of an informed and rational, yet still personal, choice must stalk every act in this sequence.<sup>95</sup>

The particular task in application with which we are presently concerned, that of exploring and clarifying the policy content of alleged constitutive prescriptions, is left largely vague and unspecified, in the contemporary literature. Both official appliers and other evaluators observably wander and waver among differing conceptions of "interpretation," "the ascription of meaning," and "free creation." For the purposes of a more detailed examination of what is involved and of considering the possible improvement of intellectual procedures, we would suggest that the comprehensive task of exploring possible policies might be more precisely categorized, as in relation to international agreements, in terms of three sub-tasks: interpreting, supplementing, and integrating.<sup>96</sup>

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[*sic*] duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.

United States v. Butler, 297 U.S. 1, 62-63 (1936) (footnote omitted).

<sup>95</sup> McDougal, *Principles of Content and Procedure*, *supra* note 70, at 393.

<sup>96</sup> Justice Cardozo clearly recognized the necessity for all three of these tasks. Thus, in discussing "the judge as legislator," he wrote:

I am not concerned to vindicate the accuracy of the nomenclature by which the dictates of reason and conscience which the judge is under a duty to obey are given

1. *Ascertaining the Community Expectations Expressed in Particular Prescriptions.*—This task requires a genuine effort to achieve the closest possible approximation to the contemporary expectations, about the requirements of decision, created in the general community as a residue of the whole flow of constitutive communication throughout our history. No other goal is compatible with the conception that authority rightfully comes from the members of the body politic. The adequate performance of this task requires, therefore, a systematic and disciplined survey and assessment of all features of the constitutive process and its context that may affect relevant communication. The significance for community expectation of any particular feature of the more general process of prescriptive communication depends upon its interrelations with all the other features of that process.

2. *Supplementing Ambiguous and Incomplete Communications.*—The task of supplementation requires the remedying of the inevitable gaps and ambiguities in prescriptive communications by reference to more general basic community policies about the shaping and sharing of values. In conventional terms, this task is sometimes described as the exercise of “reason” or the application of precedent or analogy. Its adequate performance demands, however, the disciplined employment of a comprehensive set of procedures, including, at least: specification of each of the opposing claims about prescription in terms of the interests sought to be protected and the particular demands for authoritative decision; formulation of the different options open to the decision-maker or other evaluator, which may cover a wider range than the decisions demanded by the opposing parties; estimation of the consequences of alternative choices among possible options upon the aggregate inclusive interests of the general community and the exclusive interests of the particular parties; and, choice of the option which best promises to promote the aggregate long-term common interest.

3. *Integrating Particular Expectations with Overriding Community Policies.*—In a pluralistic, democratic community, constitutive prescriptions are, of necessity, expressed, as we have observed in relation to our own basic prescriptions, in complementary form. An historic function of constitutive prescriptions is that of formulat-

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the name of law before he has embodied them in a judgment and set the *imprimatur* of the law upon them. . . . What really matters is this, that the judge is under a duty, within the limits of his power of innovation, to maintain a relation between law and morals, between the precepts of jurisprudence and those of reason and good conscience.

B. CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 133-34. See also *id.* at 14-15.

ing differing intensities in demand for different values and of establishing priorities in the protection of contrasting, even competing, values. It is, thus, evident that in many, if not most, instances an applier or evaluator cannot escape the exigencies of choice among equally authoritative prescriptions in decreeing the application of some and rejecting others. The adequate performance of this task requires, hence, not merely intellectual procedures comparable to those recommended for supplementing expectations, but also the careful identification both of the priorities among demanded values and of the situations in which such priorities are relevant.

