Creating Legal Doctrine

Edward L. Rubin
Malcolm Feeley

Follow this and additional works at: https://scholarship.law.berkeley.edu/facpubs
Part of the Law Commons

Recommended Citation
INTRODUCTION

The old, self-justificatory bromide that judges do not make the law, but only find it, is generally rejected—even scorned—these days,¹ but it continues to exercise a powerful effect on legal theory. It still whispers to us from the dark corners of legal formalism that there is no such thing as judicial lawmaking, and that, if there is, it is a violation of the rule of law. As a result, judges and legal scholars seem to believe that they have achieved a decisive conceptual breakthrough simply by rejecting this position.² Having done so, they are content to describe judicial lawmaking with generalities like judgment,³ pragmatism,⁴ religiosity,⁵ or maturity⁶ that respond primarily to a lingering

³ Cardozo, supra note 2, at 113 (“If you ask how [the judge] is to know when one interest outweighs another, 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.”).
⁴ Daniel A. Farber, Legal Pragmatism and the Constitution, 72 Minn. L. Rev. 1331, 1377 (1988) (“blend of principle and policy, of tradition and innovation, is the essence of legal pragmatism”).
⁵ Michael J. Perry, The Constitution, the Courts, and Human Rights 98 (1982) (“noninterpretive review [or constitutional policymaking] in human rights cases ... represents the institutionalization of prophecy”).
⁶ Frank, supra note 1, at 252 (the “civilized administration of justice” is achieved by “a mind free of childish emotional drags, a mature mind”) (emphasis omitted).
sense that there is something normatively defective about judicial law-making. The result is that they do not proceed to investigate the crucial question: Precisely how do judges actually create new legal doctrine? While many acknowledge that the process is common or ubiquitous, there are virtually no theories about the way that it takes place.

But it is the very ubiquity of the doctrinal creation process that underscores the need for a theory of its operation. All legal doctrines must have a beginning, and many can be directly traced to rather particular groups of judicial decisions. The constitutional right of privacy is an obvious and perhaps extreme example, but the universally accepted common law right of privacy was also established by judicial action rather recently, and the common law right of publicity was established more recently still. The right of free speech is explicitly provided in the Constitution, but the legal doctrine associated with it originated in the 1920s; before then, there were no cases, no general principles, and no operative doctrine. The Sherman Act is a positive law enacted by Congress, but the predatory pricing doctrine that flows


8. The first case to hold that such a right existed was Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905). The inspiration for the decision, of course, was Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890). For a summary of the doctrine's development, see J. Thomas McCarthy, The Rights of Publicity and Privacy §§ 1.3, 1.4 (1987).

9. This right was first articulated in Haelan Lab., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953), and was given the Supreme Court's imprimatur in Zacchini v. Scripps Howard Broadcasting Co., 433 U.S. 564 (1977). See McCarthy, supra note 8, at §§ 1.6-1.10.

10. Stromberg v. California, 283 U.S. 359 (1931); see Schenck v. United States, 249 U.S. 47 (1919). These decisions, and others of their period, created free speech doctrine; the constitutional clause had never been used to invalidate legislation prior to Stromberg, and there was little discussion of the clause in decided cases prior to Schenck. See ZECHARIAH CHAFEES JR., FREE SPEECH IN THE UNITED STATES (1941); GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 151-70 (1994); HARRY KALVEN, A WORTHY TRADITION 125-89 (Jamie Kalven ed., 1988).
CREATING LEGAL DOCTRINE

from it was formulated by the federal judiciary.\textsuperscript{11} Even the common law that we inherited from England, despite its apparently ancient lineage, can often be traced to specific acts of judicial creativity. Negotiable instruments doctrine, for example, was fashioned by eighteenth-century English judges, most notably Lord Holt and Lord Mansfield,\textsuperscript{12} about the same time that Blackstone was declaring that judicial decisions are nothing more than evidence of a preexisting law.\textsuperscript{13}

This Article presents a theory of judicial lawmaking. The theory is based upon phenomenology, as an account of human behavior, and on the "new institutionalism." Phenomenology focuses on the lived experience of human beings, and on their desire to create meaning for themselves out of the disparate forces that act upon them.\textsuperscript{14} The new institutionalism explores the functional and dysfunctional elements of institutional structure as created by and embedded in complex social environments.\textsuperscript{15} Taken together, these two approaches suggest a microanalysis of institutions that links the conceptual behavior of individuals to the output of institutional structures.\textsuperscript{16} It is a linkage that has already been developed by both economists\textsuperscript{17} and sociologists; applied to law, it becomes a tool for analyzing the previously impenetrable process of judicial lawmaking.

\begin{itemize}
\item \textsuperscript{11} See, e.g., Standard Oil v. United States, 221 U.S. 1 (1911); see also Lawrence Sullivan, Handbooks of Antitrust 172 (1977) (Chief Justice White "took the opportunity in Standard Oil to announce what has come to be known as the 'rule of reason,' a new and more general rubric under which the legality of concerted arrangements was to be evaluated.").
\item \textsuperscript{13} 1 William Blackstone, Commentaries *70-71.
\item \textsuperscript{14} The foundational works are Edmund Husserl, Cartesian Meditations (Dorion Cairns trans., 1977); Edmund Husserl, The Crisis of the European Sciences and Transcendental Phenomenology (David Carr trans., 1970); Edmund Husserl, Ideas (W.R. Boyce Gibson trans., 1962). For a canonical application of Husserl's ideas to social science, see Alfred Schutz, Collected Papers (1962).
\item \textsuperscript{15} See James G. March & Johan P. Olsen, Rediscovering Institutions (1989); Organizational Environments: Ritual and Rationality (John W. Meyer & W. Richard Scott eds., 1983); The New Institutionalism in Organizational Analysis (Walter W. Powell & Paul J. DiMaggio eds., 1991) [hereinafter The New Institutionalism].
\item \textsuperscript{17} Douglass C. North, Institutions, Institutional Change and Economic Performance (1990); Oliver E. Williamson, The Economic Institutions of Capitalism
Part I of this Article describes the factors that motivate individual judges when they create new legal doctrine. It identifies these factors as existing doctrine, personal belief or attitude, and the desire to integrate the two. Part II then explores the process by which these individual desires are shaped by institutional structures to generate an institutional result. We refer to this process as coordination, and we consider both the features and the categories of ideas that serve a coordinating function. Finally, in Part III, we discuss the insights that this descriptive theory provides for the normative quandary that still bedevils the entire subject—whether judges are justified in creating new legal doctrine without direct legislative authorization.

I. THE INDIVIDUAL JUDGE'S MOTIVATIONS

An immediate difficulty in formulating a theory of doctrinal creation is that the process involves assessing the conceptual behavior of an institution. The judiciary, after all, is an institution; any American jurisdiction, whether federal or state, consists of hundreds or thousands of individual judges, plus a variety of other employees. Modern scholars have much to say about the structure of institutions, but say relatively little about their conceptual processes. Mary Douglas has written an insightful book entitled *How Institutions Think*, but her topic is the way institutions structure individual thought, not the way that institutions solve problems or develop new ideas. Yet most political and governmental action these days springs from ideas

18. Modern organization theory offers a range of illuminating models of institutions, but rarely addresses the institution's ability to generate ideas. Of the classic branches of organization theory, the human relations school tends to emphasize individual behavior and treat the organization as possessing few behaviors of its own, see, e.g., Chris Argyris, *Personality and Organization* (1957); George C. Homans, *The Human Group* (1950); Charles Perrow, *Complex Organizations: A Critical Essay* (2d ed. 1979); Philip Selznick, *Leadership in Administration* (1957), while systems theory tends to treat institutional behaviors as largely autonomous of individuals, see, e.g., Stafford Beer, *Cybernetics and Management* (1967); Jay R. Galbraith, *Organization Design* (1977); Karl E. Weick, *The Social Psychology of Organizing* (2d ed. 1979). These approaches provide considerable insight into institutional behavior, but do not attempt to explain institutional ideas. Decision theory seems more promising, with its emphasis on the interaction of individual thought processes and institutional settings, see, e.g., March & Olsen, *supra* note 15; James G. March & Johan P. Olsen, *Ambiguity and Choice in Organizations* (2d ed. 1979); Herbert A. Simon, *Administrative Behavior* (2d ed. 1961), but its emphasis has been the institution's capabilities and limitations in carrying out tasks, not its creation of ideas.

CREATING LEGAL DOCTRINE

generated in the institutional context itself, not from either individual theory or charismatic leadership.

Whatever its origin, this lack of theory about the conceptual process of institutions is generally replaced with two different and rather unconsidered views. The first is the naive attribution of human thoughts or feelings to institutions in their entirety—for example, the assertion that the institution "behaved" or "reacted" in such and such a manner. This sort of anthropomorphism does not aid us in understanding the way that individuals in institutional roles think individual thoughts and take individual actions that produce institutional consequences; rather, it obscures this process behind a set of metaphors that range from the conspiratorial to the miraculous.

But if the fanciful animation of institutions as big, complicated people is unhelpful, the second view, which separates the institution into self-enclosed individuals with no institutional concerns, is equally unhelpful. This approach has become quite popular of late; it serves as the basis of the public-choice movement, for example, which treats all public officials as motivated solely by self-interest. The result is to exclude, as a preempirical assumption, any possibility that the individual official will think on behalf of the institution and that some collective conceptual process will emerge. It depicts the institution as a set of preestablished roles into which interchangeable individuals are inserted or removed.

We are confronted, therefore, with a complex situation that has not been sufficiently assessed. On the one hand, institutional action,

---

20. A notorious version in the legal context is the attribution of intentionality to legislatures, or to even more amorphous groups such as "the Framers." This is a belief that remains very much alive. See, e.g., RAOUl BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); ANDrei MARMOR, INTERPRETATION AND LEGAL THEORY (1992); INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT (Jack N. Rakove ed., 1990). Devastating theoretical criticisms have been levelled at the concept. See, e.g., Ronald Dworkin, LAW'S EMPIRE 312-37 (1986); Mark Tushnet, Red, White, and Blue: A Critical Analysis of Constitutional Law 23-45 (1988); JEREMY WALDRON, LEGISLATORS' INTENT AND UNINTENTIONAL LEGISLATION (forthcoming 1996); Eben Moglen & Richard J. Pierce, Jr., Sunstein's New Canons: Choosing the Fictions of Statutory Interpretation, 57 U. CHI. L. REV. 1203, 1209-15 (1990); Max Radin, Statutory Interpretation, 43 HARV. L. REV. 863 (1930).


including action based upon ideas, must be located within the minds of individuals. On the other hand, those individuals cannot be treated as generic persons with undifferentiated motivations like self-interest, but must be recognized as highly contextualized beings acting in accordance with their institutional positions. What is required, in other words, is a phenomenology of institutional thought. This would provide a way of understanding how individual human beings, on the basis of their own thoughts and actions, are shaped by their institutional context, and how, in turn, they shape that context in response to changing circumstances or conceptualizations.

The general project is obviously beyond the scope of this Article; the focus here will be on the more narrow project of providing a microanalysis of the process by which judges create new legal doctrine. Political science offers no insight into this process, and hides its embarrassment over this lacunae (to lapse into anthropomorphic discourse for the moment) by exploring the social motivations of the judges. Legal scholarship offers only minimal insights, and hides its embarrassment by debating the normative implications of the result. We will discuss these normative implications in Part III, but in order to explain the process of judicial policymaking we must first explain how doctrinal creation actually occurs.

