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Supreme Court Decision Making: The Ability to Decide and the Duty to Explain

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SUPREME COURT DECISION MAKING: THE ABILITY TO DECIDE AND THE DUTY TO EXPLAIN†

*by Norman Davidson, III**

Traditional wisdom about the judicial process held that the function of the courts was to apply rather than to change the law. The notion that courts legislate was considered an apostasy entertained by those who gravely confused the proper role of the courts with that of the legislature.[1] While it may now be safe to say that the categorical view that courts should never legislate is moribund,[2] an equally limited, if more sophisticated, view of the judicial process dominates contemporary thinking about the judicial system.

According to traditional wisdom, the essential feature of the judicial system, for purposes of understanding and defining its legislative limits, is its interstitial nature.[3] Characterizing the judicial process as intersti-

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† This article is dedicated to the friendship and careful decision making of Judge Albert Lee Stephens, Jr., Chief Judge of the United States District Court for the Central District of California, for whom I had the honor of clerking.

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1. M.R. Cohen explained:

> Whether because of the general overturning of ordinary interests brought about by the World War, or for some other reason, the controversy over the recall of judges and judicial decisions that raged some years ago seems to have disappeared. The leaders of the American bar claim to have settled the matter by a campaign of education. The keynote of the campaign was sounded by Elihu Root when he urged that the public be educated to an appreciation of the true function of the judge, which he expressed as follows: "It is not his function or within his power to enlarge or improve or change the law." In Sharswood's "Essay on Professional Ethics," republished by the American Bar Association, judicial legislation is one cardinal sin of which jurists must beware.

Cohen, *The Process of Judicial Legislation*, in READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 450-51 (1951).

2. M.R. Cohen pointed out the fallacy of contending that courts simply apply the law rather than change the law:

> In spite, however, of the apparent authority back of this theory, a philosopher need not hesitate to declare it demonstrably false, *i.e.*, contrary to fact. If judges never make any laws, how could the body of rules known as the common law ever have arisen, or have undergone the changes which it has?

Cohen, *The Process of Judicial Legislation*, 48 AM. L. REV. 161, 162 (1914).

3. One of the first, and perhaps most famous, uses of the word interstitial was by Mr. Justice Holmes:

> I recognize without hesitation that judges do and must legislate, but they can do so only

tial draws attention to the fact that judicial decision making takes place in the context of a dispute between parties to be decided by reference to applicable statutes and existing case law. The adversary context is viewed as necessarily limiting courts' ability to pick the issues to be decided and the time for their decision. A comprehensive consideration of all relevant information, as well as an airing of all interested views, is seen as impossible in the context of the single case. This inability to be comprehensive is seen as fundamentally undermining the capacity of the courts to deal with complex public problems.

The mirror image of arguments stressing the inability of judicial decision making to cope with complex public problems are arguments emphasizing the superior capability of the legislature to deal with such problems.[4] That legislative superiority is said to be based upon better access to expert opinion, greater investigative and research capability, the ability to hear a broader range of relevant testimony, and a better understanding of what the public will accept and how the proposed action will affect decision making in related areas.[5]

What underlies the view that courts are not suited to decide complex questions of public policy, and the companion perception that the legislature is unquestionably better adapted for such problem solving, are assumptions about how problems are solved.[6] Perhaps the most fundamental of these assumptions is that defensible and "rational" decision making is decision making undertaken in light of a comprehensive consideration of pertinent information, different points of view, alternative courses of action, and the possible consequences of each alternative.[7]

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interstitially; they are confined from molar to molecular motions. A common-law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court. No more could a judge exercising the limited jurisdiction of admiralty say I think well of the common-law rules of master and servant and propose to introduce them here *en bloc*. Certainly he could not in that way enlarge the exclusive jurisdiction of the District Courts and cut down the power of the States. If admiralty adopts common-law rules without an act of Congress it cannot extend the maritime law as understood by the Constitution. It must take the rights of the parties from a different authority, just as it does when it enforces a lien created by a state.

Southern Pacific Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

4. *See, e.g.*, Wilkinson, *The Supreme Court, The Equal Protection Clause, and The Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 1005-18 (1975).

5. *Id.* at 1013.

6. The way in which we view the capabilities and limitations of the judicial process reflects fundamental assumptions about what we are capable of knowing. It is the thesis of this article that adverting to and examining these basic assumptions about the epistemology of problem solving is an indispensable inquiry in understanding the limitations and capabilities of Supreme Court decision making.

7. *See* D. BRAYBROOKE & C. LINDBLOM, A STRATEGY OF DECISION 37-41 (1967) [hereinafter cited as LINDBLOM]. Lindblom seeks to isolate techniques used by social scientists which are designed to take into account the manifold difficulties in problem solving that

Given this assumption, adjudication, limited as it is to a single case or controversy, necessarily fails.

Whenever the Supreme Court decides a question which carries implications far beyond the case at bar, not only is the Court's ability to decide such issues thrown into question, but in addition, the Court's right to so decide is challenged. Those advocating a limited judicial decision making role demand an answer to the troubling question of what justifies the least democratic body—"nine old men" appointed for life, responsible to none—in deciding questions of fundamental social importance about which there is intense conflict.[8]

Those advocating an active role for the Court in deciding complex questions of public policy must therefore address themselves to the potent argument that, both from the standpoint of what is required to solve such problems and from the standpoint of who ought to decide deeply-felt and contested questions of public policy, the legislative process is unquestionably better able to produce acceptable results. This argument underlies increasingly vociferous criticisms of the Court which have undermined public confidence in judicial solutions to complex public problems.[9]

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beset decision makers. Taken together, these techniques constitute a strategy of evaluation which is effective in overcoming difficulties which are characteristic of complex problems of public policy. As will become apparent, this article draws on Lindblom's conception of what effective problem solving requires. It is not necessary to accept completely Lindblom's condemnation of other modes of solving problems to see that he makes a compelling case that the strategy of evaluation set forth is well adapted to cope with the fundamental problems associated with complex social problems.

8. While it is clear who decides, the question of what gives them the right has never been satisfactorily answered. Absent a constitutional amendment, the Supreme Court's constitutional interpretations are both authoritative and final. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). The authority most frequently invoked is Chief Justice Marshall's famous statement that [I]t is emphatically the province and the duty of the judicial department to say what the law is." *Id.* at 177. With respect to the troublesome nature of the theoretical justification for judicial review, see Bishin, *Judicial Review in Democratic Theory*, 50 S. CAL. L. REV. 1099 (1977).