It sometimes escapes notice that these latter tasks, supplementing and integrating, are always necessary and, ultimately, require a personal commitment to values. In any particular instance an applier is confronted, not merely with constitutive prescriptions, but with other prescriptive forms, such as international agreements, statutes, precedents and customary law (inferences from behavioral patterns). All of these other prescriptive forms share with constitutive prescriptions the characteristic difficulties of complementarity, ambiguity and incompleteness. In attempting to supplement and integrate all the additional prescriptive forms, the responsible applier may draw upon the most comprehensive set of community expectations that emerge as a consequence of the constitutive process. When, however, the applier reaches for these most comprehensive expectations he can only find, as we have indicated, that these too are complementary and not without confusion. At the end of his labors the decision-maker cannot, thus, avoid a personal commitment to a choice among values; no absolute—principle or computer—has yet been discovered that can make the choice for him.<sup>97</sup> Yet, this need not carry the implication, as some have insisted, that the decision-maker's choice must be arbitrary; quite the contrary, the commitment can be made both disciplined and systematic in relation to the common interest.

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<sup>97</sup> Though Justice Cardozo insisted that a judge must look, in the first instance at least, to community values and avoid "an axiology that is merely personal and subjective," he appears to have recognized the need for personal commitment. He wrote: "Objective tests may fail him, or may be so confused as to bewilder. He must then look within himself." B. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 55-56 (1928) [hereinafter cited as *PARADOXES*]. Earlier he had written: "The perception of objective right takes the color of the subjective mind. The conclusions of the subjective mind take the color of customary practices and objectified beliefs. There is constant and subtle interaction between what is without and what is within." B. CARDOZO, *JUDICIAL PROCESS*, *supra* note 1, at 110-11.

Elsewhere, Justice Cardozo quotes with approval a private letter from Professor Thomas Reed Powell that, "We must 'spread the gospel that there is no gospel that will save us from the pain of choosing at every step.'" B. CARDOZO, *GROWTH*, *supra* note 2, at 64-65 (footnote omitted).

### III. THE LOCATION OF PARTICULAR PROBLEMS IN COMMUNITY CONTEXT AND THE POSTULATION OF POLICIES

Decisions in application of constitutive prescriptions are a response to events in a community process of value shaping and sharing, are affected by the contours and details of this same process and, in turn, have consequences for the future shaping and sharing of values. All community values are at stake in the continuing flow of applicative decisions, and many, if not all, values may be at stake in any particular application. The challenging tasks of application might be more effectively performed if appliers and other evaluators conducted their operations with the aid of comprehensive and detailed cognitive maps both of the values at stake and of their individual presumptive preferences about the different institutional features of the value processes comprised within the larger community process. There is need for clarity both descriptively, about what values are at stake and, preferentially, about what choices among values are regarded as best serving the common interest. The insistent question for every applier or evaluator is for what basic policy goals is he, as a representative of the larger community, willing to commit himself for guidance in the making of the particular choices with which he is confronted. The applier does an inadequate job if he does not appraise any specific choice in the light of all relevant community policies. "Unless," as Harold Lasswell has written, "tentative value judgments are reviewed in the context of a total conception of the preferred form of social order, unnecessary inconsistencies and omissions occur."<sup>98</sup>

It has been described as the "chief contribution" of Justice Cardozo to legal philosophy that he "made explicit the problems of value implicit in legal doctrines" and, thereby, made "the judicial process an instrument of legal adaptation and not merely the sterile logomachy of a professional technique."<sup>99</sup> Happily, recognition of the necessity in the application of constitutive prescription for a choice among values is increasingly apparent in the literature. One felicitous example of this recognition comes from Professor Thomas C. Grey, who finds that "much of our substantive constitutional doctrine" has "no substantive content."<sup>100</sup> The "broad textual provi-

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<sup>98</sup> Lasswell, *Clarifying Value Judgment: Principles of Content and Procedure*, 1 INQUIRY 87, 94 (1958).

<sup>99</sup> Patterson, (pt. 2), *supra* note 4, at 165.