We can begin the analysis of doctrinal creation by identifying three major motivations that shape the way judges carry out their institutional roles. These can be described as doctrine, attitude, and integration. The first two are familiar elements in most theories of judicial decisionmaking; indeed, they restate the debate that has dominated political-science scholarship about judicial decisionmaking and figured prominently, at the very least, in legal scholarship. According to the leading school of thought in political science, represented by Joel Grossman, Harold Lasswell, Glendon Schubert, Jeffrey Segal, Harold Spaeth, Sidney Ulmer, and others, judicial decisions can be predicted by nonlegal factors such as the judges' personal backgrounds or values.23 The opposing school, which includes John Gruhl, Fret Kort, and Charles Johnson, argues that these decisions can be

frequently, although not always, predicted by examining doctrinal precedents. The contrast is less stark in legal scholarship because this scholarship tends to be prescriptive, rather than descriptive, but the debate has been all the more intense as a result. Generally speaking, those writing within the fields of critical legal studies, critical race theory, and law and economics all claim that nonlegal influences predominate, while interpretivists of various sorts, including Philip Bobbitt, Ronald Dworkin, Melvin Eisenberg, and Owen Fiss, recognize an important role for the legal tradition, although they disagree about the scope and nature of its influence.

Given the long-standing nature of this debate, and the desirability of avoiding either cynicism or Panglossianism, it seems likely, as Karl Llewellyn argued in *The Common Law Tradition* that both factors are at work, and thus it would be more productive to explore their interaction than to choose between them. For present purposes, the concern is how these factors interact to generate new doctrine. Before exploring this issue, however, it is necessary to define both doctrine and attitude from a more phenomenological perspective—that is, from a perspective that takes account of the judge’s experiential position. There have, of course, been a number of efforts to describe the process of judging, including notable recent efforts by

---


Ronald Dworkin, Melvin Eisenberg, William Eskridge, Kent Greenawalt, Richard Posner, and Frederick Schauer. The one that bears the closest resemblance to our approach is Duncan Kennedy’s, which also relies upon phenomenology. But all these efforts, including Kennedy’s, concern the interpretive process, and thus necessarily address the extent to which legal texts function as constraints. The question here is how judges reach their decisions when there is no text—when they are creating an entirely new doctrine. This is the question that is central to an understanding of the judicial policymaking process.

A. Doctrine

The first force, or motivation, that acts upon judges when they are creating new legal doctrine is existing legal doctrine—not a particular text, but existing doctrine as a whole. Since judges are supposed to decide cases by following legal doctrine, the inclination to do so is part of their more general desire to act in the proper fashion. Alisdair MacIntyre defines this well-recognized motivation as a mode of thought organized around appropriateness and concerned with obligatory action, as opposed to thought that is organized around consequences and concerned with anticipatory choice. In a recent work, James March and Johan Olsen explicitly link it with the process of legal reasoning, by which they mean doctrinal interpretation. While institutional property is a familiar concept, its operation in a given institution is generally far from simple. Every institutional role carries with it a remarkably complex set of behavioral expectations, which

32. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994).
36. Duncan Kennedy, Freedom from Constraint in Adjudication: A Critical Phenomenology, 36 J. LEGAL EDUC. 518 (1986). Kennedy derives his sense of phenomenology from Sartre. Id. at 518 n.1. Sartre is a phenomenologist because virtually all continental thought derives from Husserl, the founder of phenomenology. See Richard A. Cohen, Foreword to Emmanuel Levinas, The Theory of Intuition, in HUSSERL’S PHENOMENOLOGY (André Oriane trans., 2d ed. 1995). It is not clear, however, that Sartre is necessarily the best source for this methodology.
exist in the minds of the institution's members. As Niklas Luhmann observes, these institutionalized expectations make communication and collective action possible in a complex, uncertain world. They involve the way in which each job is done, and also extend to informal interactions: how to run a meeting, what to talk about at the beginning of the day, where to eat lunch, how to behave towards one's superiors and one's subordinates. In one sense, the expectations are continuous; the formal ones, relating to the task to be performed, and the informal ones, relating to one's personal comportment in the institution, are established and enforced by other members of the institution and perceived by the individual role occupant as a single continuous set of requirements. In another sense, however, these sets of expectations, despite their obvious overlaps, are discontinuous because they are established and perceived as such; that is, one of the institutional understandings involves the collectively perceived distinction between formal and informal rules.

Because of the individualistic, anti-institutional elements in our belief system, we tend to associate the concept of role behavior with conformism, conventionality, and repression. We see it, in other words, as an imposition on individuals that suppresses many of their natural, healthy inclinations. As a normative matter, this may be useful, but if we are to understand institutional thought and behavior we must recognize that such behavior is not only an external constraint, but also an internal relation or conceptual framework. This is true in two senses. First, the rules of behavior construct the individual's institutional role in its entirety—they constrain but they also empower. The chief administrator who initiates a massive reform program for her agency may be no less bound by role expectations than the night watchman who follows a precisely defined route around the perimeter


41. The distinction between formal and informal expectations comes from human relations theory. See Homans, supra note 18; F.J. Roethlisberger & William J. Dickson, Management and the Worker (1940).

of the agency's building. With respect to courts, the obligation to relate one's decision to legal doctrine not only limits action, but makes action possible; it provides a deep and strong system of meaning that confers both contour and legitimacy on judicial decisions. Thus, institutional actions are like a language. The English language has rather strict rules about word formation, which function as constraints on what we can say, but also enable us to speak; they are not oppressive because there is no natural or primeval speech that they preclude. It is possible to break some of the rules, of course—Ira Gershwin broke the rule for forming contractions when he wrote "'swonderful, 'smarvelous, that you should care for me"—but it is the background of other rules that gives the violation meaning.

The second way in which role expectations are relational is that the individual is not only their object, but also their origin. They do not come from "the institution" itself—that would be anthropomorphism again—but from the individuals who comprise the institution. Each individual responds to the expectations of others, and also projects expectations to which others must respond. These expectations are learned, but they are learned from others who project them and thus transmit them over space and time. They constitute the network of relations that, in a very real sense, constitutes the institution. Role expectations, in other words, are intersubjective; they exist within each individual member of the institution, but are generated by a social learning process. Collectively, they form the preempirical structure that makes possible the individual expectations that are then projected onto others. This does not mean that every member of the institution will behave identically in a given situation, but only that the set of individual views regarding appropriate institutional behavior will tend to converge because relatively powerful intersubjective forces shape those views.


44. PAUL K. FEYERABEND, THREE DIALOGUES ON KNOWLEDGE (1991).

45. HAROLD GARFINKEL, STUDIES IN ETHNOMETHODOLOGY (1984); 1 ALFRED SCHUTZ, COLLECTED PAPERS (1962).

CREATING LEGAL DOCTRINE

The role expectations for judges include both of the aspects of law identified above: law as a doctrinal framework and law as a constraint on decisionmaking discretion. In short, they involve the process of following legal doctrine. We tend to apotheosize the law, and the resulting glow obscures the very mundane, law-following process. In effect, legal doctrine is part of the manual for new employees that judges receive when they begin their job. Following established legal rules is simply the right way for judges to do this job, and is thus continuous with the rules about how to behave on the bench or in judicial conferences. In thus demoting doctrine from an overarching ethos to a portion of the judge's job instructions, however, we should not trivialize it. As Eisenberg points out, the doctrine which comprises part of the judge's sense of institutional propriety is the entire corpus of the law, including conflicts between rules, principles of legal change, and theories about law derived from secondary sources.\textsuperscript{47} In addition, different judges will perceive doctrine differently; the intersubjective, culturally embedded nature of the role will produce a high level of convergence in their views, but will not determine these views with unvarying precision.

While a judge's role will include a vast range of rules, principles, practices, and habits, it also involves the interpretation of legal texts. Judges fashion legal doctrine when they decide, for one reason or another, that existing texts provide them only with a grant of jurisdiction, and not with any particularized guidance for the case at hand. This does not mean, of course, that texts are irrelevant. Legal doctrine in general is still perceived as being derived from texts in some systematic, nonarbitrary manner; it is only the particular issue in the case at hand that is bereft of textual support. Of course, the judicial and cultural belief that doctrine is derived from texts has been the subject of much recent controversy. This analysis asserts no claim about the extent to which texts control judicial decisions; all that it asserts is that there will generally be a prevailing interpretation of various texts that will be incorporated into the judge's understanding of doctrine. There may be nothing more to textual interpretation than this consensus view,\textsuperscript{48} or there may be somewhat more,\textsuperscript{49} or there may

\textsuperscript{47} Eisenberg, supra note 31.

\textsuperscript{48} See Stanley Fish, Is There a Text in This Class? The Authority of Interpretive Communities (1980); Karl Llewellyn, The Bramble Bush 66-69 (1951); Tushnet, supra note 20; Anthony D'Amato, Legal Uncertainty, 71 CAL. L. REV. 1 (1983); David Kairys, Law and Politics, 52 GEO. WASH. L. REV. 243 (1984); Sanford Levinson, Law as Literature, 60 TEX. L. REV. 373 (1982); Gary Peller, The Metaphysics of American Law, 73 CAL. L. REV. 1151
be a great deal more.\textsuperscript{50} But, as an empirical matter, there is generally a consensus; when scholars speak of indeterminacy, they are referring to an uncertainty about the meaning of the text itself, not an uncertainty about the prevailing view. Although some interpretations will be contested at any given time, judges tend to be fairly clear about the standard interpretation of most texts, even if they cannot justify that interpretation in persuasive terms. Of course, such agnosticism about the role of texts deprives this consensus of any justificatory force. We cannot say that a judge’s behavior in following the accepted interpretation embodies the rule of law, or constitutes the product of legitimate decisionmaking; it is simply the interpretation that is in place at a given time.

\section*{B. ATTITUDE}

The second basic motivation for the behavior of individuals in institutions is their personal beliefs, or their attitudes. Roughly speaking, if role expectations determine the relationships among members of the institution, then attitudes or beliefs determine the relationship between each person’s institutional role and certain other aspects of


\textsuperscript{49} See generally Eskridge, supra note 32, at 5-80 (meaning of rules determined by interaction of text and interpreter); Greenawalt, supra note 33 (some legal questions are clear, but others depend upon a mixture of political and moral views); H.L.A. Hart, \textit{The Concept of Law} 120-50 (1961) (rules are generally open to some ambiguity, but are not entirely indeterminate); Fiss, supra note 28 (interpretive community generates “disciplining rules” that constrain interpretation); Ken Kress, \textit{Legal Indeterminacy}, 77 \textit{Cal. L. Rev.} 283 (1989) (level of indeterminacy is only moderate); John O. Newman, \textit{Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values}, 72 \textit{Cal. L. Rev.} 200 (1984) (institutional values guide interpretive process that is discretionary, but not indeterminate); Dennis Patterson, \textit{Law’s Pragmatism: Law as Practice & Narrative}, 76 \textit{Va. L. Rev.} 937 (1990) (meaning of a rule is determined by practical judgments based on textual language); Robert Post, \textit{Introduction to Law and the Order of Culture} vii-viii (Robert Post ed., 1991) (the meaning of rules is determined by social practices which incorporate relatively autonomous rules).

