The
DECISION
PROCESS
Seven Categories of
Functional Analysis
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THE DECISION PROCESS
Seven Categories of Functional Analysis*

As every student of American civics will testify the decision process of government is "legislative, executive, and judicial." Valuable as this tripartite scheme has been for constitution building purposes in our polity it is less than adequate for purposes of comparative political science or jurisprudence. With the expansion of modern inquiry the limitations of such a simple scheme have been modified in many ways, especially by detailed enumeration of the activities carried on by the various structures that are found in different historical circumstances or among the existing bodies politic of the globe. Long enumerations are helpful in connecting large words with smaller processes. Yet when we are dealing with activities that display the infinite variations of institutional practice to be found in government it is important not to lose sight of the forest by becoming preoccupied with naming the trees. We need schemes that without becoming unwieldy are more discriminating than the tripartite division of American tradition.

It is the purpose of this discussion to develop seven categories of functional analysis that have been undergoing rather intensive testing in some of the studies of comparative political science and jurisprudence in which I have had a hand. In matters of this kind it is not a question of arriving at a permanent classification. Rather,

* Delivered May 11, 1956 at the University of Maryland Seminar in Public Affairs sponsored by the Department of Government and Politics and the Bureau of Governmental Research.
the requirements of research and policy change as the context of
knowledge and controversy changes in response to the unceasing
flow of human experience. Classifications are serviceable when they
are tentative and undogmatic, and when they guide scholarly activity
in directions that are presently accepted as valuable.

Perhaps the most direct way to introduce the seven categories is
to ask seven questions: How is the information that comes to the
attention of decision makers gathered and processed? How are
recommendations made and promoted? How are general rules pre-
scribed? How are general rules provisionally invoked in reference to
court? How are general rules applied? How is the working of
prescriptions appraised? How are the prescriptions and arrangements
entered into within the framework of such rules brought to
termination?

The seven questions refer to the seven functions:

<table>
<thead>
<tr>
<th>Function</th>
<th>Description</th>
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<tr>
<td>Intelligece</td>
<td>information, prediction, planning</td>
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<tr>
<td>Recommendation</td>
<td>promotion of policy alternatives</td>
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<tr>
<td>Prescription</td>
<td>the enactment of general rules</td>
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<tr>
<td>Invocation</td>
<td>provisional characterizations of conduct according to prescriptions, including demand for application</td>
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<tr>
<td>Application</td>
<td>the final characterization of conduct according to prescriptions</td>
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<tr>
<td>Appraisal</td>
<td>the assessment of the success and failure of policy</td>
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<tr>
<td>Termination</td>
<td>the ending of prescriptions and of arrangements entered into within their framework</td>
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1 The fundamental framework used in this analysis of the decision process is in H. D. Lasswell and A. Kaplan, Power and Society, New Haven, Yale University Press, 1950. The seven functions have been selected for emphasis by my colleague, Professor Myres S. McDougal, and I in order to further comparative studies of law and government. See especially M. S. McDougal, "The Comparative Study of Law: Value Clarification as an Instrument of Democratic World Order," Yale Law Journal 61 (1952) 915-46 [also in American Journal of Comparative Law 1 (1952) 24-57].

When we examine the decision process of any body politic—national, international, state (provincial), local—it is usually possible to describe the structures specialized to a function. At the Federal level we think at once of the Central Intelligence Agency, the Bureau of Census, and the like, when we consider the intelligence function. So far as recommending is concerned we take note of the legislative proposals that are presented and promoted by the President. The prescribing function is the peculiar province of constitutional conventions and other lawmakers organs. Invocation is the task of the officers concerned with law enforcement who, for instance, must provisionally assess whether a given act contravenes the Federal code and initiate a demand for application. Application is the function to which most of the courts, commissions and departments are specialized. They determine how prescriptions are to be acted upon. The appraising function is the province of evaluators of effect and of efficiency of execution. Termination involves, among other agencies, commissions to revise statutes and treaties.