<sup>100</sup> Grey, *supra* note 79, at 709.

sions," he notes, are invoked, not so much "as the source of the values or principles that rule the cases," but, rather, "as sources of legitimacy for judicial development and explication of basic shared national values."<sup>101</sup> He adds:

These values may be seen as permanent and universal features of human social arrangements—natural law principles—as they typically were in the 18th and 19th centuries. Or they may be seen as relative to our particular civilization, and subject to growth and change, as they typically are today. Our characteristic contemporary metaphor is 'the living Constitution'—a constitution with provisions suggesting restraints on government in the name of basic rights, yet sufficiently unspecific to permit the judiciary to elucidate the development and change in the content of those rights over time.<sup>102</sup>

The difficult question is how does a decision-maker proceed when the problem is to choose and specify values? One possible expedient; we suggest, is the explicit postulation of a comprehensive set of goal values about both public order and constitutive process, and by the systematic employment of such postulations, through various interrelated skills, in the detailed relation of prescriptions to particular problems. In this way appliers could be expected to increase both the rationality of their choices in terms of their own preferred values and the candor of their disclosure to the general community. The task of estimating the consequences of any particular application is, as the late Felix Cohen once said, an "infinite" one if the calculator does not operate with "discriminating" criteria of what consequences are "important."<sup>103</sup>

It may be emphasized that an act of postulation is far from being an arbitrary matter. An act of postulation in the constitutive process is to state a commitment to a set of preferred events which are to be sought in the operation of the decision processes of the community. Since value consequences, whether desired or undesired, are inseparable from decision, a decision-maker who seeks to attain as much rationality as possible, will endeavor to pursue desired value consequences with full self-awareness rather than inadvertence. All preliminary, tentative formulations in the act of postulation will be subjected to disciplined evaluation by procedures, such as are outlined below, for their possible consequences upon the shaping and

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 848 (1935).

sharing of values. The most dedicated decision-maker will, moreover, himself take responsibility for the value consequences of his choices and avoid modes of statement that mask responsibility by attributing the commitments to other entities and sources, whether transempirical or empirical.<sup>104</sup>

The public order goal values which we recommend for postulation are of course those today commonly described as human dignity, or a free society, and which are incorporated with varying degrees of explicitness and completeness both in our constitutive process and in the many emerging global prescriptions relating to human rights. The more detailed specification of presumptive preference would extend beyond general postulation of the greater production and wider sharing in all value processes to an itemization, value by value and phase by phase, within each value sector. Elsewhere in studies of human rights, in collaboration with associates, we have suggested both comprehensive and detailed categorizations designed to be suggestive of what is required.<sup>105</sup> Any categorizations, whatever the terminology, which can be made comprehensive in reference and given detailed, empirical specification would serve equally well.

The literatures of constitutional law, political thought and jurisprudence offer a vast reservoir of potential relating to every feature of constitutive process.<sup>106</sup> The suggestion we make is that the quality of application, and hence of public order, might be greatly improved if applicers made more explicit their own basic preconceptions about the differing features of such process.<sup>107</sup>

#### IV. THE SYSTEMATIC EMPLOYMENT OF A COMPREHENSIVE SET OF PRINCIPLES OF CONTENT AND PROCEDURE

The possibility of achieving rational applications in the common interest might, we suggest, be increased if applicers and other evaluators had at their disposal a comprehensive set of principles, both of content and of procedure, designed to facilitate the performance of all the necessary tasks in application. Principles of content could guide the choice and examination of subject matter relevant to

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<sup>104</sup> See Lasswell & McDougal, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362, 393 (1971) (make necessary distinction between explicit postulation and exercises in faith and derivation).

<sup>105</sup> See McDougal, Lasswell & Chen, *Human Rights in Comprehensive Context*, *supra* note 90; McDougal, *Principles of Content and Procedure*, *supra* note 70, at 406 app. I.

<sup>106</sup> See Lasswell & McDougal, *Trends in Theories*, *supra* note 79.

<sup>107</sup> See McDougal, *Principles of Content and Procedure*, *supra* note 70, at 415 app. II (outline of possible preferences in relation to global constitutive processes).

appraising the alternatives in policy open to an applier; principles of procedure could offer agenda and techniques for bringing pertinent content to the focus of an applier's attention. The purpose of both types of principles would be to aid decision-makers and evaluators in systematic canvass of all relevant processes of communication for genuine community expectations about constitutive prescription and in bringing to bear their more detailed specifications of common interest in the goal values of human dignity.

