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General Principles of Constitutional Adjudication: The Political Foundations of Constitutional Law

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GENERAL PRINCIPLES OF CONSTITUTIONAL ADJUDICATION: THE POLITICAL FOUNDATIONS OF CONSTITUTIONAL LAW

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It is difficult to formulate the general principles governing constitutional adjudication. Two preliminary problems are the role of the observer and the nature of the observed. The position taken in this article is that the observer's role is to understand and to explain from an external point of view. Undoubtedly, there can be a formulation of the general principles from an internal point of view as Professor H. L. A. Hart would advocate. To move toward an understanding and not just a formulation, however, it seems satisfying to be ". . . content merely to record the regularities of observable behavior. . . ." [1]

To move toward an understanding does not require prediction. We can even be content to identify interesting variables of the system we are observing, and with this identification understand and explain without going as far as to predict. It is hoped that these variables, "observable regularities of conduct, predictions, probabilities, and signs," [2] will give an insight to the general principles of constitutional adjudication. This approach is an "extreme external point of view" [3] but is justified if it increases our understanding.

Hart points to the danger of missing a dimension of understanding by defining the internal aspect of obligatory rules out of existence.[4] It is submitted that Hart does not understand the methodology of the social sciences and that the study of law is one of the social sciences. Any observer is an external observer. This has been realized at least since the dissatisfaction with the introspectionist school of psychology. Hart is pointing to a small area of behavior, the obligatory nature or rules, which should also be studied. This study also has to be from an external point of view.

There is a difference between "law" and "the study of law." It

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1. HART, THE CONCEPT OF LAW 87 (1961) [hereinafter cited as HART].
2. *Id.*
3. *Id.*
4. *Id.* at 86-88.

is obvious that a judge while within the system cannot act his role by defining rules of law as a prediction of what he will do.[5] The musical conductor cannot perform his role by announcing mathematical formulae which describe the piece of music to be performed. The judge likewise performs within the system. The lawyer's role in the system is, in part, to predict for his client, but the lawyer does not predict in terms of how he is going to predict. Hart does a masterful job in giving understanding to the nature of this legal system, but his approach is also necessarily external. He is doing the same thing as the predictive theorists do, *i.e.*, externally studying the law.

The following discussion externally views the legal system focusing on the Supreme Court and constitutional adjudication. It will be in a manner similar to Hart's, pointing to significant variables of the system. Ideally a mature analysis would approach an attempt at prediction.[6] The confusion enters when the predictive theorists call their prediction "law," but this is the way they are using the word. The thrust of Hart's criticism is to point out another usage of the word "law"—the internal obligatory rules themselves. This does not mean that the predictive theorists or Hart are wrong. The important question is: Which approach is more useful in the study of the nature of law? Undoubtedly both add understanding to the study. It is hoped that the approach in the following discussion also adds an insight.

Sources of General Principles

Besides the preliminary problem of the role of the observer, there is the question of the nature of general principles. This might be discussed in a metaphysical context or in terms of a classification of

5. Hart recognizes this. *Id.* at 143.

6. For a short discussion of the uses of systematic theory and prediction in the social sciences see the preface to M. Kaplan, System and Process in International Politics at xi-xviii (1957). The uses of reducing a vast amount of data on the behavior of the Supreme Court as seen through its decisions to a set of relatively orderly propositions are that it: 1) permits an explicit statement of variables; 2) permits integration of variables from other disciplines; 3) helps direct research to all relevant variables; and 4) is a method for comparing subject matters. When a set of propositions is a theory, and is logical and empirically grounded, then one should be able to predict modal behavior within a defined system, *i.e.*, one should be able to predict conditions under which the system will be stable, the conditions under which it will be transformed, and the kinds of transformation likely. The discussion here will only assess the variables and conditions of stability. Even if prediction were attained, prediction per se is not the ideal object sought; prediction is only an operational test of systematic theoretical knowledge which is the ideal object.

norms with principles occupying one category. For operational convenience this article uses the sources of a principle as an index of its nature. Along this vein there are several possible approaches. One approach might be to examine the opinions of the Court and see what the Justices say their general principles are. This would probably be the traditional approach of the lawyer. Another approach might be to evaluate what morally ought to be the general principles. A moral philosopher might take this approach. An introspectionist might want to determine what the Justices think their general principles are, apart from what they say they are. The approach in this article is to try to construct a system of interesting variables that satisfy our quest for understanding. Whether such a system exists "out there" is irrelevant.[7] To define a system which systematically fits in with the rest of our knowledge and which is useful is the nature of all knowledge.[8] These various approaches can be associated with the various schools of jurisprudence.[9] The approach of this article is under the sociological school, looking at law as it functions with the needs of society.[10]

Existence of General Principles

A general principle has no legal reality within the legal system. It is not a rule which has obligatory force. It is neither a primary or secondary rule in the language of Hart. It tends to be a secondary rule, but in no sense is it an authoritative rule for recognition of primary rules of obligation. It especially approaches being a secondary rule when the Court refers to it in trying to justify obligatory change in the static legal system. A general principle is simply an approach, a postulate, a canon of interpretation, or a guideline. It is a starting point for legal thinking. The Court refers to these principles in opinions but they have no independent existence as part of the internal legal system. When a Justice refers to these principles in explaining decisions, he is explaining as a social scientist and not performing his legal role.

A general principle is a proposition, a variable, which helps explain

7. For a rejection of "natural systems," see D. Easton, A Framework for Political Analysis 29-30 (1965).

8. All our knowledge is based on artificial constructs, *i.e.*, theories. There is never certainty, only a theory which temporarily more adequately and simply explains a phenomenon. See H. Margenau, The Nature of Physical Reality (1950).