\textsuperscript{50} See, e.g., Berger, supra note 20 (original intent of the Framers is determinate); Dworkin, supra note 20 (there exists a best interpretation for most legal texts); id. (correct interpretation can be derived from prevailing moral principles); Michael S. Moore, \textit{A Natural Law Theory of Interpretation}, 58 S. \textit{Cal. L. Rev.} 277 (1985) (definitive answers can be derived from universally valid moral principles); Schauer, \textit{Giving Reasons}, supra note 35 (many legal texts have definitive meanings, and most have a core of definitive meaning); Frederick Schauer, \textit{Formalism}, 97 \textit{Yale L.J.} 509 (1988) (definitive rules constraining decisionmakers can be stated in linguistic form).}
that person's life.\textsuperscript{51} The precise texture that one ascribes to this relationship depends upon one's theory of the self.\textsuperscript{52} It may be seen as a relationship between the person's institutional role and the other roles a person plays, or it may be seen as a relationship between the institutional role and the individual's core identity. In either case, this interaction introduces a significant amount of variability into the individual's behavior as a member of the institution. Often, role expectations operate as a centripetal or cohesive force, and beliefs as a centrifugal or dissociative one. People's beliefs can lead them to pursue personally defined goals, rather than those established by institutional expectations, and to carve out areas of individual privilege and advantage, but this is not invariable. It is also true, at least in an open, democratic society, that high levels of commitment to the institution's goals can only result if the person's attitudes are at least generally consistent with the expectations that the institution generates.

Like role expectations, attitudes are intersubjective. Although they are part of the individual's personal thought process, and stand apart from her institutional role, they are socially constructed, as are all individual thought processes.\textsuperscript{53} While both political scientists and legal scholars generally recognize the social nature of judicial attitudes, they hold a range of views about the specific character of these attitudes. Political scientists often imply that judicial attitudes are instinctive or reflexive, the product of personal background and social class.\textsuperscript{54} Legal scholars, on the other hand, tend to emphasize the conscious or ideological character of judicial beliefs, an emphasis that can

\textsuperscript{51} David W. Rohde and Harold J. Spaeth define attitude as a set of interrelated beliefs that are relatively enduring and produce behavioral consequences. DAVID W. ROHDE & HAROLD J. SPAETH, SUPREME COURT DECISION MAKING 75-78 (1976). In this discussion the terms "attitude" and "belief" are used interchangeably, because no effort is made to distinguish beliefs from sets of beliefs. Where attitudes or beliefs are organized in a more general construct of which the judge is consciously aware, the term "ideology" is used instead.

\textsuperscript{52} For general explorations of the issue, see, for example, HARRY G. FRANKFURT, THE IMPORTANCE OF WHAT WE CARE ABOUT (1988); ERVING GOFFMAN, ENCOUNTERS (1961); GEORGE H. MEAD, MIND, SELF & SOCIETY (1934); CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY (1989); Meir Dan-Cohen, Responsibility and the Boundaries of the Self, 105 HARV. L. REV. 959 (1992).

\textsuperscript{53} PETER L. BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY (1966); MEAD, supra note 52, at 141-42, 182.

be either positive or negative. For some, such as Philip Bobbitt, Ronald Dworkin, Melvin Eisenberg, and Michael Perry, judicial beliefs serve as a pathway by which important social principles, shared by the great majority of citizens and reflecting widespread norms or values, are incorporated into law.\textsuperscript{55} For others, often associated with critical legal studies\textsuperscript{56} or critical race theory,\textsuperscript{57} judicial beliefs reflect the political ideology of society's dominant group, and become a vehicle for maintaining that group's power at the expense of ordinary citizens or people of color.

The analysis presented here does not require any choice among these views, and the subject is far too complex to address by way of a digression. It is necessary, however, to reject two somewhat extreme variations of these views in order to proceed. First, the implicit suggestion in the political science literature that these attitudes are reflexive cannot mean that judges are literally unaware of them. The judges may be unaware of their provenance, and unable to organize them into a systematic theory, but it would be bizarre to suggest that these attitudes were actually unavailable to the judge's conscious mind. A typical judicial attitude scale for the 1990 Court, for example, ranks the Justices' attitudes toward civil liberties, with Marshall and Blackmun on the liberal side, Kennedy and Rehnquist on the conservative side, and all the other justices except for Stevens leaning toward the conservatives.\textsuperscript{58} Obviously, every one of these Justices could have constructed the same ranking, and placed themselves quite accurately within it. Perhaps they have thought about the reasons why they have these attitudes and perhaps they have not; perhaps they could give a consistent account of them, although none of them would be able to satisfy Kant in this respect. But they are all fully aware of their attitude toward civil liberties, and fully able to articulate it, assess it, and consciously change it if motivated to do so.

The second extreme that must be rejected is the notion, sometimes implied in critical legal studies or critical race theory, that the

\textsuperscript{55} Bobbitt, supra note 28; Dworkin, supra note 20; Eisenberg, supra note 31; Michael J. Perry, The Constitution, the Courts, and Human Rights (1982); Ronald Dworkin, Hard Cases, 88 Harv. L. Rev. 1057 (1975).


\textsuperscript{57} See Austin, supra note 26; Crenshaw, supra note 26; Lawrence, supra note 26.

\textsuperscript{58} Glick, supra note 1, at 328-30.
federal judiciary constitutes a conscious conspiracy. The attitudes of federal judges may reflect the ideology of society's dominant elite, but that elite is necessarily a large and rather variegated one. It might well exclude people of color, and might well favor the middle and upper classes over the working class and the poor, but it cannot be much narrower than that. Judicial beliefs cannot be ascribed to a self-conscious, collectively developed plan by powerholders to perpetuate the status quo because the assumptions necessary to sustain such a claim are simply too baroque to be plausible.59

It is also necessary to distinguish the approach to judicial attitudes presented here from the concept of social principles that guide judicial decisionmaking. There is a close relationship between the two; because judicial attitudes are intersubjective, they provide a pathway by which widely felt social norms can be incorporated into judicial decisionmaking. The invocation of social principles as a guide for judicial action poses a variety of paradoxes: What are these principles, how do judges identify them, and what is their justificatory force? Demoting these principles to mere attitude or belief resolves most of these paradoxes. There is no question as to how the judge recognizes social principles or how she chooses among them; she does so instinctively because these principles are what she believes. There is also no question about the justificatory force of these social principles; because they exist as merely individual attitudes, they have no justificatory force at all. We can be partially reassured that the judge's reliance on social principles will fall within a delimited range, since these principles are the intersubjective, socially constructed views of a rather traditional group of people. But, by itself, this does not provide the predictability or sense of external constraint that is required for us to regard judicial behavior as being subject to the rule of law.

The claim that social principles provide definitive guidance for judges, and thereby legitimate departures from accepted doctrine, has been creatively and forcefully advanced by Ronald Dworkin.60 Most

59. Duncan Kennedy's insightful discussion of judicial decisionmaking, see Kennedy, supra note 36, verges close to this position, at least by implication. His example, which he presents as a first-person projection of what his own approach would be, is that of a judge who believes that the workers should prevail in any labor-management dispute, and that the employer should not be allowed to control the means of production. A class-oriented, conscious ideology of this sort, standing in opposition to general social attitudes, implies that most judges subscribe to an equally class-oriented ideology favoring employers. But this seems implausible; there is no direct evidence that the judges were not acting in good faith, or that their beliefs diverged from general social attitudes.

60. Dworkin, supra note 20; Dworkin, supra, note 55.
observers believe that Dworkin has described an important aspect of judicial decisionmaking, but one that simply does not provide the certainty he claims. Dworkin's response is to hypothesize a superhuman judge named Hercules who unerringly discerns and applies those general social principles. This seems like an admission of defeat, but more importantly, it assumes the very point at issue, namely that social principles exist somewhere beyond the realm of ordinary discourse. In fact, these principles are produced by real human beings, they are applied by real human judges, and the result is the variation and uncertainty that is inherent in all normative debate. Judges regularly rely on their own beliefs—the social principles that they believe are right—but we cannot look to that reliance as a means of subjecting judicial policymaking to the rule of law.

C. Integration

The third basic institutional motivation, and the one that carries us beyond familiar elements of judicial decisionmaking, can be described as integration. In essence, it involves the relationship between legal doctrine and personal beliefs—the way in which the individual's experience as an individual relates to the individual's experience as a member of the institution. It is essentially an adaptation of some basic insights of cognitive psychology to the institutional setting in which people function as judges. Not all choices based upon a judge's personal beliefs can be described in this manner. For example, if the judge is only interested in maximizing personal self-interest, there will be no occasion for integration. But when the judge's sense


62. In addition, by buttressing the concept of unambiguous social principles with the concept of an all-knowing judge, it violates an epistemological guideline known as Occam's Razor (entities should not be multiplied beyond necessity), which scientists also call the tooth fairy rule (only one mysterious agent per theory).


64. WILLIAM JAMES, PRAGMATISM (1907), reprinted in THE WRITINGS OF WILLIAM JAMES: A COMPREHENSIVE EDITION 376, 382-83 (J. McDermott ed., 1967).
of personal beliefs includes action on behalf of the institution, the relationship between that motivation and the demands of doctrine often involve the integration process.

Integration is the starting point for a theory of creativity within an institution, and specifically for a theory of judicial creativity. To see why this is so, it is necessary to consider the interaction of doctrine and belief in greater detail. As stated above, the judge's understanding of doctrine and his personal belief will sometimes correspond and at other times diverge. Correspondence is generally unproblematic; it means that the recognized legal doctrine seems satisfying or morally proper to the judge and can be followed without qualm or reevaluation. No process of integration is required. Of course, the judge may be incorrect in this assessment, which, at the very least, means that most other members of the institution would disagree with his perception of correspondence. Since people tend to be accurate in assessing their personal views (and how could we tell if they are not), the problem usually resides in the judge's assessment of doctrine; that is, he has concluded that existing law conforms to his personal beliefs about the situation, whereas most people, having heard an account of his beliefs, would say that his views and the law diverge. In this situation, the judge will confidently and unsuspectingly misstate existing law, and his decision will be regarded as a poor one by his colleagues, whatever their own ideology suggests about the situation. Since misperception is a popular means of avoiding intrapsychic conflict, this is likely to occur with some regularity, but need not detain us any further.

The important situation, for present purposes, is the one where the judge's attitudes are genuinely at odds with doctrine; that is, where

---


66. There is another possibility that should be added for the sake of completeness: the judge might believe that existing doctrine and his personal belief diverge, but he might be wrong, just as he might be wrong about their correspondence. Again, his error would presumably lie in his assessment of existing law. As a response to this imagined quandary, the judge might submit to his understanding of the doctrine and reluctantly apply an unaccepted legal rule. That would obviously be regarded as a poor decision, leaving the poor judge with no compensating benefit except the dubious one of having his real beliefs validated by an appellate court reversal of his actual decision. Alternatively, the judge might reject the doctrine, consciously reaching a desirable, but in his mind, unjustifiable result. In fact, he would be declaring the accepted law and in this one case, contrary to what his mother told him, two wrongs really would make a right. Finally, the judge might try to integrate his beliefs with his mistaken understanding of doctrine in a valiant effort to justify changing a doctrine that has already changed. Many of the decisions that appear in law school casebooks probably belong within this final category.
the judge finds the institutionally expected answer to be personally distasteful. As a matter of descriptive sociology, this is probably more likely to occur when there are conflicts within doctrine, thereby weakening its force. The crucial conflict, however, is not within doctrine, but between doctrine and the judge’s attitudes. Faced with a conflict of that sort, a judge has three possible options. First, she can ignore her beliefs and make the decision that her understanding of the doctrine suggests. This may cause her varying degrees of personal stress based on the nature of the issue, the breadth of the divergence, and the structure of her own personality. Assuming she is able to control this stress, she will act in a way that is, to an outside observer, virtually indistinguishable from the judge whose beliefs correspond to the existing doctrine. Perhaps there will be more hesitation or humility in her manner, perhaps qualifications will creep into her opinion, but if she has truly resolved to ignore her own beliefs, these evidences of apostasy will often be subtle and relatively insignificant.