Although it is usually possible to point to agencies that specialize in a given function, all agencies perform all functions to some extent. The Senate and the House, for example, are sources of intelligence for official agencies and the electorate. The campaigns of the individual Senator and Representative, plus debates on the floor and in committees, perform a recommending function. The prescribing function is the most distinctive role of a legislative body. In the course of debate and in committee the Congress continually performs an invoking function, since conduct is often characterized as in harmony with the law or out of line, and sanctioning activity is demanded. The Congress has applying functions, notably the ratification of appointments, the granting of funds. One major function of the Congress is appraisal, the assessment of whether past prescriptions have been lived up to, whether the results have been achieved by economical and congenial methods, and whether the results on the whole are satisfactory in terms of overriding policy goals. Of course the Congress is active in termination, putting an end to statutes.

When we think of the decision process as a whole in a body politic it is usually apparent that a function is performed outside as well as inside the organizations conventionally called governmental. By custom and tradition the intelligence function in American society is
largely in the hands of the press. The recommending function is the peculiar province of political parties, pressure groups, other voluntary associations and individuals. The prescribing function is formally a monopoly of government; yet even a cursory examination of the market, for instance, will show that coercive arrangements are often agreed to by employers and unions. The formal prescriptions of the body politic are not only invoked by policemen or prosecutors but by private parties in their negotiations. In a non-governmentalized society like ours the burden of applying community prescription rests, not only upon the official bureaucracies, but upon the leaders and bureaucracies of private organizations (and individuals). Many prescriptions are established and terminated outside the authoritative machinery of the community. Yet they are sufficiently important to the community for us as scientific observers to regard them as part of the effective power set-up (cartel arrangements, for example).

When we describe the decision process of any body politic, then, we expect to find—and we do find—that several official and unofficial participants in the arena of politics are implicated at any given cross-section in time. An inventory of the authoritative language (the formal prescriptions) confirms that this is true, though the facts are not adequately depicted in their words. The written Constitution of the U.S. makes this fully apparent. There are few direct references to intelligence. The President is to report on the State of the Union, and a census is called for. It is obvious that Congress is expected to receive much information from the Executive; and that the statements made by or in the Congress will come weightily to the notice of the other organs of government. The President is authorized to recommend action; and when we look at the amendments we see that precautions are taken to defend the right of petition, assembly, freedom of the press (and so on). That the Congress can recommend without taking final action is so obvious that it needs no confirmation. So far as prescriptions are concerned, the situation is simple enough on the surface. We read of the majority needed to pass ordinary and extraordinary measures through the Congress; and of the veto authority of the President. Looking beyond the document we know that the concurrence of a third organ is required, namely, the Supreme Court. But we know too that the Court has been sparing of its controversial role of acting as a delayed veto chamber. The document has little to say about invocation, and the structures needed to make official application of Federal prescriptions are barely alluded to in the Constitution. On the whole they are taken for granted. The appraisal function, too, must be read between the lines; but it needs no magnifying glass. Since appropriations are short-term, it is clear that officials must stand evaluation by the Congress. And there is the authorization of impeachment. Looking outside the document again it is certain that the courts were expected to be available in appraising the legality of official action. The function of termination is rather assumed than stated.

When we look beyond the text to the evidence of practice, it is clear that every agency of government is involved in varying degree with every function; and that all the component parts of American society are expected to express themselves at least through the electorate.

True as this is we must concede nevertheless that available knowledge is fragmentary. Indeed, one purpose of this analysis is to direct research attention toward neglected topics whose importance will, I think, be generally granted.

Promising Lines of Inquiry

Curiously enough, perhaps, the intelligence function has received relatively little systematic treatment. In reference to any individual, voluntary association, pressure group, political party, or governmental body the key questions are the same: From what sources is intelligence received? To whom is intelligence communicated? Here are test questions about current knowledge: Do you know of any study that has dealt with the total inflow of information to the Department of State during a given period (or even on any issue) and the outflow to the President, the Congress, other Federal agencies, other governments, state and even local governments, the press, party leaders, pressure leaders, other voluntary association leaders, and individuals? The question refers not only to formal communication but to informal exchanges. Present studies are relevant though partial. But even at
best these investigations do not tell us how they sampled the entire stream of inflowing-outgoing communication.  