It may be worth recalling that at earlier stages in our national history the most authoritative and influential commentators upon constitutional law devoted much attention to expounding and improving principles of constitutional interpretation.<sup>108</sup> Quite recently an insightful young scholar has revived this tradition by organizing an entire casebook around the theme of how to improve the making of constitutional decisions.<sup>109</sup>

The general type of principle we would recommend may be indicated by brief reference to possible principles both of content and of procedure.<sup>110</sup>

### A. Principles of Content

The most general principle, that of contextuality, is that in performing the tasks of application, preference should be given to alternatives that have been considered and evaluated in the larger context of the processes of constitutive prescription, claim and application and of the factors affecting all such processes.

#### 1. Principles Relating to the Constitutive Process.

##### (a) Ascertaining expectations

(i) Develop principles which refer to every feature of the processes of constitutive prescription, indicating the presumptive relevance of such features for shared expectations about the content, authority and control of alleged prescriptions.<sup>111</sup>

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<sup>108</sup> E.g., T. COOLEY, *CONSTITUTIONAL LIMITATIONS* (8th ed. 1927); 1 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 294-337 (4th ed. T. Cooley ed. 1873); Beth, *supra* note 16, at 108; ten Broek, *supra* note 10.

<sup>109</sup> P. BREST, *supra* note 9.

<sup>110</sup> These suggestions are adapted from an earlier formulation designed for the application of human rights prescriptions. McDougal, *Principles of Content and Procedure*, *supra* note 70, at 402. See also M. McDUGAL, H. LASSWELL & J. MILLER, *supra* note 8, at 35.

My only purpose here is to indicate a broad outline of the kind of formulations that might serve as helpful guides.

<sup>111</sup> It is not without relevance that most of our inherited principles of constitutional interpretation make reference to different features of this process of communication. What is needed is their sharper refinement and systemization.

(ii) Give effect to the expectations shared by communicators and communicatees in the process of constitutive prescription in so far as these are compatible with the goal values of human dignity.

(b) Supplementing expectations

(i) Observe the expectations created by prescriptive communications for gaps, ambiguities, and contradictions.

(ii) Remedy any inadequacies in prescriptive communications by reference to the postulated goal values of human dignity (both public order and constitutive).

(c) Integrating expectations

(i) Observe any priorities in intensities in demand among different constitutive prescriptions.

(ii) Give effect to ascertained priorities in intensity in demand in so far as such priorities are compatible with the postulated goal values of human dignity.

### 2. *Principles Relating to the Process of Claim.*

(a) Construct principles which categorize the different types of controversies in terms of the values affected.

(b) In performing, interpreting, supplementing, and integrating tasks note the relation of different types of factual contexts to different basic community policies.

### 3. *Principles Relating to the Process of Decision.*

(a) Employ principles which canvass every feature of the process of decision for its potential relevance to recommended outcomes and policy effects.<sup>112</sup>

## B. *Principles of Procedure*

### 1. *The Contextual Principle.*

(a) Employ procedures appropriately calculated to bring all relevant content to the focus of attention in the order best adapted to exhibiting relevance. In appraisal of claims and in performance of all intellectual tasks give priority to procedures which fully and system-

It is, for example, by the principle of interpretation by "major purposes" that Judge Learned Hand makes lawful the practice of constitutional review itself. See L. HAND, *THE BILL OF RIGHTS* 11, 15 (1958).

<sup>112</sup> Cf. M. MCDUGAL, H. LASSWELL & J. MILLER, *supra* note 8, at 61-64 (suggesting principles for international decision processes). It is in the formulation of these principles that appropriate emphasis, if any, might be given to the passive virtues.



atically take the larger context into account. Avoid a fragmented approach which rigidly fixes upon a few features of the context. Although continuously engaging in evaluation, suspend final judgment until examination of the whole of the relevant context.

### 2. *The Principle of Economy.*

(a) Adjust the time and facilities devoted to application to the importance of the values at stake in the controversy and to community policies.

### 3. *The Principle of Manifest (Provisional) Focus.*

(a) For a provisional focus begin with the manifest, articulated demands of the parties themselves. For each party note the claims made about the facts, about relevant constitutive prescriptions and other policies, and about appropriate decisions and measures in application.