9. For a useful precis of these schools, see 1 R. Pound, Jurisprudence 71-90, 291-94 (1959).

10. *Cf.* McDougal, *Law as a Process of Decision: A Policy-Orientated Approach to Legal Study*, 1 Natural L.F. 53 (1956).

change in the system. We need not be confined to the explanations given by the Justices. We can construct our own system of principles which have explanatory power. It is submitted that the following analysis has a superior explanatory power to that of Hart's in relation to the legal concepts with which the law is concerned within the legal system and to the concepts of political theory.[11] This is so because of a clearer recognition of what is meant by internal and external, and by the addition of general principles to primary and secondary rules. "The union of primary and secondary rules is at the center of a legal system; but it is not the whole, and as we move away from the center we shall have to accomodate . . . elements of a different character." [12] Constitutional adjudication moves away from this legal center. The elements we shall have to accommodate stem from its political foundations.

A Political System

A general principle as here defined is a variable in the legal system which we as observers choose for its explanatory power in relation to the problems in which we are interested. The central problem for this paper is the reconciliation of the rule of law and the creative role of the judicial process. A fruitful approach to this problem is to analyze the variables in terms of systems theory as formulated by Professor David Easton.[13]

Can we use a political analysis for the legal system? From Easton's use of "political," a legal system which makes binding decisions for society is a political system. Ordinarily it is thought that a legal decision does not involve bending to pressures in the society but is decided simply on the basis of predetermined and static primary and secondary rules. On the other hand, a political decision is thought to be one not based on rules, also authoritative for the society, but based on the compromising of pressures of ad hoc influence on the decision maker.[14] A politician may foster policies and ideologies to give continuity to

11. Hart 95.

12. *Id.* at 96.

13. *See* Easton, *An Approach to the Analysis of Political Systems*, 9 World Politics 383 (1957). The reader is urged to consult this article at this point. For greater elaboration, *see also* D. Easton, A Framework for Political Analysis (1965); D. Easton, A Systems Analysis of Political Life (1965). To understand the point of departure of this article one should also refer to M. Kaplan and N. Katzenbach, Political Foundations of International Law (1961) [hereinafter cited as Kaplan and Katzenbach].

14. An excellent short discussion of the distinction of political and legal is in Kaplan and Katzenbach 1-17.

his decisions for the purpose of attaining stability in the system. Is the Supreme Court likewise making binding decisions for our society to attain stability in the face of social pressures which could not be attained by simply making legal decisions based on predetermined and static rules? This is the central point in the current controversy over the Supreme Court. It is perhaps begging the question to proceed with a political systems analysis of their decisions, but it is submitted that this is a useful way to understand the Court from the view of an external observer.

A court changing the common law requirements of commercial law through a decision undoubtedly makes an authoritative binding decision which allocates scarce resources between plaintiffs and defendants in the future. Legal fictions provide an explanation which would allow one to say that the law has been constant as a "brooding omnipresence in the sky," but an external observer might explain the change in results in disputes between plaintiffs and defendants as being effected by a political decision.[15] A new norm is then established providing a new rule for the legal system. The possibility of a political approach for analyzing the dynamics of the Supreme Court is impressive. In many of these legal matters such as commercial law, the Supreme Court has the final word. As the ultimate authority for interpreting many aspects of the legal system, it is often in a position to make changes.[16]

15. This would logically follow although against common sense. If legal decisions are based on rules and there is no rule for the new decision or change from an old rule, especially if it is a reversal, then it follows that it was not a legal decision. Common sense would seem to say that there is not always social pressures forcing a political decision every time there is a slight change from past rules. There need not be pressures, however, for a political decision. Analytically it can be defined that whenever a judge departs from the established rules he is making a political decision. *But cf.* HART 132: ". . . the courts perform a rule producing function . . . ."

16. HART 137: ". . . Bishop Hoadly's famous phrase echoed so often by Gray in *The Nature and Sources of Law,* 'Nay whoever hath an absolute authority to interpret any written or spoken laws it is he who is the lawgiver to all intents and purposes and not the person who first wrote or spoke of them!'" *See also* HART 138-44. At 141 Hart makes several statements which are compatible with the considerations of stability in political systems theory: ". . . there is a limit to the extent to which tolerance of incorrect decisions is compatible with the continued existence of the same game. . . ." However, when applying this dictum to courts Hart simply states that they ". . . are parts of a system the rules of which are determinate enough at the centre to supply standards of correct judicial decision. These are regarded by the courts as something which they are *not free to disregard* in the exercise of the authority to make those decisions which cannot be challenged within the system." HART 141-42 (emphasis added). This explains little. It has the flavor of "instinct." The political systems model, it is submitted, is superior in explaining the stability of this game.

More impressive is its position of ultimate guardianship over the constitutional structure of our country. It can scarcely escape from making political decisions.[17]

The role of the Supreme Court is very political. Those who are quick to criticize the Court fail to consider this peculiar nature of the litigation before the Court. Because there are many that are quick to criticize, it is all the more important that the Court keep a fluid position in the field of constitutional adjudication.[18] Much of the litigation before the Court is of extreme importance and the Court's decisions have far reaching effects beyond the actual litigants. In the United States, the Supreme Court is much more than a body making judicial decisions; it is often making political decisions for our society. Based upon policy considerations in the highest traditions of politics, it lays down rules allocating values and resources for the society. It is at the pinnacle of power in our society for determining the norms of distributive justice. It cannot be expected to make these constitutional decisions entirely on the basis of the rules of the legal game. The Court is expounding a constitution for our society. An attempt is made at attaining stability by emulating the rule of law, but as a politician has to be responsive to his electorate, the Supreme Court has to be responsive to the dynamics of our society. It cannot be responsive by simply following and distinguishing precedents. Its decisions have to be political decisions.