9. A recent essay in *Time* Magazine seems typical of current criticisms of the Court:

> The fear, as Constitutional Scholar Alexander Bickel once expressed it, is that too many federal judges view themselves as holding "roving commissions as problem solvers, charged with a duty to act when majoritarian institutions do not."
>
> . . . When Boston's duly elected school committee refused to bus school children, the local federal judge did it himself, right down to approving the bus routes. A federal judge in Alabama ruled that inadequate mental-health care is unconstitutional. So what is adequate? His answer was a list of 84 minimal standards. . . .
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> . . . To clean up state prisons, judges in Alabama, Rhode Island, Oklahoma and Louisiana have decreed elaborate instructions on food handling, hospital operations, recreation facilities, sanitation, laundry, painting and plumbing, including the number of inmates per toilet.

Thomas, TIME, January 22, 1979, at 91, 91 (Essay) (quoting Alexander Bickel).

Even the most vociferous of critics rarely suggest that the judiciary is completely without

This article seeks to explain what it is about the judicial process which justifies the Supreme Court in deciding complex questions of public policy. Its aim is not to suggest that the judiciary is better able to decide such issues than is the legislature, but rather, to demonstrate that the judicial system has a potentially unique and invaluable contribution to make to their solution provided that certain demands are met. Once this is grasped, the question of whether or not the Court's decision was justified in a particular case can be better asked and answered.[10]

I. THE ABILITY TO DECIDE

Men and women making decisions must constantly deal with certain vexing aspects of problems and problem-solving situations. Comprehensiveness as a goal for any particular decision is unattainable.[11] Limits on one's intellectual capacity, knowledge, time, and resources dictate that choice must be exercised long before all possible or even relevant courses of action are evaluated.[12] Often there is either too much or too little information.[13] The issues which must be confronted multiply as attention shifts among competing values and different facts.[14] In addition, there is often a multiplicity of different points of view which change with time and experience.[15]

Public policy problems must therefore be simplified in order to be decided.[16] Ways must be found to select which aspects of a given problem to focus upon and which aspects to abandon. Because that very simplification necessarily excludes important values and pertinent

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authority in areas such as school desegregation. "Few would ask the judges to undo all the rights they have advanced in the past 25 years." *Id.* at 92. The most common criticism is simply that "the judges have gone too far." *Id. But cf.* R. BERGER, GOVERNMENT BY JUDICIARY (1977) (challenging the Court's right to decide certain issues as it has under the author's construction of the Constitution).

10. Standards by which to judge Supreme Court decision making have been developed by focusing upon the importance of general adjudicatory principles that are neutral in character. *See, e.g.*, Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). The political and institutional role of the Court in relation to other institutions has also been a focal point for the development of standards. *See, e.g.*, A. BICKEL, THE LEAST DANGEROUS BRANCH (1962); C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969); M. SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT (1964); Tribe, *The Supreme Court 1972 Term Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973).

11. LINDBLOM, *supra* note 7, at 39.

12. *See, e.g., id.* at 48, 113.

13. *Id.* at 50-51.

14. *Id.* at 48-49.

15. *Id.* at 26-29.

16. *Id.* at 48-49.

facts, a method must be provided for remedying that omission at a later time. There must be an opportunity to act again if a decision is in error.[17]

Public policy decisions must also be continuously reexamined because experience, in the wake of a decision, generates new information, new things to value and new reasons for valuing them.[18] Reexamination is also necessary because of the interplay between ends and means. Although the conventional view of problem solving is that means are adjusted to ends, in practice the reverse often occurs. Objectives which are currently sought must be constantly redefined in light of what experience demonstrates is desirable and possible. There is never a point at which one can "turn off" evaluation.[19]

Public policy problems also present the difficulty of identifying what points of view are really in conflict and to what degree. Defensible choice must then be exercised among what are often hotly-contested points of view. To the extent possible, ideological conflict over issues not really in question must be avoided.

Because these problems are repeatedly faced by those dealing with complex issues, people have in fact devised ways of solving them. A "strategy" has emerged, the general characteristics of which are captured in the following passage:

> [T]he problem of evaluation is simplified by a concentration on social evils rather than on utopias . . . . [L]imits on man's competence are acknowledged in reforms that alter only relatively small parts of the social structure at any one time . . . . [C]ontinuity and readjustment diminishes the need to be right in any single decision . . . . [A]ims change with experience [and] with policies; and . . . experiments in social reform teach some things that cannot be learned in any other way.[20]

As the following discussion will illustrate, the judicial process shares the characteristics of this strategy as well as possessing other features. Thus, it has the capacity to be an effective process for deciding complex questions of far-reaching social impact.[21]

A strategy of decision able to cope with many changing values, the interplay between ends and means, the need for continuous reevaluation of purpose in light of experience, the difficulty of predicting the consequences of any given action in a complex setting, and limitations

17. *See id.* at 48, 55.

18. *Id.* at 71.

19. *Id.* at 52-57.

20. *Id.* at 82 (discussing 1 K. POPPER, THE OPEN SOCIETY AND ITS ENEMIES 139-44 (1945)).

21. LINDBLOM, *supra* note 7, at 107. *See also id.* at 81.

upon human knowledge, time, and resources, proceeds incrementally: that is to say, in small steps.[22] Each step becomes a repository of information for exploring the propriety of succeeding steps. Each step becomes a touchstone for moral, psychological, and societal response to social ordering. While each step can be the beginning of big or fundamental change, it is not so large that it cannot be remedied by a subsequent step.[23]

Such a step in the legal system is, of course, the decided case. A case resolves a dispute between real parties. It thereby presses abstract values into decisions between available remedies. This very concreteness allows us to ask how much of one value we are willing to give up to achieve more of another value.[24] Each case throws prior experience and traditional wisdom into a confrontation with contemporary experience and understanding.