### 4. *The Principle of Clarified Focus.*

(a) Explore both asserted facts and larger context, independently of the perspectives of the parties, from the standpoint of a disinterested observer. Evaluate the different versions of potential facts and make an independent characterization. Note the whole of the potentially relevant prescriptions and the range of potential choices in decision.

### 5. *The Principle of Observing Trends in Past Experience.*

(a) Observe the successes and failures, in terms of approximations to general community policies, that have previously been achieved on comparable problems by invocation of the varying alternative prescriptions and by alternatives among the options in decision.<sup>113</sup>

### 6. *The Principle of Realistic Orientation in Factors Affecting Decision.*

(a) Observe the factors in predisposition and environment that appear to have affected past applications.

(b) Appraise the probabilities of these and other factors affecting possible future outcomes in decision.

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<sup>113</sup> This principle includes Justice Cardozo's methods of "historical development" and "tradition." B. CARDOZO, *GROWTH*, *supra* note 2, at 61-62; B. CARDOZO, *JUDICIAL PROCESS*, *supra* note 1, at 30-31.

7. *The Principle of Observing the Constraints of Future Probabilities.*

(a) Construct alternative future possibilities in decision and decision impact.

(b) Estimate the relative costs and benefits, in terms of general community policies, of the various alternatives in decision.

(c) Calculate the probable net costs and net benefits of each option.<sup>114</sup>

8. *The Principle of Evaluating and Inventing Options in Decision.*

(a) Relate all options to basic general community policies and choose the option that will promote the largest net aggregate of common interests.<sup>115</sup>

It is not unusual to hear the objection, whenever the several dimensions of decision process are given systematic mention, that these dimensions are so complicated that it is impracticable to suppose that they can be taken into account in particular controversies. Such an objection is, however, lacking in rationality in several ways. Most frequently, it conveys the false impression that to spell out a descriptive, analytic theory is to invent the complications of the process of reality; it is not the simplifying theory but the facts of life that create the complexity confronting decision. Such an objection ignores,

The traditional doctrine of "precedent," emphasized by so many commentators, obviously builds upon the wisdom of making the best possible use of past experience, as well as upon metaphysical notions of "binding." Past decisions alone, however, may not be adequate guides to rational future decisions. Helpful suggestions about the use of the past are offered in C.A. MILLER, *supra* note 16; Wofford, *The Blending Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502 (1969).

<sup>114</sup> Justice Cardozo noted that his emphasis upon history was derived from a concern for the future. He wrote:

I do not mean that the directive force of history, even where its claims are most assertive, confines the law of the future to uninspired repetition of the law of the present and the past. I mean simply that history, in illuminating the past, illuminates the present, and in illuminating the present, illuminates the future.

B. CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 53.

<sup>115</sup> Justice Cardozo indicated that his method of "logic" or "philosophy" was much more than syntactic and he recommended the systematic employment of all methods. B. CARDOZO, GROWTH, *supra* note 2, at 62-63. Elsewhere he wrote: "For the creative process in law, and indeed in science generally, has a kinship to the creative process in art. Imagination, whether you call it scientific or artistic, is for each the faculty that creates." B. CARDOZO, PARADOXES, *supra* note 97, at 59.

A thoughtful effort to enlarge this vision and to suggest fruitful lines for inquiry appears in D. HOROWITZ, THE COURT AND SOCIAL POLICY (1977).

further, the selective, guiding and time-saving functions of an explicit outline of what is to be done. Appropriate principles of content and procedure can provide modalities for exploring information that is often overlooked or, perhaps worse, inflated out of all proportion in less comprehensive and balanced approaches. A place can be found for all the significant variables interacting in the social process at any relevant cross-section in time, with evaluation in the light of the competence of those who make primary observations and employ analytic methods. The responsible decision-maker will, of course, be keenly aware of the constraints of time; as the consideration of any particular controversy unfolds, the decision-maker's map may become more definite about what he can hope to learn by giving further attention to specific sources of observation or by further utilizing available procedures. Expectations of comparative advantage shift, and as marginal expectations rise or fall, it becomes progressively more apparent when to stop considering and when to make final commitment.