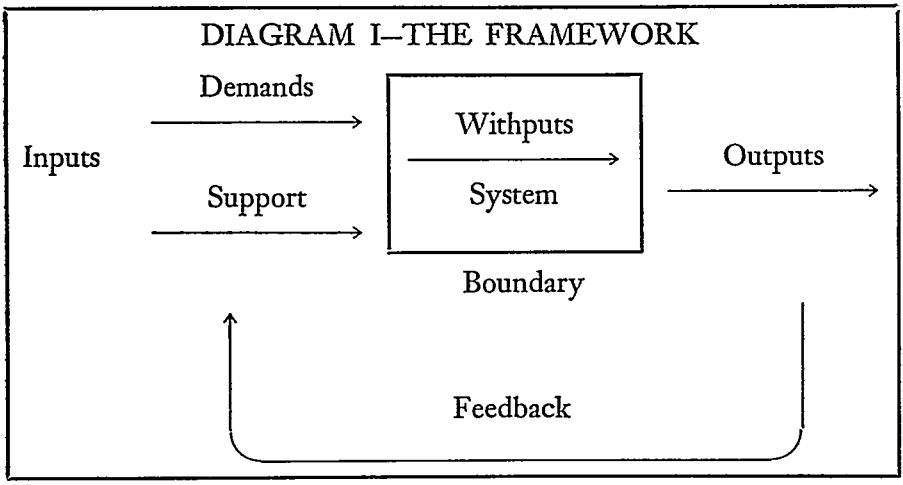
It is from this central position in the interpretation of our political structure that the following analysis of general principles arises. Easton's scheme presents a framework for the variables.

INPUTS

The system under analysis here is the Supreme Court making binding political decisions for our society. The basic inputs for this system are demands and support. The two interesting demands on the Supreme Court are that their opinions be well reasoned in terms of the legal game, *i.e.*, like cases should be decided alike, and yet the Court must also meet the demands of justice. There is a demand to be neutral

17. A classic statement of this is Wade, *The Basis of Legal Sovereignty*, 1955 CAMB. L.J. 189: "[I]t is always for the courts, in the last resort, to say what is a valid Act of Parliament; and that the decision of this question is not determined by any rule of law which can be laid down or altered by any authority outside the courts, it is simply a political fact."

18. *Cf.* Hart, *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).



and also to be result oriented, to be legal and yet to render equity.[19]

The support given to the Court is an important consideration when evaluating how far it can go in meeting or denying these conflicting demands.[20] This support can also be analyzed in the terms which Easton applies to the three-fold structure of the political system, *i.e.*, support for the political community, regime, and government. Support for the community is the agreement to settle differences by action in common. Without this support the very existence of the system would be threatened. Recently there have been suggestions for having procedures to overrule the Supreme Court. There probably is some withdrawal in the South of support for the basic system of a Supreme Court as there is some support to disrupt the whole general political system and engage in another Civil War. These suggestions for change, however, most likely evidence a withdrawal of support for the regime. Support for the regime is support for the basic structure. Many Southerners would replace the Supreme Court with a committee of fifty or some other structure, but still they support the community. They agree to be governed by the decisions of some sort of structured Supreme Court. Support for the government is the support given the actual men occupying the offices of the regime.

19. When these demands became irreconcilable in England, the system divided into law and equity.

20. Of course such a consideration is irrelevant in terms of the legal game. The point of this study is not to say that the Justices actually make such realistic calculations; the point is that as an external observer the theory presented here helps explain the objective behavior of the Court. This is not intended to interpret the subjective thinking of the Justices.

Thus, support can be directed toward three objects in the political system. These are the political community, regime, and government. It should be noted that there is a spillage effect from one object to the other, *e.g.*, much support is generated toward the nine Justices as the government of the system because of their roles in the regime.

OUTPUTS

The basic output of the system is decisions. With this output the system seeks stability. This withinput[21] of requiring stability rather than blindly following the dictates of justice might be repugnant to some natural law advocates. The use of this withinput for understanding does seem useful, however, for the external observer.[22]

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21. For an explanation of this concept, see D. EASTON, A SYSTEMS ANALYSIS OF POLITICAL LIFE 54-56 (1965).

22. The caveat of note 20 above is relevant here. *Cf.* KAPLAN AND KATZENBACH 17-19. Hart says: "We only need the word 'validity', and commonly only use it, to answer questions which arise within a system." HART 105. See also his discussion on efficacy and validity. HART 97-107.

Even an absolutist such as Frantz justifies his position in terms of efficacy. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1439 (1962):

> It is perfectly conceivable that the public interest—even in "security" or in national "self preservation"—might be better served by maintaining freedom of speech than by the policies and programs to which the first amendment is asked to yield. It may be that freedom of speech is safer than repression in the long run.

This position is not based only on efficacy but also accounts for justice in a sense. A form of this conception of law is recommended by McDougal and Lasswell. McDougal, *supra* note 10, at 57-58:

> The distinction we make between decisions that are taken in accordance with the expectations and processes of community authority and other decisions may now enable us to clarify and sharpen the conception of law we recommend. When decisions are taken in the sense that severe deprivations, or threats of such deprivations, are marshalled to support demands or choices without regard for authoritative community prescription, such decisions are not law but naked power or unlawful coercion. When, on the other hand, effective power is not at the disposal of authority, and expectation of decision in accordance with community prescription lacks realism, such authority is not law but illusion. The conception of law that we recommend is, accordingly, that of the process of decision in which authority is conjoined with effective control, in which decisions are both authoritative and controlling.