A second option for the judge is to ignore the doctrine and make a decision that is governed entirely by her attitudes. Presumably, this would involve the conscious thought, and perhaps the explicit statement, that “the law requires me to do one thing, but I find that law objectionable and I have decided to ignore it and do something else instead.” Behavior of this nature is extremely rare, given the power of role expectations. As Robert Cover describes in *Justice Accused*, even abolitionist judges enforced the Fugitive Slave Law, rather than engage in civil disobedience from the bench. During the past few decades, feelings have run high about abortion, but how many lower court judges, even Republican-appointed ones, have declared that they would not follow *Roe v. Wade*?

The third course of action when doctrine and attitude diverge is to integrate the two. In this process, the judge finds some way to unify her subjective sense that the law as it exists requires one result with her subjective sense that the law ought to be different. The structure of this integrative process is fairly well defined because our legal system contains a variety of principles that recognize and explain doctrinal change. It is generally accepted that the law evolves, that specific constitutional or statutory language can mean different things in different circumstances, and that we should look at the underlying purpose or intent of positive legal enactments as well as their literal

---

language. All these principles, being well-recognized if not universally accepted, are elements of the law itself and are available for use in the integrative process. What is not part of the law as it exists—what could not be, if the concept is to have any meaning—are those changes in the law which would bring it into congruence with the judge's attitudes. Those attitudes, therefore, can be regarded only as supplying content or direction to doctrinally accepted notions of legal change.

In the process of integration, the judge has the personal or phenomenological experience that she is changing the law, or at least stretching the existing doctrine. This experience will tend to demand an explanation; a judge who acknowledged that she had changed existing law on the basis of her own beliefs without writing an opinion, or who was perceived as doing so, would be regarded as doing a poor job. But the two operative motivations in the integrative process demand different kinds of explanations. The judge's attitudes will lead her to justify her conclusion in terms of general normative or social principles. The judge's commitment to doctrine will lead her to justify her decision in terms of the existing law, including the rules for legal change that this existing law incorporates. Frederick Schauer suggests that the act of explaining one's position involves the invocation of more general considerations and a statement of commitment to those considerations. According to this view, the judge's explanation would be the alembic of the integrative process—the place where she states a general consideration that is consistent with the underlying spirit of the law and with generalized normative or social principles.

This account of judicial behavior as motivated by the desire to integrate doctrine and belief is, of course, a conceptual one. It traces the judges' motivations as conscious states of mind, and it describes the judges' motivations in terms of their own beliefs, and it describes their actions in terms of the ideas that they developed within the context of the legal system. One could search for deeper, more structural explanations. Public choice theory would focus on the self-interest of the judges, ascribing doctrine creation to their desire to maximize their salaries or their leisure time. While this does not seem to be a particularly promising approach, the closely allied school of positive political theory, which is substantially more plausible than the public choice account, would explain the cases as an effort to expand the institutional power of the judiciary. Marxist scholars might attribute

---

the judiciary’s actions to the elite’s desire for more efficient mechanisms to control the lower classes—mechanisms that operate more systematically and are purged of the evident abuses that might draw attention to this system’s oppressiveness or incite open rebellion. A neo-Marxist account might stress the rhetoric of rights and reform as a means of masking social oppression. While these explanations can be illuminating, they are not sufficiently specific to answer the question that this inquiry addresses. That question is why a particular institution—the judiciary—adopts a particular approach at a particular time. An analysis of underlying motivations is unhelpful because it is equally applicable to all governmental actors at all the relevant times. To explain a particular event, it becomes necessary to factor in the very same conceptual, contingent developments that have been invoked without relying on these deeper motivations. In addition, these deeper explanations, whether based on public choice, Marxism, or a variety of other theories, do not describe the terms in which the actors themselves think. Yet these actors—the judges—are not bugs or boulders, but sentient, indeed intelligent, beings who participate in creating a complex system of meaning through the legal system. That process is worth describing, and its internal dynamics provide at least a necessary and perhaps sufficient explanation for the events in question.

An emphasis on the actual thought processes of judges does not imply the claim that these processes can be described in some pure, objective form, anterior to any theory. The conceptual account given above is itself a theory, and it is derived from the more general phenomenological idea that people construct systems of meaning to control both their perceptions and their actions. The claim is that this theory is anterior to any deeper one; that people do not act automatically, but as part of a conscious process that intervenes between their structural position and their actual behavior. One can then proceed to a deeper theory if one chooses, but the gain in explanatory power is often counterbalanced by the interpretive nature of the effort. For example, judicial behavior is described here as being motivated, in part, by the judge’s personal attitudes. One could then argue that these attitudes are always generated by personal self-interest, institutional self-interest, class interest, or whatever. If any of these explanations could be persuasively demonstrated, they would add genuine depth to the analysis; while they remain contested, they may only add complexity. Whether they are right or not, however, they still must
operate through conceptual mechanisms like a decisionmaker's attitudes, and it is those mechanisms that this Part discusses.

II. THE COORDINATION PROCESS

While the interaction of doctrine, attitude, and integration occurs within a single judge's mind, a new doctrine, however conceptual its character, is not an individual idea. The mere fact that one particular judge articulates a new legal concept does not, by itself, render that concept the doctrine of her jurisdiction. In order to achieve that status, the concept must be actualized as a basis for institutional action. It must be something that the institution, as a functioning social entity, is prepared to implement.

To continue avoiding anthropomorphism, however, it is necessary to follow the strategy of microanalysis that the new institutionalism recommends and to define institutional implementation in terms of individual behavior.69 We can begin by assuming that there is some element of inertia built into every decisionmaker's set of role expectations. It arises from the individual's desire for stability and from the institutional or social virtue of continuity. In the legal system, such inertia is associated with the reliability of law and great value is attached to it.70 In fact, what is notable about judicial institutions in most situations is the relative weakness of an institutional ethos of innovation; other institutions possess more conscious ideologies to encourage change, although most have strong inertial elements as well. The creation of new legal doctrine is the process by which this institutional inertia is overcome. This section defines that process, explains its relationship to the hierarchial structure of the judiciary, and then describes the particular features that establish the contours of new legal doctrine.


A. THE COORDINATION OF INTEGRATIVE EFFORTS

The engine that drives the creation of new ideas within institutions generally, and within the judiciary in particular, is a countervailing set of attitudes among a large proportion of the institution's members. This divergence can result from external forces, internal changes, the entry of new people into the institution, or a variety of other factors. Whatever its origin, its result will be that the members will undertake a variety of efforts at integration, and even those who initially ignore their personal attitudes and act in accordance with their established role will be amenable to integrating ideas. Since attitude is intersubjective, these integrative efforts will frequently be widespread—the more widespread they are, of course, the more they resemble the social principles on which so many accounts of judicial decisionmaking rely. As previously stated, however, the concept is used here as an empirical observation, not a decision rule for individual judges. For a divergence between doctrine and belief to trigger doctrinal change or creation, the divergent attitudes need not be universal or even conceptually available to every judge; they need only be reasonably common.

The idea that will become the new legal doctrine is one that ultimately prevails as a means of integration for the majority of judges. The process by which this occurs can be referred to as coordination. In one sense, coordination represents a further level of abstraction; integration involves the relationship between doctrine and attitude, while coordination can be seen as the relationship among individual integrative efforts. As such, it is quite rarified. Attitude or belief involves the individual's personally lived experience, and role expectations involve a complex, historically developed institutional experience. Integration is the intersection of the two around a specific issue; it is not, in itself, a personally grounded experience, but a concept that emerges from those experiences. Coordination is the intersection of various people's integrative processes, removed still further from lived experience because it contains only those elements of the integrative process that can be shared among individuals. It is not

71. Argyris, supra note 18; Rosabeth Moss Kanter, The Change Masters: Innovation for Productivity in the American Corporation (1983); Edwin P. Hollander & James W. Julian, Studies in Leader Legitimacy, Influence and Innovation, in Group Processes 115 (Leonard Berkowitz ed., 1978). There has been some discussion, of late, about creating institutions that are biased toward change rather than stability, but people are probably most enthusiastic about that approach when they disagree with the particular institution's present views. See, e.g., Roberto Mangabeira Unger, False Necessity 395-595 (1987).
necessarily a least common denominator, because one person can learn new things from another, but it is clearly a subset, or abstraction, of the integrative efforts that the various members of the institution undertake.

Coordination is an institutional process; it involves ideas that are necessarily held in common by many, if not all members of a given institution. In defining coordination's operation, there is the ever-present danger of anthropomorphism—of simply saying that the integrative process of the institution's members "gets" coordinated, or that the institution coordinates it, without bothering to define the phenomenology of this process. But it remains true that only individuals can think, and if an idea emerges from an institution, that idea must be present in the minds of real human beings who belong to or speak for that institution.

An idea can coordinate individuals' senses of integration while existing within the minds of individuals because the individuals in an organization will generally be committed to that organization as part of their institutional role. Consequently, they will have a specific, often conscious motivation to coordinate their integrative efforts with the other members of the organization. They will recognize that they must simplify or abstract these individual efforts if the goal of a shared institutional approach is to be achieved. This process involves the distinction between what can be thought and what can be thought in conjunction with others. Coordination in this sense is mutual, not intersubjective; it is not a mental process, arising as part of the individual's experience of the world, that is shared with others due to a system of meaning that preempirically structures experiences. Rather, it is a thought or idea that is consciously adopted by individual members of the institution to integrate their ideology and their role expectations in a manner that is consistent with their colleagues.

Without delving too deeply into the phenomenological structure of thought, we can note that coordination is kept separate from integration because judges are able to bracket their entire decisionmaking process. In effect, they set their own integrative efforts to one side.

72. The term is used here by analogy; as originally defined by Husserl, it represents the method of transcendence. His description of the mental process, however, is applicable to any conscious effort to suspend one's own belief by moving toward second order thought. Husserl states:

At the natural standpoint we simply carry out all the acts through which the world is there for us. . . . At the phenomenological standpoint, acting on lines of general principle, we tie up the performance of all such cogitative theses, i.e., we "place in brackets"
and examine the conclusions of other judges. Ordinarily, we assume that our own best solution to a problem deemed to be within our area of competence is the solution to be followed. But to the extent judges perceive themselves as members of an institution, they will question this assumption by bracketing their thought process and examining solutions that differ from their own conclusions. Although they may remain persuaded that their own integrative effort best resolves the perceived conflict between existing doctrine and their personal beliefs, they can accept a different integrative effort because it possesses a superior capacity for coordination. To put this another way, individuals reconstruct themselves, and more particularly their thought process, as members of the institution to which they belong.

Coordination occurs when judges communicate their ideas to one another. Probably the most common, and certainly the most studied, means of doing so is a judicial opinion. We need not inquire at this juncture whether the opinion represents a candid account of the judge’s thought process, although much interesting work has been done on this subject. In writing the opinion, the judge sets down her public account of the way that her personal beliefs can be integrated with her perception of existing legal doctrine. That is a thought process of its own, born of the need to act consistently with one’s role expectations. It represents the judge’s real feelings in her institutional role, and the question of whether it represents her real feelings about the integrative effort, apart from the personal attitudes that have already been incorporated in the integration process, is too metaphysical to be productive. There are other ways for judges to communicate, of course, including attending judicial conferences, making personal contacts, serving on multienmember panels, and stating their views in

what has been carried out, “we do not associate these theses” with our new inquiries; instead of living in them and carrying them out, we carry out acts of reflexion directed towards them. . . .

Husserl, Ideas, supra note 14, at 140-41 (emphasis in original).

law reviews and similar publications. In a concrete, anti-formalist account of judging, such means of communication count just as much as the traditional means of written opinions.