A second characteristic of decision making which is well adapted to coping with complex public problems is that solutions appear in a series of steps presenting continuing opportunities to act again.[25] The difficult problems which confront us are not solved by any one decision; solutions come from processes which repeatedly attack such problems in light of what past decisions have demonstrated to be possible and desirable.[26] There must be the recurring opportunity to act again on the basis of expanded understanding without having to redecide that which past experience has laid to rest.[27]

Continuous decision making is one of the essential features of the judicial system. Each case is subjected to the scrutiny of subsequent cases. While courts must finally decide disputes between the particular

22. *Id.* at 111-17.

23. *See id.* at 83-88, 107, 121. The primary virtue which Lindblom assigns to accomplishing fundamental change by small steps is that it takes into account the difficulty of predicting the consequences of any given decision. The more cataclysmic the change accomplished by a single decision, the more limited our understanding of its consequences becomes. In addition, simplification is achieved by comparing alternatives, all of which are similar to the status quo. A dominant characteristic of problem solving which successfully deals with too little or too much information is that it holds attention to the familiar and focuses upon the ways in which the situation that might result from alternative policies differs from the status quo. *See, e.g., id.* at 121.

24. *Id.* at 85, 88, 96, 98. *See generally id.* at 17-18.

25. Lindblom terms this feature "serial." A serial attack recognizes that progress is made by continuous exploration rather than by one comprehensive solution. Unending chains of responses, in which past moves are found wanting and new moves advance, take advantage of our limited capacity to understand and solve vexing social problems while refusing to succumb to them. *Id.* at 99-100.

26. *Id.*

27. *See id.* at 52-57.

litigants at bar, courts do not finally resolve the issues presented by those disputes. The complex problems of social ordering which form the backdrop for disputes are explored and attacked by succeeding decisions. Not only are problems the object of unending chains of decided cases, but each decision is made in light of experience with prior decisions in similar contexts. The doctrine of stare decisis, and the very nature of decision making by use of precedent, require the consideration of the success or failure of past decisions in similar cases. When the judicial system does produce a patchwork of decisions at odds with each other, as in the case of circuit conflict, it is usually because of genuine disagreement and not because of ignorance of prior judicial experience in similar cases. As discussed below,[28] this kind of disagreement is a source of innovative approaches, and is, itself, a central characteristic of decision making adapted to solving complex public problems.

The impossibility of being comprehensive in the sense of exploring all possible or even relevant means and ends, the multiplicity of changing values, and limitations on human comprehension, time and resources, dictate that adaptive decision making will tend to move away from social ills rather than toward a fixed objective. This "remedial" characteristic reflects the necessity of suppressing vice as it is currently understood even though virtue may be difficult to define.[29]

The legal system possesses precisely this characteristic of remedying injuries experienced as ills in the community. The remedial process operates by proceeding in corrective steps which explore the depth of human sentiment and the societal cost attendant to a felt wrong.[30] This does not mean the solutions emerging are incomplete or noncomprehensive. The development of products liability is one of many examples of how individual case solutions to isolated wrongs are marshalled by case law and precedent to produce a coherent pattern of solutions.[31] Likewise, the meaning of the Supreme Court's decision in

28. *See* note 36 *infra* and accompanying text.

29. LINDBLOM, *supra* note 7, at 82, 102-04.

30. Compare, for example, the policies articulated in Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963) with the revised policy considerations of the California Supreme Court 5 years later in Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (overruling *Amaya*).

31. In California, for instance, the parameters of the products liability cause of action have emerged only as the need for definition has appeared in the cases. *See, e.g.*, Greenman v. Yuba Power Prods. Inc., 59 Cal. 2d 57, 377 P.2d 897, 23 Cal. Rptr. 697 (1963) (establishing basic cause of action against manufacturer by user of product); Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964) (extending cause of action to retailer defendant); Canifax v. Hercules Powder Co., 237 Cal. App. 2d 44, 46 Cal. Rptr. 552

Brown v. Board of Education,[32] which eradicated the separate but equal doctrine, is still undergoing the process of definition[33] in light of the numerous contexts in which discrimination continues to surface and in light of the struggle to remedy past discrimination.

Defensible decision making must be able to produce new and better responses and approaches: there must be the capability to innovate. The ability of an organization to be creative or resourceful is closely associated with its ability to recombine units of information into new patterns. The ability to innovate is related to the "combinatorial" richness of the system by which information is stored, processed and evaluated.[34] Viewed from this perspective, the legal system possesses an enormous capacity to produce creative solutions. Because the Court makes its decision in the context of competing lines of authority, recombination is necessarily an integral part of the judicial process. The ever expanding system of precedent presents an unlimited yet manageable source of combinational richness.[35]

The capacity of the judicial system to innovate is also related to the fact that different courts adjudicate similar disputes, use the same prec-

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(1965) (extending cause of action to wholesaler defendant); Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969) (extending standing to third party bystanders who are not users of product); Price v. Shell Oil Co., 2 Cal. 3d 245, 466 P.2d 84, 75 Cal. Rptr. 652 (1969) (extending cause of action to lessor of property as defendant when no sale had occurred).

32. 347 U.S. 483 (1954).

33. *See, e.g.*, University of Cal. Regents v. Bakke, 98 S. Ct. 2733 (1978) (decided on nonconstitutional grounds); San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

34. LINDBLOM, *supra* note 7, at 98-99. Pioneering work by Karl Deutsch applied the viewpoint of cybernetics to questions of fundamental importance including the nature of innovation. Cybernetics presupposes that all organizations are alike in certain fundamental characteristics and every organization is glued together by communication. Communication, the ability to transmit messages and react to them, makes organizations. This is true for a living cell, a computer and an organization of thinking men and women in a social group. Recombination of units of information appears to be closely related to the ability to innovate:

> [T]he ability of any political decision system to invent and carry out fundamentally new policies to meet new conditions is clearly related to its ability to combine items of information into new patterns, so as to find new solutions that may be improbable in terms of their likelihood of being discovered, but relevant once they are discovered and applied.

K. DEUTSCH, THE NERVES OF GOVERNMENT 163 (1963).

35. Long before cybernetics or incrementalism, Mr. Justice Cardozo powerfully expressed the enormous capacity of the judicial process to give birth to creative changes:

> The changes, as they were made in this case or that, may not have seemed momentous in the making. The result, however, when the process was prolonged throughout the years, has been not merely to supplement or modify; it has been to revolutionize and transform. . . . Nothing is stable. Nothing absolute. All is fluid and changeable. There is an endless "becoming."