An interesting analogy to the problem of absolute idealism and considerations of efficacy is the debate between idealism and power politics in international relations. This "great debate" was started by the publication of H. MORGENTHAU, IN DEFENSE OF THE NATIONAL INTEREST (1952). The recent debate in the law journals starting with Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959)

Courts are set up in society to allow an alternative to self-help in disputes when self-help would threaten the stability of the society. The stress is on minimizing litigation and allowing self-help to solve problems when possible. The Supreme Court is sometimes compared to a safety valve for our society—When too much pressure builds up on important constitutional questions affecting the whole society, the Court is used to let off some steam and preserve the stability in the society.

In order to maintain itself, the Court has one dominant general principle that governs constitutional adjudication. The system attempts to attain stability through the general principle of keeping a fluid position: to decide only what they have to decide.

FLUIDITY

The Court does not want to lead itself into blind alleys in following and distinguishing precedents in the judicial process; it wants to be creatively ambiguous. For the sake of optimum stability, it is important that its decisions appear based on the rule of law. Otherwise the Court will subject itself to severe criticisms and attacks as evidenced by recent developments. People have an expectancy that decisions will appear to follow the rule of law to a degree. This appearance is jeopardized when they often have to reverse and contradict themselves. They cannot write Judge Handy opinions,[23] but have to appear to follow the rule of law.

There are several sub-principles that govern constitutional adjudication to help attain a fluid position by allowing the Court to decide only what it has to.[24] These sub-principles effect the appearance of following the rule of law. The Court can determine for itself, in effect,

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parallels this debate. However, there is not an explicit recognition of the political nature of the legal system and thus the debate is couched in terms of "neutral principles" and "creativity." The point of view of the present article is that the Court is a powerful political system which follows its "national interest." However, it follows this interest, *i.e.*, stability, most efficiently when its stabilizing political decisions can coincide with the idealism of neutral principles in the legal game. For an analogous conclusion in the field of international relations *see* R. OSGOOD, IDEALS AND SELF-INTEREST IN AMERICA'S FOREIGN RELATIONS (1953).

23. This is an allusion to the fictional opinions of Judge Handy in L. FULLER, THE PROBLEMS OF JURISPRUDENCE (temp. ed. 1949). This fictitious judge espoused the American legal realists' position from the bench.

24. It is emphasized again that technically, in line with the theoretical framework of this article, these principles only explain and do not *allow* decisions. The Court itself may explain its behavior by the following principles but this does not mean that they are obligatory rules of law.

when the social pressures make it necessary to decide an issue. This makes the Court a very powerful organ in our society. Some of these sub-principles are jurisdictional requirements. The Supreme Court shares many of these with other courts. For example:

1) Only a final order and not interlocutory orders can be appealed;[25]
2) An issue has to be ripe;[26]
3) There has to be a case or controversy;[27]
4) There has to be standing to sue;[28]
5) Litigants have to exhaust administrative remedies;[29]
6) Litigants have to exhaust state remedies before coming to federal court;[30]
7) Political questions are not justiciable;[31] and

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25. The Court has departed from this principle showing that it is not an obligatory rule. *See* Mercantile National Bank at Dallas v. Langdeau, 371 U.S. 555 (1963); Local 438, AFL-CIO v. Curry, 371 U.S. 542 (1963).

26. 3 K. DAVIS, ADMINISTRATIVE LAW TREATIES (1958): "The basic principle of ripeness is easy to state: Judicial machinery should be conserved for problems which are real and present or imminent, not squandered on problems which are abstract or hypothetical or remote." Davis states that the Court has fluctuated in its application of this principle.

27. U. S. CONST. art. III. The reasons given for this requirement are that an advisory opinion: 1) would interfere with the Court's independence; 2) would interfere with the legislative function; and 3) violates separation of powers by combing judicial and legislative functions. An advisory opinion was held unconstitutional in Muskrat v. United States, 219 U.S. 346 (1911). A prayer for a declaratory judgment, however, has been held to constitute a controversy. Nashville, C. and St. L. Ry. v. Wallace, 288 U.S. 249 (1933).

28. 3 K. DAVIS, *supra* note 26, at 209: "When a moving party lacks standing to challenge governmental action before the reviewing court, the usual theory is that the court lacks jurisdiction to consider the validity of the governmental action. But the Supreme Court applies or ignores the theory as it sees fit in any particular case." *See also, id.* at 291-92: "[T]he federal courts have invented a law of standing that is too complex for the federal courts to apply consistently." *See* Tileston v. Ullman, 318 U.S. 44 (1943); Massachusetts v. Mellon, 262 U.S. 447 (1923).

29. The Supreme Court does not invariably enforce this requirement, 3 K. DAVIS, *supra* note 26, at 56.

30. Mooney v. Holohan, 294 U.S. 103 (1935).

31. The Court, moreover, will determine what is a political question. Coleman v. Miller, 307 U.S. 433 (1939). This is not a retreat from Marbury v. Madison, 1 Cranch 137 (1803), but is an even greater assertion of power, *i.e.*, the Court will decide when to apply their power. It has now been said that the Court stayed out of the area of legislative reapportionment too long because of the political question myth. *See* Gray v. Sanders, 372 U.S. 368 (1963).

8) Litigants have to raise any constitutional question at the start and keep raising it on appeal.[32]

This principle of keeping a fluid position is not unique to the Supreme Court. This is an approach of all courts in the legal game, but as the decisions requested become more important in a political context, the more important and the more *constitutional* this approach becomes.