**B. Coordination and Hierarchy**

The process of coordination operates either horizontally or vertically; that is, it either emerges from the collective actions of various institutional actors or it is imposed by the leaders of the institution. For horizontal coordination to generate institutional change, it must ultimately become absorbed into the set of role expectations that all the members of the institution experience. This can be regarded as a three-stage process. First, a widespread though not necessarily universal divergence between the members’ role expectations and personal beliefs produces various efforts to integrate the two, and these efforts are communicated to other members of the institution. In the second stage, those members who have made these efforts accept one particular means of integration as a conscious strategy for fulfilling certain institutional goals that their role expectations demand. Finally, when this chosen method, or coordinating idea, becomes sufficiently common, it will begin to seem like appropriate institutional behavior and the conflict between role expectation and belief will be resolved by its generalized adoption. Not all the members of the institution need agree with the coordinating idea in order for it to become enrolled in the repertoire of institutionally proper behaviors. For a complex institution, two different and even conflicting courses of action may be comprised within the ambit of appropriate behavior, at least when one is old and one is new. Over time, of course, we would expect a well-functioning institution to settle on a relatively unified approach.

Vertically or hierarchically promulgated ideas may begin by simply integrating the leader’s role expectations and beliefs. The integrative effort can then be issued as an order with no coordinating features, and it will be effective if the members of the institution are willing to obey the leader. More precisely, the members’ role expectations often includes a principle of obedience; having received an instruction from the leader, they would ignore, or at least bracket, their own beliefs to the extent that these beliefs conflict with the newly promulgated order. This combination of integration and ukase by the leader of an institution is certainly a familiar strategy, but it is not a
particularly promising one. To begin with, it underestimates the difficulty of developing integrative ideas that achieve the institution’s purposes. In a situation where role expectations and personal beliefs diverge both for the leader and for other members of the institution, the leader will not necessarily be the person who can integrate these two divergent motivations most effectively. Thus, coordination of the subordinates’ and leader’s integrative efforts may be necessary to generate the best solution. More importantly, the willingness of subordinates to obey an institutional leader is generally limited; the more democratic the society and the more prestigious and “professional” the subordinates, the greater their resistance to outright command will be. When the subject matter of a command is merely routine, the propriety of hierarchical relationships is likely to prevail. However, if the command is generated by a divergence between the leader’s role expectations and personal beliefs, as it must be to constitute a new institutional idea, it will generally be received by subordinates whose own role expectations and beliefs have diverged. They are likely to resist the command because the command’s authority belongs only to their own role expectations, which is exactly what the divergence between role expectation and belief has called into question. In other words, the leader’s efforts to impose her integrative effort on subordinates will often conflict with her subordinates’ own integrative efforts, and their beliefs will then impel them to resist the command. This does not simply mean that an institutional idea is being undermined by truculent subordinates; it means that there will be no institutional idea at all, because an institutional idea is a practice followed by all the relevant members of the institution, not a declaration of the institution’s leaders.

The way that the declarations of a leader become institutional ideas is that they coordinate the integrative efforts of the people who comprise the institution, or at least those who determine the institution’s actions. It is simply cookbook management theory that a good leader should obtain the willing cooperation of his subordinates.


75. See, e.g., Chris Argyris, Integrating the Individual and the Organization (1964); Kanter, supra note 71; Kurt Lewin, Resolving Social Conflicts (1948).

76. Argyris, supra note 18; Bennis, supra note 74; E.P. Hollander, Leaders, Groups and Influence (1964). To the extent that the leader can control the subordinate, it is by transforming the subordinate’s construction of reality. See Weick, supra note 18.
The important point for present purposes is that this approach is not only an effort to control subordinates; it may also serve a conceptual function, producing cooperation because it generates new ideas that solve a dilemma generally felt by the members of the institution.

The judiciary develops new doctrine by both horizontal and vertical coordination. Some new doctrines, or integrative efforts with the potential to become new doctrines, percolate up through the lower courts and do not reach the supreme court of the jurisdiction until after a coordinating idea has taken shape. Others rise rapidly, generating a supreme court opinion that either coordinates or fails to coordinate the integrative efforts of the lower courts. If it fails, the supreme court is operating purely by command, not coordination. In response, lower court judges must either suppress their own beliefs or begin developing new integrative efforts that circumvent the force of the high court opinion. As that opinion ages, these integrative efforts are likely to increase, ultimately generating new coordinating ideas by horizontal action, or inviting the supreme court to do so in a new opinion.

Many discussions of the U.S. Supreme Court tend to overemphasize the Court’s role, and thus the verticality of the judicial decision-making process. Ironically, the tendency to do so comes from both sides of the debate about the relative importance of attitude and doctrine. For those who want to emphasize the “imperial” or “political” nature of the Court, an unexpected coup de main, without lower court precedents or conceptual preparation, is a deliciously unreasonable posture for the Court to adopt. For those concerned with doctrine, a Supreme Court decision renders prior lower court decisions irrelevant; they become mere historical footnotes that scholars can ignore when analyzing the architecture of prevailing law and that attorneys avoid citing because their reasoning or details may differ from the reigning precedents. In fact, both views are something of an exaggeration; most major Supreme Court cases represent the culmination of a coordination process that began horizontally, among the federal trial

and appellate courts. While this pattern is far from universal, it is much more common than is generally assumed.

C. THE CHARACTER OF COORDINATING IDEAS

Since coordination is an institutional process, the character of the ideas that instantiate it will vary depending on the nature of the institution. The institution that we are concerned with here is the judiciary. In that context, coordinating ideas must have a specific and distinctive set of characteristics—they must be fully realized, delimited, and directional.

The most basic feature of a coordinating idea for the judiciary is that it must be fully realized at the time of its creation. It cannot be an argument or a provisional approach that awaits delineation in the future, but must be presented as an end state: a definitive right, obligation, qualification, or exception. One reason for this is structural; because the judiciary is highly dispersed and loosely organized, coordination involves action at a distance. Judges do not meet together very often except on panels at the appellate level. For the most part, they communicate through their written opinions, and the opinion needs to present a clear and fully formulated solution if that solution is to appeal and take hold. In other words, coordination must occur in real time and real space, where the quantity of information that can be communicated is restricted by the institutional structure. In an institution like the American judiciary, the ideas that judges will find applicable or usable will generally be limited to a single, fully realized concept.

A second reason why coordinating ideas must be fully realized is conceptual. Our system of law does not possess an overarching theoretical framework from which particular decisions are derived. Apparently, there was a time when legal scholars thought it did, or at least were willing to assert it did in order to get law schools accepted on university campuses. They maintained this belief, if they ever had it, for the first twenty or thirty years after law schools achieved this status and they have been assiduously making fun of it for the

ninety years that followed.\textsuperscript{79} Many scholars now believe that judges proceed by practical reasoning—that they employ a mixture of various techniques informed by intuitions, political experience, and knowledge drawn from other disciplines to reach decisions in situations of uncertainty.\textsuperscript{80} In such a system, new doctrines are likely to be introduced as discrete, fully defined units because there is no method of inductive or deductive argument, no analytic procedure, syllogism, or rule that can serve the purpose. Judges must be presented with the end product, the change itself, and must decide by their intuitive, experiential method whether that change is desirable.

Finally, coordinating ideas must be fully realized because previous coordinating ideas were fully realized. That is, once doctrinal change takes place by means of fully realized legal concepts for the reasons just described, the process becomes powerfully self-reinforcing. This is not only because judges like to do things the way their predecessors did, but also because the process of development, in law as in so many other fields, is path dependent; the means by which the result is reached affects the nature of the result itself. All doctrine was created at some time, and the judge-made parts of it were generally created through the process of conceptual coordination. As a result, the doctrine consists, almost in its entirety, of a linked collection of end states that once served as coordinating ideas. Absent codification, this collection of ideas will not be extensively reconstituted or "smoothed out"; no judge has the time or means to do so. Consequently, the law retains the imprint of its generative process, and strongly encourages that process to continue.


Another basic feature of a coordinating judicial idea, apart from its fully realized character, is that it represents a delimited change in doctrine, generally involving a single right or obligation. Coordination is a response to a particular divergence between role expectations and attitudes, and it provides a way of unifying various individual efforts to integrate that divergence. While each judge will probably experience a variety of such divergences at any given time, it is unlikely that the group of judges who experience this divergence on one issue will be the same as the group who experience it on another. Even if there is a substantial overlap, it is also unlikely that a fully realized idea that resolves the integrative efforts of these judges on one issue can be linked to a second idea resolving a second set of integrative efforts. Because of the particularized nature of the coordination process, that process will generally proceed one step at a time.

The result is incremental change, of course, and as Martin Shapiro and others have suggested, incremental change is in fact a familiar feature of judicial decisionmaking. For present purposes, the important point is that incrementalism is not only a tradition within the judiciary, or a personal preference of the middle-class, middle-of-the-road individuals who constitute it; that is, it is not simply an empirical observation about judges' institutional role expectations or personal beliefs. Rather, it is a structural feature of the coordination process. Even if some judges were smitten with the desire for comprehensive, root-and-branch reform, they could not coordinate this desire with the rest of the judiciary and they probably could not coordinate it with each other.

The idea of incremental, step-by-step development, with each step being fully realized or complete, resembles punctuated evolution. This is not surprising; incrementalism by fully realized steps would seem to be the method of change built into any process that is not directed by a controlling force that stands above the individual participants. A controlling force can either instruct the participants to follow a comprehensive long-range plan or provide a general vision which the participants follow on their own. Absent such a force, change must proceed step-by-step, with each step justifying itself as an improvement that should be accepted on its own terms, just as each evolutionary alteration must confer a competitive advantage in order to be genetically preserved. There is no person or belief system that

---

82. See STEVEN JAY GOULD, ONTOGENY & PHYLOGENY (1977).
can reassure the participants that a currently unappetizing change will yield good results at some time in the future.

The final feature of coordinating ideas may be referred to as directionality. Although doctrinal creation proceeds on an incremental basis, without overarching control, the individual decisionmakers do have some sense of the general contours of the law. Guido Calabresi uses the image of the legal landscape, while William Eskridge describes the phenomenon as horizontal coherence; in phenomenological terms, each judge feels the totality of the law the way a person in one particular location feels the totality of his surroundings, and makes sense of his particular location in relation to that feeling. A somewhat more modest version of this idea is teleology, or if that sounds less than modest, directionality. The law may not be truly consistent at any given time, but it does tend to move in a particular direction, perhaps in response to general social principles that are actuated through the judges' beliefs. Judges will be aware of that direction, and it will shape their choice of coordinating ideas. Karl Llewellyn captured this notion in The Common Law Tradition, his magnum opus in which he significantly modified his legal realist belief in the unpredictability of judicial decisions. He argued that judges' decisions are predictable if one places them in social context—a process made easier when judges write in the Grand Style and themselves seek to locate their decisions in the prevailing legal context. In short, a coordinating idea must not only be fully realized and delimited, but also generally move in the direction that judges perceive prior doctrinal innovations as establishing.

This is the weakest of the three features of coordinating ideas because it is the most subject to changes in judicial attitudes. When a new political party gains control of the executive branch, it will often begin appointing judges whose attitudes differ from the previously appointed ones. These new judges are not likely to have beliefs that affect the fully realized character of coordinating ideas, and they are relatively unlikely to have beliefs that affect the delimited or incremental quality of these ideas. But they may well believe that the direction of the law is wrong, and their efforts at coordination may

---

83. Calabresi, supra note 73, at 129-31. For a critique see Weisberg, supra note 79, at 221-30.
84. Eskridge, supra note 32, at 239-74.
85. Llewellyn, supra note 29, at 256-398.
involve a change in the law's previous directionality. It seems plausible, however, that legal development has an inertial character, so that changing direction requires more time and energy than continuing along the prior path. In addition, some of the doctrine's directionality may involve technical issues that are not located on contested political terrain; this was true, for a long time, of the steady expansion of tort liability that common law courts effectuated. Thus, coordinating ideas will generally need to reflect the directionality of legal doctrine, even though they can sometimes abandon this feature as a result of changes in judicial attitudes.