It is not, as has been emphasized, my suggestion that any intellectual strategies, however systematically developed and carefully refined, can enable an applier of constitutive prescriptions to dispense with a final creative choice. The necessities for such a choice are inherent in the materials with which he must work and the making of such a choice is his unique responsibility. What I do suggest is that the employment of such strategies, appropriately developed and elaborated, might enable an applier better to know what options are open to him and more rationally to make his choice among such options. Though a personal commitment by the applier is inescapable, such a commitment, when achieved by systematic and disciplined procedures is the most nearly attainable opposite of arbitrariness. For appliers genuinely dedicated to the common interest, effectively designed principles, employed in appropriate combination, might serve both to minimize the arbitrariness of choice and to establish a comprehensive and coherent frame of reference for the more effective relation of particular choices in application to the overriding goal values of an increasingly demanded public order of human dignity.

It is sometimes said that nothing is more practical than good theory; conversely, it might be added that few things are more destructive than bad theory. One fundamental misconception that has caused some observers to refuse to face the complexities that in fact inhere in the application of constitutive prescriptions and to seek escape in "principled decision" is, as described above, the belief that constitutional review by the Supreme Court is undemocratic. Formal

voting is not, however, as was noted by Professor Rostow,<sup>116</sup> the only modality by which people express their views in our contemporary community. In deep appreciation of the all-pervasive importance of customary law in any community, Julian long ago remarked: "After all, what is the difference whether the people makes known its will by a vote, or by things themselves and by acts."<sup>117</sup> What makes constitutional review democratic is a widely shared community expectation, a comprehensive and continuing plebiscite, about how decisions are to be taken. A second misconception that appears to inspire many of the advocates of "principled decision" is that the principal goal sought by our forefathers and by us in a balancing of power among different branches of the government is that of economy or efficiency and that the courts should not do what the Congress or the state legislatures might be able to do better. The more fundamental purpose for which the basic features of our constitutive process, including the balancing of power, have been developed through millenia of effort is, however, not that of efficiency, but rather that of freedom and of the protection of individual human rights.<sup>118</sup> Finally, it would appear to be a gross misperception to suggest that our maintenance of constitutional review by courts makes the judiciary "more equal" than other branches of the government, disturbing that delicate balancing among the branches necessary to freedom.<sup>119</sup> The competence of courts to initiate policy is more limited than that of the other branches of the government, and judges, like other officials, must operate within the constraints of the effective power processes of the community which insure that they cannot depart too far, or too long, from general community expectation. The problem of applying constitutive prescriptions in particular instances of controversy is indeed a complex one, but there would appear no rational alternative, if we are to maintain the historic balancing of power that has served us so

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<sup>116</sup> E. ROSTOW, *supra* note 54, at 114-46.

<sup>117</sup> DIGEST 1.3.32.1, *quoted in* C. McILLWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* 64 (rev. ed. 1947).

<sup>118</sup> *See* W. GWYN, *THE MEANING OF THE SEPARATION OF POWERS* (1965); K. LOEWENSTEIN, *POLITICAL POWER AND THE GOVERNMENTAL PROCESS* (2d ed. 1965); Lasswell & McDougal, *Trends in Theories*, *supra* note 79.

<sup>119</sup> The argument by Professor Frank Strong in *President, Congress, and Judiciary: One is More Equal than the Others*, 60 A.B.A.J. 1050 (1974), would appear to be infected by somewhat absolutist and mechanical conceptions of the "separation of powers" and "equality," to minimize the necessarily creative role in any application of constitutive prescriptions, and to ignore the effective constraint within which the Supreme Court must operate. The superlative historical review in Strong, *Bicentennial Benchmark: Two Centuries of Evolution of Constitutional Processes*, 55 N.C. L. REV. 1 (1976) does not add persuasiveness to the argument.

well, to facing it in all its complexity and seeking to bring to bear all possible intellectual resources in improved performance.

What we need most is a contemporary Cardozo and a new, and more constructive, American legal realism.