B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 27-28 (1921).

edential history and arrive at different conclusions. Just as a court may analyze information and values neglected in prior decisions by other courts, it may also simply consider the approaches of other courts to be wrong. Two courts may reach different conclusions, though each considers the same case precedents, and though the disputes under adjudication arise from strikingly similar factual situations. The viewpoints and approaches reflected in such differences are invaluable sources of judicial innovation.[36] Thus, in the federal system, the United States district courts recombine lines of competing precedent, often arriving at different decisions; the circuit court of appeals is faced with the diverging lower court decisions as well as with the same competing lines of precedent. The Supreme Court, frequently finding the circuits in conflict, reviews this entire precedential history and arrives at the final recombination.

Decisions involving hotly-contested public problems must be made with an understanding of what the fight is about. A decision making process which can deal effectively with complex public problems must be able to identify what values are really at stake in a given dispute. Precision in identification of the issues will facilitate avoidance of needless conflicts. Yet, we often do not know what our values are until a concrete choice is presented in which we can focus in specific terms upon how much of one value we are willing to give up in order to obtain more of another value.[37]

The fact that judicial decision making takes place in the context of a concrete dispute forces objectives to be understood and adjusted in terms of the impact of the relief on the parties at bar. Moreover, the remedial, continuous and exploratory nature of judicial decision making presents numerous opportunities for some agreement to be reached, even among members of opposing ideological camps. The very concreteness of disputes which give rise to court decisions to a large extent avoids conflict along ideological lines. On the other hand, that conflict is often exacerbated when issues are debated or attempted to be resolved in the context of finally deciding issues of ultimate principle.[38] Because court decisions are remedial and must resolve a specific dispute, they take advantage of the frequency with which we find ourselves agreeing on what we are against, even though we cannot always agree on what we are for. In other words, consensus is promoted by decision making which must choose between available remedies in the

36. LINDBLOM, *supra* note 7, at 104-06, 127.
37. *See* note 24 *supra* and accompanying text.
38. LINDBLOM, *supra* note 7, at 123.

context of an actual dispute. Provocations are avoided on an enormous range of politically irrelevant issues. Agreement can often be reached on alternative policies, regardless of disagreement on ultimate values.

Paradoxically, the very characteristic of the federal judiciary which is seen as limiting the Court's decision making role, the fact that federal courts may decide only "cases" or "controversies,"[39] is one of the central adaptations for deciding complex problems. The presence of a concrete dispute affords a way of limiting information so as to make it manageable. It also presses abstract values into choices between realistic alternatives. This helps us to identify how much of certain values are really being given up to obtain other values. Similarly, the characteristic of complex problems which is said to eliminate the courts as legitimate makers of public policy, the difficulty of knowing the consequences of any given action when numerous variables are present, is accommodated by the continuous and remedial nature of judicial decision making.

This article has attempted to demonstrate up to this point that the judicial process is uniquely adapted for devising solutions to complex public problems. However, inevitable questions remain. How can this ability of the judicial process be squared with certain basic assumptions about the role of the courts? When is a question properly referred to the legislature for decision? When should the Supreme Court overrule precedent in a setting involving complex public policy considerations and conflicting values? An examination of some common notions about stare decisis and the role of courts may be helpful in determining answers to these questions.

II. THE DUTY TO EXPLAIN

It is a common belief that the law should furnish a clear guide for the conduct of individuals so that they may plan their affairs with reasonable assurance against surprise. People usually conduct their affairs on the assumption that past doctrines will be maintained. Yet, judicial decision making, which is, by definition, retroactive, will most frequently adjudicate controversies that arose yesterday. Thus, when it is necessary to make a break with the past, to overturn past precedent and set down new rules of public policy, should not this task be left to the legislature which is under a constitutional mandate to act prospectively?[40] This analysis, however, fails to account for some of the essen-

39. U.S. CONST. art. III, § 2.

40. *E.g., id.* art. I, § 9 (prohibition against ex post facto laws).

tial features of judicial decision making. The judicial process, by its very nature, proceeds in small steps, constantly probing the future by recombining units of information into new patterns and new decisions. While the end result might be a revolutionary new development, the means are a series of small, incremental steps.[41] This very process of serial change, then, gives notice of new directions. Indeed, the dicta of a case may frequently serve the function of a weather vane to those who are interested in which way the winds are blowing. In addition, prospective overruling can act in substantial mitigation of judicial change. The Supreme Court must ask itself whether expectations have been created by past decisions, whether there was, in fact, reliance, and if so, whether it was justifiable in light of the past decisions.

That like cases ought to be treated alike is a basic moral principle of our legal system.[42] This fundamental belief springs from the necessity of maintaining public confidence in the judiciary as a source of equal treatment and disinterested and reasoned judgment. As Max Radin has pointed out, however, it may be just as difficult to follow the winding path of precedent as it is to overrule precedent.[43] In formulating the rule of a case in its own factual context, the judge must seek some level of generalization if the principle enunciated is to have future utility. Courts necessarily expand or contract the rule by bringing other cases, with their own factual settings, within the previous generalization. At a certain level of generalization they have, in fact, formulated an entirely new principle.

The notion of incremental change recognizes that society is in flux. In fact, almost every case that reaches the appellate level demonstrates anew that the law is uncertain. Competing lines of authority are ripe for recombination. Yet change is compatible with reliance and social ordering because the pattern and general direction of the movement can be grasped. Like cases need not and often should not be treated alike in that a similar decision is reached: like cases must merely be treated with like process. As part of that process, the Supreme Court must ask whether the similarity between the case at bar and like past cases is such that a similar result should be reached in light of presently applicable and desirable policies.

Stare decisis is frequently thought to be important in that it furnishes

41. *See* note 35 *supra*.

42. For a discussion of the traditional view of the concept of treating like cases alike, see Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Winston, *On Treating Like Cases Alike*, 62 CALIF. L. REV. 1 (1974).

43. Radin, *The Trail of the Calf*, 32 CORNELL L.Q. 137, 139 (1946).

a fair and expeditious adjudication by eliminating the need to relitigate and reexamine every relevant issue in every case. It is in fact a storehouse of past experience which is not to be lightly discarded. The issue of when, and under what circumstances, the Supreme Court should reexamine the fundamental value of a rule is thus a crucial one. At least four factors come into play here: (1) What has the incremental, serial and remedial history of the precedent in question revealed? (2) Have conditions changed to an extent that the premises of the decision have been significantly affected? (3) Was the data which was available to previous decision makers adequate to formulate the principle evolved? (4) What is the cost of reexamination?