D. THE CATEGORIES OF COORDINATING IDEAS

What kinds of ideas can serve the coordination function that is central to the creation of new legal doctrine? For anyone familiar with contemporary legal scholarship, the two types of legal reasoning that will come almost immediately to mind are analogy and metaphor. The role of these techniques in legal thought has long been recognized, and the level of interest in them continues to increase, with major contributions in the last few years from Steven Burton, Steven Eisenberg, Steven Winter, Cass Sunstein, and others. While these discussions often refer to legal thought in its entirety, they

86. Burton, supra note 80, at 25-40.
87. Eisenberg, supra note 31, at 83-96.
90. There is extensive interest in these techniques, particularly analogy, among European legal thinkers. See, e.g., Aleksander Peczenik, On Law and Reason 392-404 (1989); Theodor Viehweg, Topics and Law (W. Cole Durham, Jr. trans., 1993); Cees W. Maris, Milking the Meter: On Analogy, Universalizability and World Views, in Legal Knowledge and Analogy 71 (Patrick Nerhot ed., 1991); Giuseppe Zaccaria, Analogy as Legal Reasoning: The Hermeneutic Foundation of the Analogical Procedure, in id. at 42.
91. There are also numerous discussions of the metaphorical structure of thought in general. See Jacques Derrida, Margins of Philosophy 219-71 (Alan Bass trans., 1982); George Lakoff, Women, Fire, and Dangerous Things (1987); George Lakoff & Mark Johnson, Metaphors We Live By (1980); Metaphor and Thought (Andrew Ortony ed., 2d ed. 1993); Paul Ricoeur, The Rule of Metaphor: Multi-Disciplinary Studies of the Creation of Meaning in Language (Robert Czerny, Kathleen McLaughlin, & John Costello trans., 1977); Richard Rorty, Essays on Heidegger and Others 9-26 (1991). While much of this debate is illuminating, the argument threatens to become somewhat uninteresting because it does not explain what nonmetaphorical speech and thought could possibly be like, at least for
seem to possess particular relevance to the process of doctrine creation. In fact, the most obvious role for analogy and metaphor in legal decisionmaking is as a means of generating coordinating ideas for the creation of new doctrine.

A notable feature of both analogy and metaphor, as opposed to deductive reasoning, is that they produce fully realized ideas. An analogy asserts that two legal situations resemble each other; a metaphor uses an image, not necessarily legal, to characterize a given legal situation. When using an analogy, one takes a complete and established approach to one subject and applies it, in its entirety, to another. Thus, a court might argue that the considerations that underlie the right of privacy are just like those involving libel, and right then, without any further elaboration, an entire doctrinal apparatus has been imported into a new realm, started up, and set to work. Similarly, when using a metaphor, one takes a complete image and applies it to a situation as a means of conceptualizing that situation in its entirety. There is a visual quality to metaphor; it is like a picture, where one sees the totality at a glance and then fills in the details upon closer examination. This can be contrasted with a necessarily linear verbal argument, where one proceeds point-by-point, filling in the details of each step before proceeding to the next. The metaphor of a chilling effect in First Amendment law, for example, brings to mind in an instant a complete mental image of a cold wind emanating from the offending governmental agency and of potential speakers, like pedestrians in Chicago, withdrawing in discomfort to protect themselves from its effect.

---

ordinary discourse (as opposed to mathematics). As used here, metaphor is not either the general use of concrete concepts or a figure of speech, but the use of a nonliteral or nondeductive concept as a basic element in a legal argument.

92. This follows Searle, who argues that a metaphor is a statement whose literal meaning can call to mind a different meaning for the purpose of telling us about the object of the metaphor, but not about the metaphorical expression. Thus, the sentence “Richard is a gorilla” tells us something about Richard, not about gorillas. John R. Searle, Metaphor, in Metaphor and Thought, supra note 91, at 83.

93. See, e.g., Dombrowski v. Pfister, 380 U.S. 479, 487 (1965) (“The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure.”) Having been articulated, the term becomes available for use as a fixed element of constitutional argument. See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 777 (1976) (Stewart, J., concurring) (“The advertiser’s access to the truth about his product and its price substantially eliminates any danger that governmental regulation of false or misleading price or product advertising will chill accurate and nondeceptive commercial expression.”).
To this fully realized quality of analogy and metaphor can be added their delimited effect. While both can vary in their scale from large doctrines to minor emendations, neither can function as a comprehensive theory, resolving questions not yet asked or situations not yet encountered or imagined. Both methods have a specificity that limits them to a particular issue, whether small or large; when the next issue arises, one must begin anew, seeking the most felicitous analogy or metaphor. Of course, there can be a connection between analogies and metaphors, due to the association of ideas, but the value of each new analogy or metaphor must be demonstrated in the specific context in which it is used. Since these methods are not fully logical, there is no underlying argument that can definitively carry them beyond their context. Put another way, the applicability of analogies or metaphors must be apparent on their surface, for that immediate applicability is the source of their appeal. They are thus restricted to the issues they address at the time they are applied.

Analogy and metaphor do not necessarily possess directionality—that must be supplied from elsewhere—but their fully realized and delimited quality makes them natural methods for the generation of coordinating concepts. They are not the only methods, however; instead, they represent the middle range of a continuum that extends in either direction to smaller scale and larger scale efforts. A small scale, but still significant means of generating doctrine, is a process which can be called "labelling"—the mere giving of a name to a vaguely discerned but previously unarticulated legal idea. The right of privacy (adopted from Warren and Brandeis' famous article), the right of publicity (invented by a judge), the doctrine of unconstitutional conditions (developed over time by many judges), and the doctrine of irrebuttable presumptions (invented and abandoned by the U.S. Supreme Court) were all products of felicitous labelling. They are not analogies because they imply no comparison, nor are

they metaphors because they conjure up no mental images. Rather, they exemplify the primordial act of naming, by which one takes mental control of something and perhaps creates it as a separate entity. It is the label itself that gives this technique its fully realized character, and the inherent specificity of labelling is the source of its delimitation.

At the other end of the continuum is an institutional conceptualization, a fully realized concept of an entire institution’s legal status. Carried too far, of course, this can become a legal theory of the institution—that is, a generalized account of the way in which an institution obtains or exercises legal authority. Such a theory might be too extensive and controversial to coordinate the judiciary’s integrative efforts. What renders the concept usable as a coordinating idea is that it is limited to one specific institution. It represents a conceptualization of the institution, a grounded image that coordinates individual judges’ efforts to integrate their sense of proper judicial behavior with their personal attitudes about the way the institution is supposed to operate. In some sense, therefore, the concept of an institution is just a large-scale metaphor. Metaphor, however, is a heavily visual notion, and institutions are often too complex to visualize in the usual manner. A fully realized but delimited concept of an institution’s legal status may be capable of articulation only in terms of that institution, and not in terms of any particular image.

Since metaphor, analogy, labelling, and even institutional conceptualizations are regarded as common elements in legal thought, their centrality in the process of doctrine creation raises a question about the extent to which the process is distinct from legal thought in general. The answer will depend upon one’s position regarding the extent to which legal doctrine is indeterminate. There is clearly a high level of indeterminacy inherent in the process of doctrinal creation because the search for analogies, metaphors, labels, or institutional conceptualizations is necessarily an open-ended one. While a good analogy or metaphor, for example, may possess a sense of “rightness,” it would be implausible to insist that there was only one right metaphor for a given legal question.

If one believes that legal doctrine is relatively certain, then one would regard it as being controlled by techniques different from those needed to create new doctrine. Statutory language could be applied

to specific fact situations based on standard canons of interpretation, and precedents could be followed on the basis of their rationale. In this case, the use of more impressionistic methods such as metaphor or analogy would be limited to the creation of new doctrine, and the process described above would be only one part of judicial decision-making, albeit an important part. On the other hand, if one believes that legal doctrine is largely indeterminate, then judges are creating it much more often—perhaps every time that they reach a decision. In that case, the process described is the essence of legal thought and all else is apology and facade.

For present purposes, there is no need to adopt a position on this much-debated question. The creation of doctrine clearly represents a mode of legal decisionmaking where doctrine is indeterminate; how much deeper this indeterminacy extends does not necessarily affect the analysis of that core area. It seems likely, however, that judges' experience in creating doctrine is different from their experience in deciding more ordinary cases. Because of our preexisting myth that judges are merely discovering the law, there is really no domesticated theory of indeterminacy. Commentators tend to reinvigorate the concept that the law is definitively determined, or shatter it and concede the entire field to the forces of untrammeled willfulness. In all probability, however, there are degrees of indeterminacy, and the level of indeterminacy is sufficiently greater when new doctrine is created to regard this as a distinct judicial activity.

The most plausible account is that legal decisionmaking forms a continuum that extends from relatively determined decisions on the one hand to the highly indeterminate process of doctrinal creation on the other. Many decisions will strike judges as compelled; this does not mean that an individual judge cannot reach a different conclusion, but only that certain conclusions, once reached, will be regarded as correct by the great majority of other judges. Such consensus may be merely the result of social conventions, as Stanley Fish asserts,99 or it may follow what Owen Fiss calls disciplining rules.100 In any case, the continuum extends from these "easy cases"101 through increasing

99. Fish, supra note 61.
100. Fiss, supra note 28.
101. Schauer, Easy Cases, supra note 35. Schauer's position is open to challenge, of course. See Sanford Levinson, What Do Lawyers Know (and What Do They Do With Their Knowledge)?: Comments on Schauer and Moore, 58 S. Cal. L. Rev. 441 (1985); James W. Nickel, Uneasiness About Easy Cases, 58 S. Cal. L. Rev. 477 (1985); David A.J. Richards, Interpretation and Historiography, 58 S. Cal. L. Rev. 489, 516-22 (1985). Indeed, these critiques probably
levels of uncertainty, with the process of doctrinal creation and its attendant techniques of analogy, metaphor, labelling, and institutional conceptualization playing an increasingly important role.

Within this continuum, however, there would seem to be at least two discontinuous transitions; in other words, to invoke one of the dominant metaphors of our own century, the continuum is quantized. The first transition occurs at the point where the level of indeterminacy can call forth a coordinating idea. Below that point, judges will not perceive a sufficient divergence between existing doctrine and their own beliefs to require integration, or they will experience that divergence but will regard existing doctrine as so compelling that it will demand obeisance and foreclose the integrative process. Without individual efforts at integration, coordinating ideas cannot develop. There is no motivation to adopt such ideas, which only function as a conscious response to the felt need to coordinate the judges' integrative efforts. Once this first transition has occurred, however, judges become aware that they need to integrate the existing doctrine with their personal beliefs. This means that they are conscious of the integration process and that coordinating ideas provide the means by which that process can be implemented. The second quantum shift in the continuum occurs at the point that judges consciously recognize that the coordination process is not simply interpreting some existing legal source, but is creating a new doctrine. In other words, they recognize that the coordinating idea is an indeterminate creation of judicial thought and not an emanation of existing law. At present, judges' understanding of their role motivates them to resist this recognition, even when it most accurately reflects their decisionmaking process. To the extent they do, the continuum appears relatively smooth, but still extends beyond interpretation to doctrinal creation; to the extent they recognize the process, the second quantum shift in the continuum becomes apparent.