EXPECTANCIES

Besides the jurisdictional sub-principles of the fluidity principle of stability, there is the demand principle to give the greatest moral force to a judgment by meeting the expectancies of the society. These expectancies could vary from society to society. Professor Lon Fuller lists eight such expectancies in our culture:[33]

1) The judge should not act on his own initiative, but on the application of one or both of the disputants;
2) The judge should have no interest in the outcome;
3) The judge should confine his decision to the controversy and should not attempt to regulate the parties' relations going beyond the controversy;
4) The case should involve an existing controversy and not merely the prospect of some future disagreement;
5) The judge should decide the case solely on the basis of the evidence and arguments presented to him by the parties;[34]
6) Each disputant should be given ample opportunity to present his case;
7) The judge should give reasons for his decision;[35] and
8) The judge should proceed according to previously declared rules.

Others could be added, *e.g.*, the judge should be concerned with the real nature of the transaction and not the disguise. These principles are not peculiar to constitutional adjudication.

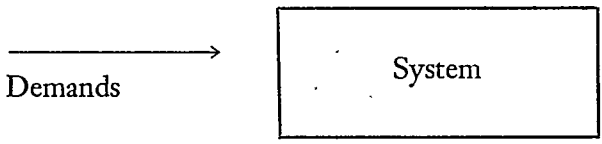
32. Bryant v. Zimmerman, 278 U.S. 63 (1928). One has to even anticipate the unconstitutional construction of a statute by a state court while an appeal is pending. Herndon v. Georgia, 295 U.S. 794 (1935).

33. L. FULLER, *supra* note 23, at 706-08.

34. Civil law countries do not follow this procedure. Sometimes the Supreme Court has been known to decide on the basis of issues not presented by the parties. Sometimes the Court decides in a certain way no matter what is argued.

35. Fuller makes the point that this will lessen the moral force of a decision if it is apparent that the judge did not understand the case. L. FULLER, *supra* note 23, at 708.

DIAGRAM II–DEMANDS



Demand: Justice

General Principle One: Neutrality

Decide like cases alike according to previously announced rules.

General Principle Two: Procedural Due Process

Decide cases through certain procedures that the culture defines as just.

Sub-principles:

Disputants initiate
Disinterested judge
Decisions confined to controversy
Existing controversy
Decision on basis of evidence presented
Ample opportunity to present case
Judge should give reasons

General Principle Three: Equity

Decide with some result orientation in spite of harsh previously announced rules.

Peculiar Constitutional Principle: Creativity

We are looking for principles that explain the Court's behavior in constitutional adjudication. The central question is the purpose of the principle. It is tautological simply to answer that the principle is to explain the outcome of disputes. Fuller's principles are undoubtedly applicable to constitutional adjudication as well as to the commercial law case where no change is effected and no political decision is made even in the broad sense used here. His principles are not peculiar to constitutional adjudication.

What principles are peculiar to constitutional adjudication? The answer lies in the peculiar nature of constitutional adjudication. The importance of a constitutional dispute far transcends the litigants involved. Its resolution molds the structure of our society. The principles

governing constitutional adjudication should not just maximize the moral support of the particular litigants but should strive to mold society in the best possible way for all. Expressions espousing this creative role are common.[36] Such expressions typify the sociological approach to law. Law is a device to attain the needs of society. These needs of society will be a demand on the system. Whatever these particular needs may be, however, the over-all general principle is to obtain support from society to attain stability. This is done in part through political decisions which meet these needs.

The current controversy over the Supreme Court stems from the fact that this creativity is thought to be in the hands of the legislature and not in the hands of the courts. The courts are to continue playing their legal game rigidly and if injustice creeps in, the Court can bring it to the attention of the legislature whose role it is to make such changes.

Is there any meaning to this debate in the literature about "neutral principles" and judicial creativity?[37] The debate really boils down to a misunderstanding between the opponents. Both sides admit that the Court should give legal reasons for its decisions and not write Judge Handy opinions. But there seems to be confusion about their creative role. Professor Wechsler says that the Court can be creative but at the same time it must be principled.[38] Much of the controversy is simply over whether a particular decision is principled or not.[39] But there is a

36. For example, *see* Miller and Howell, *The Myth of Neutralization in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 684, 689, 690 (1960).

37. *Cf.* Henson, *A Criticism of Criticism: In re Meaning*, 22 FORDHAM L. REV. 553 (1961). He concludes that the Court makes more semantical sense than its critics. "Too much of the recent criticism of the Supreme Court is of this semantically empty variety. It is of no value to anyone . . . What does it 'mean' to say that the Supreme Court's decisions are sometimes more 'result orientated' than is ideal? What is 'ideal'? How could a judge possibly decide a case without considering the result of his decision?" *Id.* at 559. A possible answer to the last question is that a judge could decide a case without considering the result if it involved a choice-of-law problem. The judge would first determine which law should apply and after making this decision without "peeking" at the result under the alternatives, he would apply this law to the case. This neutral objectivity could exist in other areas of litigation if a judge could avoid the temptation of looking ahead at the results of the determination of a rule after application.

38. *See* letter by Wechsler contained in Pollack, *Constitutional Adjudication: Relative or Absolute Neutrality*, 11 J. PUB. L. 48 (1962).

39. *See* Henkin, *Some Reflections on Current Constitutional Controversy*, 109 U. PA. L. REV. 637, 652-62 (1959); Pollack, *Racial Discrimination and Judicial Integrity*, 108 U. PA. L. REV. 1 (1959). Both Henkin and Pollack agree with Wechsler's thesis, but only proceed to attempt to show that the particular cases Wechsler gives as examples of the Court being unprincipled are actually examples of principled decisions.

real conflict which is not well articulated in the literature. The Court as a political system is confronted with the input of meeting the conflicting expectancies of remaining within static rules and with meeting the constantly changing expectancies of justice within the society. This is a conflict between logic and value. The critics of Wechsler take up the battle cry of Holmes and Pound against mechanical jurisprudence. "The life of the law has not been logic."