The final factor, which is implicit in the first four, concerns whether or not members of the Court intuitively sense that the instant case presents a proper occasion to reaffirm or reject the validity of a traditional legal principle in light of present policy. Periodic reexamination which results in continued judicial imprimatur may be just as important as reformulation or rejection because such decisions reconfirm our belief that long-established doctrines are capable of continued vitality in the modern context.

When the Court is faced with the decision whether to reject or reaffirm a given legal principle, it must consider the notion of "judicial capital." Within a specified time period the Supreme Court might be seen as accumulating or possessing a certain amount of capital which is a reflection of its ability to have its decisions accepted by the public and by other branches of government. This capital may be spent wisely or foolishly in formulating and effectuating social policy through law.

Supreme Court decision making should proceed with the understanding that the very nature of the judicial process tends to conserve judicial capital.[44] An adaptive system which proceeds in small steps and is continuous and remedial maximizes the chance that its decisions will be accepted without precipitating a crisis of confidence or legiti-

44. Notions of judicial capital may be in part responsible for the Court's reluctance to rule broadly on many constitutional issues, although the policy against overbroad rulings is usually articulated by reference to the "case or controversy" requirement. *See* U.S. CONST. art. III, § 2. What may also underlie recent Supreme Court decisions in the desegregation area, which appear to retreat from the promise of Brown v. Board of Education, 345 U.S. 483 (1954), is the perception by the Court that it is the sole initiator of reform and thus jeopardizes its legitimacy. In addition, the traditional reluctance of courts to issue orders which they cannot effectively enforce may be responsible for the Court's recent hesitation in the area of school desegregation. The Court may well perceive its judicial capital as being eroded by the anomolous situation of local courts becoming responsible for the day-to-day administration of community school systems. *See* note 9 *supra*.

macy.[45] More important, decisions by the Court need not lag behind the perceived attitudes of the community.[46] The exploratory and recombinatorial capability of the judicial process often will result in a decision which drags community values along with it rather than following at a respectful three paces.[47] In such cases the drain on judicial capital often can be tempered by the integrity of the Court's opinion and by the extent to which time, experience and subsequent cases reveal its wisdom.

The judicial process can be viewed as a way of storing, retrieving and recombining information. Indeed, the system of precedent may be one of the most potentially creative systems of organizing and reusing information ever devised. The combinatorial and exploratory effectiveness of the judicial process, however, depends upon the value of each unit of information going into it. The unit of information upon which the system of precedent is built is the decided case. Effective recombination for creative decision making necessarily assumes the worth of the individual opinion. Thus, courts, and in particular the Supreme Court, must tell us why they have decided as they have. This not only means that the Court must clearly set forth the basis for decision, it also requires the Court to squarely confront past precedent and explain why it has decided to follow or depart from prior decisions. Moreover, the Court must look forward to and anticipate the impact of continuing or departing from precedent in light of contemporary understanding. Failure to expressly and specifically justify a decision irreparably damages the system of precedent[48] because succeeding judges do not have

45. Robert Dahl asserts that "[T]he policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States." Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957).

46. While legislatures are sometimes paralyzed in the face of controversial, politically sensitive issues, the courts' insulation from direct accountability to the electorate often allows them to take action to remedy pressing social ills when the legislature has been unable to act. As Robert Bork has observed, the legislature, itself, may often be guilty of connivance in this result: "Rather than making the tough choices, legislatures will frequently write a vague law, and pass [the hard decisions] off on the courts." Robert Bork, *quoted in* Thomas, TIME, January 22, 1979, at 91, 92 (Essay). Such legislative abdications place an inordinate burden upon Supreme Court decision making. *See* note 67 *infra*.

47. One example of such a decision might be Gideon v. Wainwright, 372 U.S. 335 (1963) (establishing indigent criminal defendant's right to counsel in felony trials).

48. In Griswold v. Connecticut, 381 U.S. 479 (1965), Mr. Justice Douglas did purport to explain his decision. However, it appears that the Court may have been less than frank in its opinion. *Compare* the concurring opinion of Mr. Justice Goldberg, *id.* at 486. Some of the analytical problems that have been encountered in cases following *Griswold* seem to stem from this lack of frank explanation. For instance, although *Griswold* relied largely upon marital privacy, the named plaintiff in Roe v. Wade, 410 U.S. 113 (1973) was an unmarried

the benefit of what judicial decision making at its best can offer: an agonizing struggle to use the accumulated wisdom of the past in light of contemporary understanding to do essential justice to the parties at bar while anticipating the results of a rule of general application.[49] Viewed in this context, there is no more important duty than to fully set forth the basis for the Court's decision. The integrity of judicial history is at stake in each and every decision.[50]

To the extent that prior decisions honestly report the basis for deci-

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woman seeking an abortion. Similarly, although Eisenstadt v. Baird, 405 U.S. 438 (1972) was decided on equal protection grounds, it owes a clear debt to *Griswold*. In *Eisenstadt* the Court struck down a law prohibiting, inter alia, the distribution of contraceptives to unmarried women. In Carey v. Population Services Int'l, 431 U.S. 678 (1977), a deeply divided Court extended the principles of *Griswold* and *Eisenstadt* to invalidate state laws prohibiting the sale of contraceptives to minors under 16 years of age. Yet, the Court summarily affirmed a law which was claimed to invade the consensual privacy of Virginia homosexuals in Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976). The district court decision in that case, 403 F. Supp. 1199 (E.D. Va. 1975), had relied strongly on the assumption that the *Griswold* line of cases was limited to privacy related to marriage and family life. Yet, the Court apparently did not feel it necessary to clarify any inconsistencies that affirmance of the district court decision might have suggested. The result of this series of cases is a doctrine of privacy whose parameters seem hopelessly unclear. Greater clarity, explanation and frankness in *Griswold* might well have helped to produce a more consistent, understandable and analytically justifiable result. *Cf.* Furman v. Georgia, 408 U.S. 238 (1972) (where the deep division among members of the Court made it almost impossible to ascertain a rule of decision in the case; consequently, decisions purporting to follow *Furman* have demonstrated acute confusion).