III. DOCTRINAL CREATION AND THE RULE OF LAW

This, then, is a description of the institutional process by which judges create new legal doctrine. As stated at the outset, the task of describing this process has tended to be ignored by scholars who are still concerned about asserting that it exists and justifying its existence.
Having provided a description, the question now arises whether this description is of any assistance in answering the normative question. In other words, does the idea that doctrine is created through the institutional coordination of individual integrative efforts provide any basis for arguing that this process is legitimate.

The challenge to the legitimacy of doctrine creation is whether it conforms to the rule of law. In general, the rule of law demands that judges be subject to external constraints that are general, clear, well-accepted, and congruent with the legal order. The phrase has other meanings as well, but this is the one that is implicated by the judicial creation of new legal doctrine. All our government officials are bound by broad constitutional rules governing their procedures for decision, but the rule of law also demands some substantive constraints on the decisions that they can reach. For legislators, elections serve as the requisite constraint; we allow legislators to make law, within broad constitutional limits, because we regard elections as a means of limiting their power. For administrators, who are not elected, the constraint is the enabling statute enacted by the legislature. If judges make law, according to the rule approach, they too should be constrained. They are not constrained by either election or supervision, however. This can be regarded as one aspect of Bickel’s countermajoritarian difficulty; the problem in this case is not that the courts are invading the preserve of the majoritarian branches, but that they are exercising the same level of discretion as those other branches without being subject to the same majoritarian constraint. This final section explores the sources of constraint that inhere in the coordination process that has been described, and then considers the hierarchical pressures that act in opposition to those constraints.

A. THE SOURCES OF CONSTRAINT

The mere descriptive fact that judges regularly create new legal doctrine strongly suggests, at the intuitive level, that this process possesses some sort of normative justification. After all, judges are likely to take the rule of law quite seriously. It is part of their set of role expectations—their institutionally induced beliefs about the way they should carry out their official functions. Judges, being a rule-abiding group of people by and large, are not likely to ignore such beliefs.

This is in fact the impression one receives from reading judicial decisions. Even in decisions that create new doctrine, judges generally seem to be operating under a sense of constraint, rather than expressing their desires or exercising their will. The megalomania of tropical dictators and the self-righteous, bureaucratic willfulness of the Important Personage in Gogol's *Overcoat*\(^{103}\) are absent from existing records of judicial decisionmaking. The impression is that these are the same judges who decide contract cases and construe the Securities Exchange Act, and that they feel the same sense of constraint as they do in these more traditional activities.

The constraint that judges experience when creating new legal doctrine does not derive from a text, but from the internal dynamics of the coordination process. As stated, coordination involves the conscious decision to displace one’s own efforts at integration with an integrative effort that can be communicated to, and followed by, a large number of dispersed individuals within the judiciary. For an idea to coordinate individual judges' integration processes, it must be continuous with existing legal doctrine; that is, it must be perceived by judges as a natural outgrowth of that doctrine, rather than a radical departure. To use Gadamer's phrase, it must be part of the judiciary's effective historical consciousness.\(^{104}\) Only certain ideas possess the simplicity, clarity, and continuity to serve this purpose. These ideas are necessarily legal, in a recognized social sense, because legal training is the principal thing judges share.

To be more specific, coordinating ideas in the judicial context must be fully realized, delimited, and must usually reflect the prevailing directionality of law. Thus, they consist of a small step in a particular direction—a step that is formulated as a specific doctrinal element that is recognizably similar to preexisting doctrine. These are severe, albeit not determinative, constraints. Judges who are subject to them are unlikely to experience a sense of unrestrained freedom; instead, they will perceive themselves as struggling to find the most persuasive formulation from among a very limited range of possibilities. That sense of limitation—of conscientious striving to find an acceptable solution, rather than of self-indulgent exultation at imposing one—constitutes the rule of law for the judiciary.


Thus, in the conceptual area, as in the operational area, the constraints on judicial policymaking are internal to the process by which policymaking is carried out. This is neither an oddity nor an accident, but derives from the independent character of the judiciary. As stated above, law functions as both a framework that engenders judicial decisionmaking and a constraint that disciplines it. The concept of an independent judiciary demands that the same conceptual structures perform both these functions. If the doctrinal framework that engenders decisions did not provide the constraint on those decisions, then the constraint would need to come from elsewhere, that is, from another decisionmaker. But the judiciary, being independent, must constrain itself; it must generate the limits on its actions from the same practice that constitutes those actions. Because the framework and constraint overlap, judges can only be constrained by the inherent dynamics of the law itself, as they themselves formulate it. That is why the demands of doctrine creation—of the coordination process—can be understood as securing the rule of law.

This process of self-constraint is consonant with the views of many commentators, including Philip Bobbitt, Dennis Patterson, and Steven Winter, who regard judicial decisionmaking as a socially situated practice legitimated by the well-established rules that are internal to that practice. The discussion here asserts that within that social practice judges themselves, as a matter of their phenomenological experience, perceive particular constraints upon their actions. Quite often, that perceived constraint comes from a text, or more precisely, their agreed-upon perception of a text. In the case of policymaking, the constraint comes from the demands of the coordination process. The text may seem more external to the decisionmaking process, and thus more of a constraint, but the current debate about interpretation casts serious doubt on this impression. Besides, there can be varying degrees of constraint, and the fact that policymaking is less constrained than some interpretation does not mean that it is unconstrained in its entirety.

The self-constraint of the coordination process is also consonant with what Niklas Luhmann108 and Gunther Teubner109 call the autopoiesis of law. In their view, law is a self-describing, self-reproducing system that generates new elements within the framework of that system. This is not a return to the much-scrorned idea that legal doctrine is autonomous or apolitical; the notion, rather, is that law is a system of meaning, and that political or moral values only affect law when they are translated into legal terms and evaluated in accordance with existing legal criteria. “Their normative content is produced from within the law itself, by constitutive norms which refer back to these values,” as Teubner says.110 Thus, the judges’ own personal ideologies are not law, as judges themselves well know. They become part of law through a process of integration and coordination whose contours are established by existing legal categories. The autopoietic structure of the legal system means that this process is subject to a set of internally generated constraints that are recognizable as the rule of law. Indeed, it means that only such internally generated constraints could satisfy the rule of law, for no legal standard exists outside the autopoietic system which generates such standards.

It may be objected that the internal dynamics of the coordination process do not provide clear guidance for an individual judge or definitive constraints on her decisions. That is true. What is being constrained is not each individual judge but the judiciary as an institution.111 The individual judge, like the individual legislator or administrator, is an official who is granted a significant amount of discretion. We can no more expect the rule of law to comprehensively and unambiguously control each judicial decision than we can expect

---


110. Teubner, supra note 109, at 35.

the need for reelection to control each individual legislator or the supervision of the President to control each federal administrator.\footnote{112} It is not the individual decisionmaker who is constrained, but the institution in its general operation.

For some reason, we tend to forget that the judiciary is an institution when considering the rule of law. Although descriptive political science has long recognized this apparent fact,\footnote{113} jurisprudence tends to speak of "the judge," as if America had only one of them, operating in lordly isolation.\footnote{114} Jurisprudential theories are invariably framed as descriptions of, or prescriptions to, a single judge, who is supposed to perceive the constraint of law or the demands of justice as a matter of individual perspicacity. Ronald Dworkin goes so far as to call his ideal judge Hercules,\footnote{115} and we all know that Hercules did not have supervisors, colleagues, or staff members when he set out to perform his labors.\footnote{116} Indeed, he was a self-conscious loner; he originally joined Jason’s expedition on the Argo, but wandered off one day and went on to pursue more solitary adventures.\footnote{117} This image of the judge as an isolated hero, cutting off and cauterizing the hydra-heads

\footnote{112} Some legislators are lame ducks, or come from safe seats; some administrators function largely on their own, even though their supervisor’s supervisor was appointed by the President. Moreover, the ultimate penalty for disobedience is not death, but simply the loss of one’s job; consequently, legislators and administrators will decide to disobey whenever their personal beliefs make that act of disobedience more valuable to them than their position. There are also legislative decisions that are too technical for any significant group in the electorate to police, and administrative decisions too detailed or fact-dependent to be controlled by a superior. In addition, as Mortimer and Sanford Kadish indicate, societies like our own may grant public officials a certain range of discretion, including the discretion to disobey the orders that their superiors issue. \textsc{Mortimer R. Kadish \& Sanford H. Kadish, Discretion to Disobey 66-94 (1973)}.

\footnote{113} \textit{See, e.g.,} Lawrence Baum, \textit{American Courts: Process and Policy} 2-5 (2d ed. 1990); Glick, \textit{supra} note 1; Goldman \& Jahng, \textit{supra} note 54.

\footnote{114} Bobbitt, \textit{supra} note 28, at 167-68 ("A judge who never felt the constraints of the various modalities, who felt that any decision could be satisfactorily defended, would be very very foolish or very very unimaginative. . . . [But the] United States Constitution formalizes a role for the conscience of the individual sensibility by requiring decisions that rely on the individual moral sensibility when the modalities of argument clash."); Ronald Dworkin, \textit{A Matter of Principle} 17 (1985) ("So a judge following the rights conception must not decide a hard case by appealing to any principle that is in that way incompatible with the rule book of his jurisdiction. But he must still decide many cases on political grounds, because in these cases contrary moral principles directly in point are each compatible with the rule book."); Joseph Raz, \textit{The Authority of Law} 186 (1979) ("There is an indefinite number of different modifications of every rule conforming to the two conditions spelt out above. The court's obligation, however, is to adopt only that modification which will best improve the rule.").

\footnote{115} Ronald Dworkin, \textit{Taking Rights Seriously} 105-30 (1978).


\footnote{117} Id. at 217, 228-29.
CREATING LEGAL DOCTRINE

of injustice, is an appealing one, but it is hardly realistic. Judges are members of institutions, which means they interact with and are constrained by other judges. Each individual judge will be aware that the judiciary as a whole, not its individual members taken one by one, is the proper locus of operation for the rule of law.

It is only from the outside that this process seems potentially or actually unconstrained, as if "the judiciary"—this mystic collectivity—could cavalierly decide to do whatever it desires. From the inside, from the phenomenological perspective of individual judges, the creation of new legal doctrine is a complex, arduous endeavor. Perhaps the judge can reach a specific result on the basis of his personal preferences, although few judges really do this. But he cannot create new doctrine without coordinating his ideas with other judges—either those in different courts or, at the appellate level, those on his panel. Thus, the multimember nature of the judiciary, often regarded as an unfortunate impediment to principled decisionmaking, is in fact an important mechanism for securing the rule of law in the judicial decisionmaking process. Existing doctrine, moreover, forms an enclosing shell around the judge, toughened by institutional demands and made opaque by the judge's legal training. It is difficult to push this shell outward at any point, especially because actions must be performed in coordination with other judges. In other words, doctrinal creation, far from being an act of an unfettered judicial will, is inherently constrained. Judges understand this intuitively, as part of their personal

118. Hercules did obtain some help from his charioteer in defeating the Lernaen Hydra, but, as a result, the ever-begrudging Eurystheus refused to count this labor toward the originally required ten. Id. at 107-09.

119. See, e.g., Michael J. Gerhardt, The Role of Precedent in Constitutional Decisionmaking and Theory, 60 GEo. WAsH. L. REV. 68, 138 (1991); Paul Gewirtz, Remedies and Resistance, 92 YALE L.J. 585, 670-72 (1983); Arthur Selwyn Miller, On the Choice of Major Premises in Supreme Court Opinions, 14 J. PUB. L. 251, 257 (1965). These discussions focus on multimember panels, rather than the judiciary as a whole, and there the role of compromise may be larger relative to the role of conceptual coordination.