> To me, Professor Wechsler's lecture . . . represents a repudiation of all we have learned about law since Holmes published his Common Law in 1881, and Roscoe Pound followed during the first decade of this century with his pathbreaking pleas for a result-orientated, sociological jurisprudence, rather than a mechanical one. It would raise the element of rules, of precedent, of what he calls "principles" or "reasons" in the judicial process to a position of absolute primacy which all we know about law denies.[40]

Creativity and the Written Opinion

We may know this about the law, but does this mean that the judge who is actually playing the legal game should write a Judge Handy opinion? The reason this is such a rhetorical question is because of our strong expectancies that the judge will play the legal game in terms of neutral principles. Because of this expectancy, the system to survive follows this principle within the tolerances of the system. These tolerances may be wider in the field of constitutional adjudication by the Supreme Court because there is an expectancy that the Supreme Court will make political decisions. There is recognition that it is a political system. To this degree of recognition, the Court can safely play the legal game with political overtones.

Except when the pressures are so strong for a result which cannot be rationalized in legal language, the Court should decide on the basis of legalities in order to optimize the feedback effect of the outputs of ideology and policy. The judge cannot explain his role while he is within the system. Professor Wechsler must likewise feel that he is within the system while he is a professor of law and will not talk about creativity apart from following the norms of the legal game. Many of his critics do not understand this position and fall head over

40. Rostow, *American Legal Realism and the Sense of the Profession*, 34 Rocky Mt. L. Rev. 123, 138 (1962).

heels discussing questions of value and criticizing Wechsler for being an immoral neutralist.[41]

No one doubts that judges should be moral and should decide on the basis of values besides legal doctrine.

> . . . [C]onfrontation of values is what constitutional adjudication is all about . . . [This] does not mean an impass. . . . It does mean that judges must identify the competing values, must estimate the value consequences of preferring one set of competing values to another and must choose.[42]

Does this mean that these value debates should be reflected in the opinion as a basis for decision?[43] Cardozo stated:

> . . . [S]ymmetrical development may be bought at too high a price. Uniformity ceases to be good when it becomes uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social interest served by equity and fairness. . . .
>
> If you ask how he is to know when one interest outweighs the other, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself.[44]

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41. For example, *see* Miller and Howell, *supra* note 36. Much of their article is of interest, but it seems to misunderstand Wechsler's notion of neutral principles. Their point is that one cannot be objective in the social science. But, as discussed above, the judge's role within the system is not that of a social scientist. He is playing a role in a legal game with obligatory rules. He has the internal point of view, as discussed by Hart. Thus, most of Wechsler's critics are talking on a different level. Their discussion of value has little significance on Wechsler's level. They are talking about different things. The critics of Wechsler would not want an abandonment of the rule of law and allow Judge Handy to run wild. However, Miller and Howell do seem to understand the problem in a strange dictum with a strange hint: "Legal fictions permeate law and the legal process. They are useful to the extent that they serve desirable ends. The 'shining . . . ideal of the rule of law above men, evolved solely from Reason' is partially fictional in nature. It is a useful fiction. But the alternative is not despotism." *Id.* at 695. Is not the alternative Judge Handy and is this not despotism?

42. Pollack, *supra* note 38.

43. *Cf.* the criticism by Professor Currie in the conflict of law field that it is not for a court to balance the interests of the fora. Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958). *See also* Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755 (1963).

44. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112-14 (1921).

Is this balancing to be in the opinion?[45] In brief, these balanced decisions are political decisions. "In short, the judge is inevitable [sic] concerned with policy, since law is 'a means to social ends, and not an end in itself.' He makes law, and does not merely find it." [46] But within the legal game should the fiction of finding the law be dispensed with and the judge admit that he is a maker of law? We as external observers can recognize that he makes the law; this is useful for our understanding. The judge, however, has a different perspective.

The legal realists who criticize Wechsler are looking for more predictability and certainty in their own minds by discarding the myth of legal formalism. To advocate that the judge also discard this myth while playing his role is quite another matter. For the purpose of more predictability, such a change in the role of a judge would create more uncertainty.[47]

Llewellyn vs. Creativity

A most satisfactory analysis of the creative role of the judge is that

45. If it does reach the status of being accounted for in the opinion, will it not take on the character of legal doctrine to be followed and then again discarded because of future social interests? Do these critics in the footsteps of Holmes envision the lawyer arguing before a court on the basis of policy? Can appeal be made to natural law? Because of the sheer volume of litigation, policy arguments would soon take on the symbolic character of legal rules. This is a channeling device of any political system.

46. Rostow, *supra* note 40, at 131.

47. *See* Clark and Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 Yale L. J. 255, 267 (1961). An interesting comparison is in the field of conflict of law. The shift from the formalistic Beale rules to approaches which weigh the interests of the jurisdictions involved has been attacked by the Bealists as importing unpredictability into the area because of the largely subjective nature of the judges weighing of interests. Currie's criticism is that it is not his role to make such a judgment in the first place. In any case, after the initial decisions of weight to be given in various situations have been rendered, then these will evolve into legal formalism and will give more predictability than the formalism of Beale because of the greater sophistication of analysis of issues through the weighing of interests. But think of the disruption of certainty in ordering litigation if a judge were suddenly to declare he was going to decide cases henceforth on the basis of justice on the facts rather than through the use of neutral legal formalism.