49. In a recent keynote address, Max Lerner discussed various models which have been used to advance our understanding of Supreme Court decision making. Rather than determinism, behaviorism or other models, Mr. Lerner found the greatest utility in what he termed the "organismic" model of constitutional history. This model views the judicial branch as a living, dynamic, evolving and sometimes decaying institution. The term "holistic" was not used because, while it suggests consideration of the total organism, it fails to point to an "integrating principle." Keynote Address by Max Lerner, First West Coast Conference on Constitutional Law (Sept. 17, 1977). Under the view of judicial decision making set forth in this article, the integrating principle is the integrity of the struggle or process by which the Court uses the accumulated wisdom of the past in light of contemporary understanding to do essential justice to the parties at bar while anticipating the results of a rule of general application.

50. There is no way to overstate the importance of viewing the judicial system as one which stores, reflects and preserves our history. Judges and those practicing law bear responsibility for its accuracy and integrity. *Cf.* A. SOLZHENITSYN, THE GULAG ARCHIPELAGO TWO (1975) (emphasizing that it is of the utmost importance that the integrity of history be preserved and that persons with firsthand knowledge of historical events assume responsibility for that preservation).

Failure to sufficiently explain and justify has also left the Court open to accusations of "selective activism," which recent critics of the Court have defined as activism which "depends on whether or not [the Court] likes the result." Thomas, TIME, January 22, 1979, at 91, 92 (Essay) (discussing Roe v. Wade, 410 U.S. 113 (1973) as a possible example of selective activism). These types of criticism demonstrate how a lack of clear rationalization can damage the Court's appearance of integrity and impartiality. *See generally* note 48 *supra*.

sion, subsequent decisions are left little room to base analysis upon narrow concerns, special interests or ideas which experience has laid to rest. The right to decide depends upon the duty to explain. Failure to do so fundamentally undermines the legitimacy of the Supreme Court in deciding the questions which deeply affect and divide us.

Recent decisions, including abortion cases,[51] and first amendment cases involving the media,[52] have necessitated that those seeking to justify judicial involvement in the solution of complex problems answer questions even more difficult than those posed at the beginning of this article. Added to the difficulty of justifying such decision making by nine electorally irresponsible men is the problem of nine such men deciding important questions based on information received wholly independent of the record. The Blackstonian conception of judicial decision making based on information made part of the record below no longer accounts for what, in fact, happens in the Supreme Court. Facts which have come to the Court's attention through means other than the traditional methods of pleading and proof have often been critically important to decisions of the Court.[53] These "legislative facts"[54] are not generated by the adversary system. Instead, they are products of inquiring judicial minds.[55] Yet, since these facts are extrinsic to the parties' pleadings and argument, their underlying assumptions and accuracy are not subjected to the probing and scrutiny which the adversary system can provide.

The Supreme Court's unwillingness to confine itself to strictly "adjudicative facts"[56] is readily understandable. The adversary system has serious shortcomings. It assumes both that the parties will have equal legal resources and that they will bring to the Court's attention all pertinent information. Stare decisis itself has played a role in the Court's

51. *See, e.g.*, Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973).

52. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713 (1971); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

53. *See* Miller and Barron, *The Supreme Court, The Adversary System, And The Flow Of Information To The Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187, 1193 (1975) [hereinafter cited as Miller].

54. "Legislative facts" are facts that come to the Court's attention through means other than the traditional methods of pleading and proof. For instance, they may be facts which did not appear in the parties' pleadings, but which the Court, sua sponte, deemed relevant. *See id.* at 1233-35.

55. *Id.* at 1187-89, 1192. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973), where Mr. Justice Blackmun established the "trimester" system for dealing with the problem of abortion, although it appears that the parties never mentioned "trimesters" in the pleadings. Miller, *supra* note 53, at 1187-97.

56. "Adjudicative facts" is a term utilized to describe facts which are part of the parties' own pleadings. *See, e.g.*, Miller, *supra* note 53, at 1193-99.

departure from "adjudicative facts," for it can be argued that the binding national precedential effect of the Court's decisions should not be made to depend upon a poorly pleaded or argued case. However, the problem remains. What answer is there to the criticism that, when the Court deems it appropriate, a private litigant can get what Congress and the President cannot obtain: an advisory opinion?[57] In certain cases, the "legislative facts" relied upon can be so essential that, in effect, the lawsuit is retried at the appellate level, without the benefit of a hearing or of any of the due process safeguards designed to ferret out tenuous assumptions, faulty reasoning and unexamined bias.

The answer is not to purport to require the Supreme Court to refrain from considering "legislative facts." Such a limitation on the Court is neither possible nor desirable. If an opinion is to be a storehouse of current knowledge and wisdom, Justice Traynor's admonition must be heeded; the Supreme Court justice must be willing to plunge himself or herself into other disciplines to the extent his or her knowledge and sense of propriety allow.[58] No effort should be spared to muster every bit of information available which speaks to the case at hand.[59] Any disadvantages inherent in the use of "legislative facts" can be overcome by scrupulous adherence to the judicial process itself as set forth in this article. That is, the Court must undertake to deal directly and expressly with lines of competing past precedent and set forth exactly why that precedent should not control in light of the Court's contemporary understanding, whether that be fed by "legislative facts" or "adjudicative facts." In addition, the Court must undertake to expressly anticipate the impact of its decision beyond the case at bar. Most important, the Court must have the courage to set forth the presence of any "legislative facts" and the relationship such facts have to the Court's decision. After this has been done, the process of subsequent cases adjudicating similar controversies will then act upon and test the truth, accuracy and wisdom of the facts which were vital to the Court's decision.

The justices must also, themselves, be aware of the enormous capacity of the judicial system to attack complex public problems with innovative solutions. Unless those making the decisions understand this

57. *Id.* at 1196. The abortion decisions, along with other types of cases, are said to constitute "advisory opinions" because the holdings go far beyond the issues relevant to the individual litigants. *See id.* at 1193.