120. The image of doctrine as a shell that limits meaning to a subset of all culturally available meanings is suggested by Patricia Williams in The Obliging Shell: An Informal Essay on Formal Equal Opportunity, 87 MICH. L. REV. 2128 (1989). It is not a Gadamerian horizon. See GADAMER, supra note 43, at 267-74. Gadamer's horizon represents the limits of our understanding at our own historical moment; the shell of existing doctrine lies well within that horizon. As an ordinary person, the judge can see beyond it, but when she performs her role as judge, the shell generally constrains her thought processes. The creation of doctrine, then, must take place from within the doctrinal framework where the judge has been placed by her specialized training and socially established role, not within the larger space that is limited by her horizon as an historically situated human being. She brings her broader attitudes into the shell, often in a direct way that goes beyond Teubner's idea of autopoietic law, see supra text accompanying note 109, but the process of doctrine creation must be actuated from inside the doctrinal system.
experience in their position, and thus do not perceive doctrine creation as raising substantial difficulties for the rule of law.

While the coordination process provides constraint, it also permits movement; over time, coordinated judicial creativity will reposition the enclosing shell, even though its opaque resilient quality will remain the same. The possibility of movement is essential for descriptive purposes because the law indeed evolves, and most people would regard this possibility as equally essential for normative purposes. To be sure, the constraint provided by coordination will not satisfy those for whom the rule of law involves fealty to fixed principles of natural or positive law origin, but this failure only means that we are dealing with an evolutionary theory. Many of our leading theories of less controversial judicial activities, such as interpretation or common law decisionmaking, are also evolutionary. If the rule of law depends upon unchanging principles, Eskridge’s\textsuperscript{121} or Aleinikoff’s\textsuperscript{122} theory of statutory interpretation, Ackerman’s\textsuperscript{123} or Bobbitt’s\textsuperscript{124} theory of constitutional interpretation, and Eisenberg’s theory of common law decisionmaking\textsuperscript{125} fail just as badly as the theory of doctrine creation outlined above. To put the matter another way, this theory of doctrine creation, like most contemporary theories of judicial decisionmaking, limits the acceptable results at a given time on the basis of the preexisting doctrine, but does not prescribe any absolute limitations.\textsuperscript{126}

B. THE CONFLICT BETWEEN HIERARCHY AND CONSTRAINT

Our federal and state judiciaries, while more collegial than most of our institutions, are ultimately hierarchical, headed by a supreme court whose decisions possess authoritative force. This creates the possibility, as previously described, that the jurisdiction’s supreme court will dispense with the coordination process and operate by ukase. Confronted with a situation that creates a conflict between

\begin{itemize}
\item \textsuperscript{123} Bruce Ackerman, We the People (1991).
\item \textsuperscript{124} Bobbitt, supra note 28.
\item \textsuperscript{125} Eisenberg, supra note 31.
\item \textsuperscript{126} John Rawls, A Theory of Justice 83-90 (1971) (pure procedural justice requires only that proper procedures be followed and allows any result, as opposed to perfect or imperfect procedural justice, more often called substantive justice, where there is an independent criterion of fairness).}
\end{itemize}
their understanding of doctrine and their personal beliefs, the supreme court justices may develop their own integrative solution and then impose it on the lower courts, relying on their institutional power rather than on the coordination process. Of course, as research on small group behavior in the judicial context suggests, coordination remains necessary among a sufficient number of the supreme court's judges to constitute a majority of the institution. But sometimes a smaller group, or even a single judge, will have a decisive voice, and in any case the opportunities for direct interaction among the judges on a single court will tend to weaken the requirements of coordination. Thus, a supreme court, like an agency head or chief executive officer, has the power to preempt the process of coordination.

According to the account just given, this approach appears to deprive doctrine creation of the constraint inherent in coordination and thus revives doubts about whether doctrine creation violates the rule of law. In fact, that violation probably occurs in many circumstances—Roe v. Wade being the most notable example—and the concern about its occurrence probably leads the supreme courts to hesitate in many others. Much of Alexander Bickel's analysis in The Least Dangerous Branch is devoted to the argument that precipitous decisions weaken the Supreme Court's legitimacy. The reason why the Court's legitimacy is vulnerable, in Bickel's view, is the "countermajoritarian difficulty." But Bickel is certainly correct in observing that the Supreme Court exhibits a healthy solicitude for its political legitimacy, even if that legitimacy rests on firmer ground than he believed. To be sure, his area of concern is broader than doctrine creation; any decision that is likely to elicit controversy or that generates a conflict between high principle and practical politics challenges the Court's legitimacy in Bickel's view. But doctrine creation is generally the starkest assertion of authority by the judiciary—the time when it sticks out its proverbial neck the furthest. Creating doctrine precipitously, without waiting for the coordination process to generate


129. Bickel, supra note 102.

130. Id. at 16-23.

131. Id. at 23-34, 244-72.
a solution that seems relatively continuous with preexisting legal doctrine, is thus the situation that would raise the most serious legitimacy problems.

Bickel's recommendation is that the United States Supreme Court should employ a variety of procedural devices to avoid making definitive decisions prematurely.\textsuperscript{132} Many criticisms have been voiced about his views, but two that are particularly relevant are that Bickel turns the Supreme Court into a political actor—and not just any political actor, but a craven, poll-watching, dispute-dodging political actor—and that he sanctions insincere subterfuges.\textsuperscript{133} If Bickel's technique is limited to doctrine creation, however, these objections lose much of their force. There is nothing craven, or even excessively "political," about saying that one is not in a position to articulate a new legal doctrine until the lower courts have decided more cases, generated possible approaches for the Supreme Court to adopt, and indicated what sorts of ideas would be accepted by the judiciary as a whole. Similarly, there is nothing insincere about refusing to decide a case when one does not possess the legal doctrine required for decision. Of course, the lower courts do not have this luxury, but lower court decisions do not have the same capacity to terminate the ongoing process of coordination— they do not, in Robert Cover's memorable phrase, possess the "jurispathic" potential of a supreme court decision that operates by command and not coordination.\textsuperscript{134} As noted above, judges of supreme courts sometimes abandon the inherent constraints of the coordination process, most notably the constraint of directionality, when they are appointees of a newly victorious political party. In effect, these judges are looking to the political mandate of that party for their legitimacy, and are thus exchanging the inherently judicial rule of law, which is based on the constraints of coordination, for its popular or electoral equivalent.

There are countervailing motivations, of course. One of the most common triggers, or "cues," for the Supreme Court to address an issue being litigated in the federal court system is a conflict among the

\textsuperscript{132} Id. at 111-198.


\textsuperscript{134} Robert M. Cover, Nomos and Narrative, 97 HARV. L. REV. 4, 40-44 (1983).
This could be viewed as an effort to remedy defects in the coordination process, providing a definite resolution in cases where the lower courts were unable to settle upon one doctrinal idea that would coordinate their various integrative efforts. Another reason the Supreme Court intervenes is that a majority of its members disagree with a consistent body of lower court decisions. This would seem to represent the triumph of hierarchy over constraint, but federal judges are not an easy group to control—certainly no easier than any other group of professionalized, self-confident subordinates. Thus, when the Supreme Court operates by command, its success in creating new legal doctrine that applies to anything other than the case at hand is far from guaranteed. An example of this phenomenon is the Supreme Court's decision in *Jones v. Alfred H. Mayer Co.*, which held that a post-Civil War statute forbade discrimination by private persons under the authority of the Thirteenth Amendment's abolition of "all badges and incidents of slavery." The statute had been interpreted by federal courts only twice before, and there had been no preparatory cases leading to the Supreme Court decision. While the decision itself was clever, it served no coordinating role for the lower courts; as a result, they were unable to use the "badges and incidents of slavery" concept in connection with race relations, and regularly rejected any claims based on this concept that went beyond the precise facts of the *Jones* case. In this case, the Supreme Court, despite its hierarchical


136. This is, in effect, the third reason given in the Rule for granting certiorari. Sup. Ct. R. 10.1(c). See also Hellman, supra note 135, at 1040-41; Donald Songer, Concern for Policy Outputs as a Cue for Supreme Court Decisions on Certiorari, 41 J. POL. 1185 (1979); Ulmer, supra note 135.


139. See NAACP v. Hunt, 891 F.2d 1555 (11th Cir. 1990) (flying confederate flag on Alabama state capitol dome was not a badge or incident of slavery); Steirer v. Bethlehem Area Sch. Dist., 789 F. Supp. 1337 (E.D. Pa. 1992) (requiring students to perform 60 hours of community service between start of ninth grade and completion of twelfth grade was not a badge or incident of slavery); Jane L. v. Bangerter, 794 F. Supp. 1537 (D. Utah 1992) (prohibition of abortions does not subject women to a badge or incident of slavery); *In re Herberman*, 122 B.R. 273
authority, found itself in a similar position to that of legal commentators. Commentators have also proposed a variety of interesting ideas for new doctrines based on the Thirteenth Amendment. Since judges read law reviews, or at least are capable of doing so, these ideas have been conceptually available to them. But without the motivation of diverging attitudes and doctrine and the consequent motivation to integrate the two, no idea, no matter how interesting, is likely to trigger the institutional process of coordination.

CONCLUSION

This Article begins from the position that legal scholars have been asserting for six or seven decades, although perhaps not quite convincing themselves, that courts regularly create new legal doctrine. It then presents a theory of this process, based on phenomenology and the new institutionalism. According to this theory, judges are motivated to create new legal doctrine by their efforts to integrate their sense of existing doctrine with their personal beliefs or attitudes. Being members of an institution, they consciously strive to coordinate

---

(Bankr. W.D. Tex. 1990) (treating income accruing to debtor after he filed Chapter 11 case as property of the estate except to the extent of a reasonable salary due to debtor as compensation for his services as professional employee is not a badge or incident of slavery); Bobilin v. Board of Educ., 403 F. Supp. 1095 (D. Haw. 1975) (mandatory cafeteria duty in school is not a badge or incident of slavery); Sharp v. Kansas, 783 P.2d 343 (Kan. 1989), cert. denied, 498 U.S. 822 (1990) (appointment of lawyer to represent indigent defendant is not a badge or incident of slavery).

these integrative efforts; the result is that new legal doctrine is based on coordinating ideas that are fully realized, delimited, and generally reflective of the directionality of current doctrine. These ideas can be either analogies, metaphors, labels, or institutional conceptualizations. The linkage between the individual motivations of judges and the behavior of the institution as a whole renders this theory a microanalysis of the process being considered.

In addition to describing the process by which judges create new legal doctrine, this Article also argues that the process is legitimate—specifically that it conforms to the rule of law. The rule of law demands that judicial decisionmaking be subject to general, clear, well-accepted constraints that are congruent with the legal order. Doctrinal creation meets this standard because it is constrained by the internal dynamics of the coordination process—the requirement that the new doctrine must integrate the individual integrative efforts of the judges that comprise the judiciary, as an institution. This requirement will generally be satisfied only by doctrinal propositions that are fully realized, delimited, and reflective of the law's directionality; in other words, by propositions that represent an incremental extension of existing law. Such propositions are widely recognized as the type of lawmaking that judges are expected to engage in, and the dynamics of the process by which they are generated are clear, general, and consistent with our prevailing ideas about the role of courts. To be sure, the coordination process can be displaced by a decisive action by the jurisdiction's supreme court. In that case, the constraining force of the coordinating process will be weakened, and the decision must derive its legitimacy from other sources,

Legal scholars have generally tended to demonize, although occasionally lionize, the judicial creation of law. This Article has tried to domesticate that process. Judges create new doctrine all the time. They do so not as a result of some brain seizure, or lust for power, or act of self-denying heroism, but as a regular part of their job. This process can be described, understood, and justified. It is one of the basic, quotidian elements of our legal system.