It should be noted that at least two writers advocate realistic frankness on the part of the judge for reasons other than greater predictability. Professor Horack in his article *Cooperative Action for Improved Statutory Interpretation*, 3 Vand. L. Rev. 388 (1950) pressed the courts to admit their role in interpretating statutes to impress on them such a responsibility instead of their traditional passing the buck by strictly construing statutes. And Jerome Frank ingeniously argued for the same approach to statutes but for the reason that this will encourage them to exercise such acknowledged power within responsible limits. Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 Colum. L. Rev. 1271 (1947).

of Karl Llewellyn in *The Common Law Tradition: Deciding Appeals.* In seventy percent of appellate cases the decision is predetermined by the legal rules of the system. In thirty percent of the cases, however, there is a novelty which allows the judge a degree of creativity. This does not allow him to be arbitrary; there are steadying factors.[48] These factors place restraints on the political decisions of the Court. Under the analysis above and using Llewellyn's thirty percent statistic, we can say that the Court makes political decisions in about thirty percent of the cases, *i.e.*, when they are not forced to decide a certain way by the established norms.[49] Although these partially overlap with Fuller's principles listed above, these steadying factors are more meaningfully listed as withinput demands for stability rather than under the public expectancy for justice. These steadying factors are thus subprinciples in our model under the principle of having a substantial percentage (seventy percent) of forced decisions.

The courts are able to be creative within the legal doctrine because of a "Grand Style."

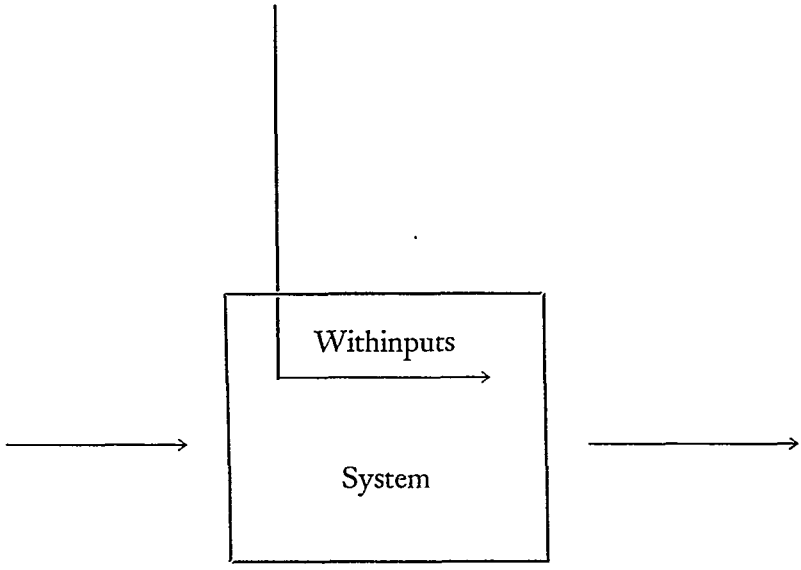
> One factor which convinces Professor Llewellyn that the law grows along discernible lines is his discovery that in a major portion of decided cases appellate courts base their holding on an unqualified citation to prior authority . . . but that in 30 per cent of the cases studied the citation was to a prior ruling that was not in strict terms a holding. From this he concludes that the courts are building, are creating, but that they are able to do this within bounds set by available doctrine . . . it is the return to the Grand Style which, for Llewellyn, is the real key to reckonability of our courts today. . . . This judicial style viewed precedents "as welcome and *very* persuasive," but tested precedent against three types of reason: (1) the reputation of the opinion-writing judge, (2) "principle"—a broad generalization yielding sense and order —and (3) "policy" or the consequences of the rule. . . . it is the

48. K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 19-61 (1960). These steadying factors are listed in summary form, *id.* at 19, to wit: (1) Law-conditioned Officials; (2) Legal Doctrine; (3) Known Doctrinal Techniques; (4) Responsibility for Justice; (5) The Tradition of One Single Right Answer; (6) An Opinion of the Court; (7) A Frozen Record from Below; (8) Issues Limited, Sharpened, Phrased; (9) Adversary Argument by Counsel; (10) Group Decision; (11) Judicial Security and Honesty; (12) A Known Bench; (13) The General Period-Style and Its Promise; and (14) Professional Judicial Office.

49. Political decisions are also made when the Court departs from the established norms.

surest device known to insure reckonability without sacrificing the duty to Justice.[50]

DIAGRAM III—WITHINPUTS



Withinput: seek stability

General Principle One: Fluidity

Decide only what is necessary to decide through imposing jurisdictional requirements.

Sub-principles: Appeal final orders only
Ripe issues
Case or controversy
Standing
Exhaust administrative remedies
Exhaust state remedies
Political questions
Raise constitutional question at start

General Principle Two: Mechanical Jurisprudence

Decide as forced to seventy percent of time by applying the established norms; in remaining thirty percent, steadying factors prevent arbitrary decisions.

50. Clark and Trubek, *supra* note 47, at 259-60.

Sub-principles:	Law-conditioned Officials
	Legal Doctrine
	Known Doctrinal Techniques
	Responsibility for Justice
	The Tradition of One Single Right Answer
	An Opinion of the Court
	A Frozen Record from Below
	Issues Limited, Sharpened, Phrased
	Adversary Argument by Counsel
	Group Decision
	Judicial Security and Honesty
	A Known Bench
	The General Period-Style and Its Promise
	Professional Judicial Office

This analysis of Llewellyn's statement is similar to Hart's statement that the law has an open texture. "The open texture of law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials *striking a balance, in the light of circumstances between competing interests* which vary in weight from case to case." [51] His statement is strikingly similar to the analysis here except he does not call this creative role political. He also adds that the courts "disclaim any such creative function." The analysis here points out why this disclaimer is made. It is not one of the moves in the legal game. To move so would work against the stability of the system. This analysis also imports an element of rule scepticism which Hart argues against. The political rule is not just limited to the thirty percent or to the open texture. The Supreme Court can choose to go against the seventy percent of solidified rules. This is also done by "striking a balance, in the light of circumstances between competing interests." In terms of systems theory this is explained by the stability requirements and the variables analyzed above.