58. Traynor, *Reasoning in a Circle of Law*, 56 VA. L. REV. 739, 750 (1970).

59. One of Mr. Justice Douglas' great strengths was his ability to use empirical data and social science findings to demonstrate how disadvantaged the poor in fact are in the United States. Dorsen, *Equal Protection Of The Laws*, 74 COLUM. L. REV. 357, 361 (1974).

potential, the system will not serve as a source of continuing solutions to public problems.[60] Justices should view prior decisions as competing lines of authority to be tested in light of contemporary understanding.[61] Cases should be seen as opportunities inviting exploratory responses, attempts to solve problems as imaginatively as is compatible with being fair to the public and the parties at bar. Rigid rules of stare decisis have no place in such a system.[62]

The proposition that judicial decision making is capable of, and even peculiarly well adapted to, attacking complex problems of public policy, rests, in large part, upon the assumption that one can be reasonably confident that what one decision neglects, a subsequent decision will correct. Thus, while a particular decision may be "interstitial," the judicial process is not. The error of those maintaining that the courts are not suited to pass on complex public problems is in focusing upon a single decision when, in fact, that one decision is merely a link in an evolutionary chain.

In order, however, for issues to be refined and errors corrected, the people affected by such issues and errors must have access to the courts. The incremental, serial, continuous and remedial process which justifies judicial treatment of complex public problems cannot go forward unless those who are aggrieved have such access.[63] Even more than the failure to explain, the appalling lack of effective legal representation for millions of people undermines the ability of, and justification for, the

60. In the words of Justice Traynor:

> At the slightest sign that judge-made law may move forward these bogus defenders of stare decisis conjure up mythical dangers to alarm the citizenry. They do sly injury to the law when the public takes them seriously and timid judges retreat from painstaking analysis within their already great constraints to safe and unsound repetitions of magic words from the legal lore of the year before much too long ago.

Traynor, *No Magic Words Could Do It Justice*, 49 CALIF. L. REV. 615, 621 (1961).

61. For an interesting discussion of how justices of the Court during the Warren years viewed the weight that should be given to stare decisis, see Noland, *Stare Decisis and the Overruling of Constitutional Decisions in the Warren Years*, 4 VAL. UNIV. L. REV. 101 (1969).

62. Recognizing the creative potential of the judicial process speaks to the resolution of the debate between Goodhart and Stone. *Compare* Goodhart, *The Ratio Decidendi of a Case*, 22 MOD. L. REV. 117 (1959) *with* Stone, *The* Ratio *of the* Ratio Decidendi, 22 MOD. L. REV. 597 (1959). The innovative model of judicial decision making under consideration supports Stone's position. Stare decisis cannot be understood to lay down definitive rules of prescription and prohibition. Rather, the system of stare decisis is geared to increase the range of competing versions available in rough proportion to the importance of the point of law. The notion of the ratio decidendi of a case, rather than an emphasis upon the binding effect of each step in the analysis, "is almost a perfect medium for the creation of multiple and competing references." Stone, *supra*, at 619.

63. Since access, almost by definition, starts with lower courts, the responsibility to assure access to litigants must rest with those lower courts as well as with the Supreme Court.

Supreme Court to decide important questions of public policy.[64]

III. CONCLUSION

The judicial system possesses a unique capability to deal creatively and effectively with disputes presenting complex problems of public policy.[65] It does not follow, however, that the essential function of the Supreme Court is to resolve such problems or that the Court is better able to address them than the other coordinate branches of government or even the private sector.[66] Supreme Court decision making cannot operate effectively in the face of abdication of decision making responsibility by the legislative and executive branches of government at all levels and by private citizens and organizations.[67]

The essential function of the Court may be, as Alexander Bickel has suggested, not so much the final resolution of complex problems about which there is intense conflict, but rather, the preservation of the diffusion, separation and balance of power, both intragovernmental and be-

64. A substantial segment of our citizens remain unable to obtain legal services. One recent study concludes that while over 10% of the population meets the rather stringent eligibility requirements for public legal assistance, existing programs can handle only about 1/7 of the need. Moreover, another large segment of the public, while not eligible for existing programs, cannot realistically afford legal assistance. One recent estimate goes so far as to suggest that possibly 4 of every 5 persons cannot afford lawyers for their routine legal problems. Manning, *Opening Statement*, 4 LITIGATION, Winter 1978, at 1 (Journal Of The Section Of Litigation Am. Bar Ass'n).

65. *But see* Rabin, *Dealing with Disasters: Some Thoughts on the Adequacy of the Legal System*, 30 STAN. L. REV. 281, 298 (1978) in which the author argues that, when confronted with an unprecedented occurrence, administrative and judicial systems are less effective than other bodies.

66. The private sector has, in fact, produced many innovative alternatives to the traditional adjudicatory process. *See, e.g.*, Green, Marks & Olson, *Settling Large Case Litigation: An Alternative Approach*, 11 LOY. L.A.L. REV. 493 (1978).

67. In a famous passage, Learned Hand expressed the fundamental dependence of judicial decision making upon the assumption of responsibility by other institutions and members of society:

> You may ask what then will become of the fundamental principles of equity and fair play which our constitution enshrines and whether I seriously believe that unsupported they will serve merely as counsels of moderation. I do not think that anyone can say what will be left of those principles; I do not know whether they will serve only as counsels; but this I think I do know—that a society so riven that the spirit of moderation is gone, no court *can* save; that a society where that spirit flourishes, no court *need* save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.

L. HAND, *The Contribution of an Independent Judiciary to Civilization*, in THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 181 (I. Dillard ed. 1952) (address by Learned Hand at 250th anniversary of founding of Supreme Judicial Court of Massachusetts, Nov. 21, 1942). *See* note 46 *supra*. With regard to the importance of private individuals acting in the public interest, *see* Oldham, Book Review, 51 S. CAL. L. REV. 335, 341 (1978) (R. NADER, M. GREEN & J. SELIGMAN, TAMING THE GIANT CORPORATION (1976)).

tween government and the private sector.[68] The performance of this function upholds and defines the very structure supporting our basic freedoms. Where the structural lines are drawn is critical to how complex public problems will be resolved, and by whom. The issues faced by the Supreme Court in performing this function are enormously difficult.[69]

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68. Alexander Bickel, *The Uninhibited, Robust and Wide-Open First Amendment*, California Continuing Education of the Bar Tape (Sept. 1972) [hereinafter cited as *The Uninhibited First Amendment*]. Alexander Bickel puts it so well:

> Madison knew the secret of this disorderly system, indeed, he invented it. The secret is the separation and balance of powers. Men's ambition [is] joined to the requirements of their office so that they push those requirements to the limit which, in turn, is set by the contrary requirements of another office joined to the ambition of other men. This is not an arrangement whose justification is efficiency, logic or clarity. Its justification is that it accommodates power to freedom and vice versa: it reconciles the irreconcilable.

Id.

69. As an example, Bickel cites the Supreme Court's resourceful efforts to cushion rather than to resolve clashes between the first amendment and interests which conflict with it, by using accommodations that rely upon the separation and diffusion of power. The devices which are in most common use go by the names of vagueness and overbreadth:

> The Court will not accept infringements on free speech by administrative or executive action and if the infringement occurs pursuant to a statute, the Court will demand that the statute express the wish of the legislature—in the clearest, most precise and narrowest fashion possible. Essentially, what the Court is exacting is assurance that the judgment that speech should be suppressed is that of the full pluralist open political process, not of someone down the line representing only one or another particular segment or faction in the society, and assurance that the judgment has been made closely and deliberately with full awareness of the consequences, and with clear focus on exactly the kind of speech that the legislature wished to suppress.

Id. An example given by Bickel is New York Times Co. v. United States, 403 U.S. 713 (1971). By invoking, in appropriate circumstances, the doctrine of executive privilege, the President can withhold documents from Congress and certainly from the public at large. Yet under the *Times* case, if a newspaper had obtained such documents without itself having participated in their theft, it could have published them with impunity; and if someone had stolen the documents and delivered them to a United States senator, that senator could use them and read them on the floor of the Senate and thus make them public. There would be no recourse against him because of the immunity granted by the Constitution to members of Congress. The paradox is that government is entitled to keep things private, but with very few exceptions involving the highest probability of very grave consequences, it may not do so effectively. Bickel explains that:

> Members of Congress, as well as the press, may publish materials that the government wishes to, and is entitled to, keep private. It's a disorderly situation, surely. But if we ordered it, we would have to sacrifice one of two contending values, privacy or public disclosure, which are ultimately irreconcilable. If we should let the government censor as well as withhold, that would be too much dangerous power and too much privacy. If we should allow the government neither to censor nor withhold, that would provide for too little privacy of decision making and too much power in the press and in Congress. So we are content with the pulling and pawing because in it lies the maximum assurance of both privacy and freedom of information. Not full assurance of either, but maximum assurance of both.

The Uninhibited First Amendment, supra note 68. *See* Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975) (exerpted from an address by Mr. Justice Stewart on November 2, 1974 at Yale Law School).

It is here, in connection with discharging its function to "balance" the balance of power, that the incremental,[70] continuous,[71] remedial[72] and innovative[73] nature of Supreme Court decision making is most valuable.[74] This function lies at the heart of judicial review. The Supreme Court's ultimate responsibility for its discharge mandates that the Court engage in the agonizing struggle referred to,[75] explain the basis for decision,[76] identify any "legislative facts" vital to the decision,[77] and that the Court, and others involved in the administration of justice, see to it that citizens have continuing access to the courts.[78] In other words, the justification for judicial review arises from the unique nature of the judicial process itself: but it does so only when that process operates at its full potential.

When, then, is the Supreme Court justified in overturning precedent? For all the reasons set forth in this article, the most appropriate time is when there has been an incremental, continuous, remedial and exploratory history of judicial decision making. Does this leave room for a departure from existing precedent based upon what the Court considers to be a moral imperative,[79] or for courageous and imaginative attempts to deal with problems not adequately addressed by past precedent?[80]

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70. *See* notes 22-24 *supra* and accompanying text.

71. *See* notes 25-27 *supra* and accompanying text.

72. *See* note 29 *supra* and accompanying text.

73. *See* notes 34-36 *supra* and accompanying text.

74. The reason that judicial decision making is potentially so well suited to discharging this function is found in the very nature of the judicial process. Its incremental and remedial characteristics allow change to occur in small steps, in light of past experience, so as to preserve accumulated wisdom, while its continuous and innovative attributes create the capacity for dynamic and even revolutionary change. "Balancing" the balance of power requires the most careful yet creative decision making possible.

75. *See* note 49 *supra* and accompanying text.

76. *See* notes 49-50 *supra* and accompanying text.

77. *See* notes 55-59 *supra* and accompanying text.

78. *See* notes 63-64 *supra* and accompanying text.

79. Brown v. Board of Education, 347 U.S. 483 (1954) was a legitimate instance of the Court's response to a moral imperative. Other examples might include Harper v. Virginia Bd. of Elections, 388 U.S. 663 (1966) (establishing a right to vote in state elections); Gideon v. Wainwright, 372 U.S. 335 (1963) (establishing indigent criminal defendant's right to counsel in felony trials); Skinner v. Oklahoma, 316 U.S. 535 (1942) (invalidating state law providing for compulsory sterilization of habitual felons). *But cf.* Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (warning that the Constitution is not designed to promote any one social or economic theory and that judges must separate their own philosophical beliefs from their interpretations of the Constitution). *Compare* Furman v. Georgia, 408 U.S. 238, 314 (1972) (Marshall, J., concurring) *with id.* at 375 (Burger, C.J., dissenting) (demonstrating disagreement among members of the Court as to what does and does not offend the collective moral conscience of American society as a whole).

80. The first attempts to demonstrate that the Constitution embodies a right of personal

The answer is yes, because each decision starts its own chain of decisions which will then explore and reveal the wisdom of that decision. No one decision is so irreversible that it cannot be corrected by a subsequent decision. If the Court adheres to the requirement that its reasoning be explained and that its essential factual assumptions be revealed, narrow and self-serving concerns, fuzzy thinking and all the manifestations of imperfect analysis will be exposed as such. The best protection against abuse of judicial authority may be the sobering realization that the chickens will come home to roost.

While writing this article, I was concerned that the view of the judicial system here expressed carried with it a relativism at odds with principle. I hope this is not the case, and that the view of the judiciary set forth in this article, and the view which the judicial system actually reflects, is that dogma should never stand in the way of truth and that principle worthy of adherence must be able to withstand the most exacting test of past experience, contemporary wisdom and essential justice to the parties at bar.

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privacy can be viewed as such attempts. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965).