Conclusion

This analysis leaves the legal system little different from the political system. The existence of the rules for which Hart is arguing so hard can be explained by systems theory as simply the building up of ideology and policy. These are anticipatory outputs of the system by which support is maintained. Ideology is the belief that decisions will

51. Hart 132 (emphasis added).

be within a certain range. Ideologies introduce stability by giving people a probability of what will happen in future policy decisions. Policies are the interpretative statements about binding decisions. The rules of the legal system fit into this analysis.

There is one significant difference between the legal system and the traditional political system. This is the variable of input and output of resources. Of course, there is some input of resources but the legal system does not have control of the resources in its jurisdiction in the way that a territorial sovereign has. The legal system cannot determine its budget. Its utilization of power in no sense comes close to the possibility of getting support through the manipulation of the allocation of resources which is open to a legislature. A legal system, as here analyzed, cannot make decisions on the allocation of resources in the absence of a legal dispute before it. Also, support is not built up for the system through informal benefits obtained from judges, *i.e.*, patronage power, in the way it is done by the ordinary politicians. Because of the absence of these ways to build up support for the system, rules take on a very important role in the stability of the system.

Even with these differences we are justified in analyzing the legal system as a political system if it suits the purposes of one's research. Systems theory as outlined by Easton need not be limited to political systems. Any system could be analyzed in terms of this input-output framework.[52] We here called the legal system political because then Easton's terminology used for the political system could be applied and it seemed highly illuminating. That a system strives for stability is not itself political. This is not the political foundation of the legal system. The political foundation as here analyzed is that the legal system is a political system, *i.e.*, it makes binding decisions allocating scarce resources for the society. Its decisions are not always based on past rules and to this extent these are political decisions.

Where is the traditional political system in this analysis? It is outside the legal system as a parameter. It is an independent variable the changes of which we might be interested in as to its influence on the legal system, *e.g.*, a change in federalism or the separation of powers. We have not gone into these interrelations as might have been expected from the title.[53]

52. *Cf.* the unpublished discussions at the joint meetings of the Association of American Law Schools and the Law and Society Association in Detroit, December 27, 1967, on the subject "Systems Approaches to Socio-Economic Problems."

53. KAPLAN AND KATZENBACH, *supra* note 13, goes into the influence of the changes in the political structure of Europe on the specific rules of international law. I have not

From this analysis, something similar to Hart's work has arisen, although in another way. Morality has been removed from the legal system. It is a game with no goals of substantive rules which are suppose to emerge. Validity of a rule in Hart's system is a question of fact even from an internal point of view.[54] In this article, it is also a question of fact. The only considerations are stability, efficacy, and the factual determination of expectancies.

It is hoped that there is some semantical meaning in this article and that it is not the semantically empty variety warned against by Henson.[55] The model in this article is not intended to replace Hart's model or anyone else's. The judge can give a decision as to what the law is, but in this study about law it is not the conclusion that is important. Roy Stone expressed it well when he said:

> What I have attempted to show is that to obtain a concept of law it is not enough to replace this or that model, the command theory of Austin or the predictive theory of the American Realist by another theory, say that of the "obligation" and the "to be obliged" of Professor Hart as a paradigm, to the features of which any system of laws must approximate to be a candidate for admission: that what is important is the argument in support and against such a candidature. These arguments may be that ratiocina-

discussed any specific rules of constitutional law in light of political influences. I have set down principles of constitutional adjudication in the framework of systems theory and explained the function of these general principles as variables within the legal system itself without going into the parameters of the system. A variable is a parameter outside the system when it can be accepted as a given without going into detail as to how the variable operates. Inside the system is only that which is of direct impact on the system; and these are the variables with which I have been concerned here, examining them directly going into detail as to their nature as well as their change. Of course the selection of variables is an arbitrary matter depending on one's purposes. Here we have left out the traditional political system from direct analysis, and have not considered how its changes affect the legal system. Undoubtedly the traditional legal system is a political system also. Thus, we have two political systems paralleling each other within the same society. Or better said, the legal apparatus of society has political features which make it a sub-political system of the general political system. *Cf.* Fenno, *The House Appropriations Committee as a Political System: The Problem of Integration,* 56 AM. POL. SCI. REV. 310 (1962). Each of the three branches of government is a sub-political system making binding decisions. Perhaps all that is being said here is the old statement that the government is composed of three branches. But it is often overlooked because of the mythology about rules that the judicial branch is also *political.* The attempt here has been to show this through a systematic analysis of the general principles of constitutional adjudication in terms of systems theory.

54. HART 107.

55. Henson, *supra* note 37.

> tion found in courts of law, the informal logic which is a nice mixture of the rhetoric and dialectic, the argument from the case to case which sometimes resembles moves in chess, the counting by a child on an abacus, the doing of a sum or an exercise in logic, the holding of a prism to the light to see the rainbow and the translation of a Latin prose, or the composition of a Greek verse: and at the end of it all we know what every schoolboy knows, it matters not whether you win or lose but "how you play the game." [56]

56. Stone, *Symposium and Suit*, Northwestern Rev., Winter 1961, at 24.