Consider the recommending function. What audiences are reached by the promotional activities of the Department of Agriculture, for instance? What individuals and organizations, official or unofficial, urge policies upon the Department?

Formal acts of prescription are relatively well studied because of the importance of statutes and regulations. What prescriptions does an agency make for itself and others? What prescriptions made by others are binding on the agency? These questions are easy enough to answer where enactments are printed. But many prescriptions are not to be found in a code book. They are "customary law" and must be ascertained by studying the propositions invoked in the diplomatic

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8 The modern study of communication has provided us with trend knowledge concerning the American electorate. For instance, we keep rather well informed currently of how many people spend how much time reading newspapers, magazines, and books, listening to speeches or radio; viewing TV or films. We know something about the source of the news (how much is obtained by correspondents attached to the local unit of a medium of communication, to a cooperative association, to a private syndicate, to a governmental agency). We are told about the degree to which private individuals, associations and governmental offices of the intelligence received by public officials at various levels. Some studies have described the inflow of officially communicated information from one agency or official to another. Attempts have been made to describe informal flow. The historical trend in these exchanges has been sketchily investigated. A few examples: James E. Pollard, The Presidents and the Press, New York, Macmillan, 1947; (Comment) "Local Monopoly in the Daily Newspaper Industry," Yale Law Journal 61 (1952) 949-1009; Louis H. Mayo, "The Limited Forum," George Washington Law Review 22 (1954) 261-317; "The Free Forum," ibid., 22 (1954) 387-446. Consult the collected articles in the symposia on communication by Daniel Katz (et al.), Wilbur Schramm, and B. Berelson and M. Janowitz.  

9 Beginning with E. Pendleton Herring's study of the constellation of pressure group activities impinging upon the Congress and the Federal administrative agencies investigations of the kind have become distinctive features of American political science. Yet the interaction between agencies and the total official and unofficial environment remains to be systematically sampled. Indispensable first steps include such work as Richard E. Neustadt's description of the growth of the President's recommending function in recent years. Neustadt's "Presidency and Legislation: Planning the President's Program," American Political Science Review XLIX (1955) 980-1021. Case studies are helpful in seeking to disentangle the recommending from the other functions. Ralph K. Huitj suggests that the intelligence role of congressional committees has been exaggerated. See "The Congressional Committee: A Case Study," American Political Science Review XLVIII (1954) 340-365. The constellation of factors that contribute to the early patterning of a role are of great importance since they stereotype the way in which the role is subsequently conceived. See James Hart, The American Presidency in Action in 1789, New York, Macmillan, 1948.

and bargaining activities of members of the political community. Furthermore, we distinguish between those who are authorized to prescribe and those who in fact make the decisive determinations. We go beyond the final vote at elections or in legislative bodies to discover the winning coalitions. And we may take the additional step of finding who initiated the winning proposal or whose support was of pivotal importance in obtaining a successful combination.

Research on the invoking function tries to answer two main questions: In reference to whom are prescriptions invoked? By whom are prescriptions invoked in reference to the agency? In diplomatic intercourse among governments the conduct of another Power is called legal or illegal according to a treaty, convention, or principle of international law. Parties characterize their own conduct in such terms. Any government is likely to initiate formal legal action in various jurisdictions in connection with a wide range of controversies.

4 Formally speaking the Congress and the President share the prescribing function (with the Court) at the Federal level. How does effective control as distinct from formal authority work out? An important step was taken by L. H. Chamberlain when he examined the legislative history of 90 major statutes and sought to assess the relative weight of the President, the Congress and the subordinate groups. The statutes were classified according to some prominent institutional characteristic (e.g., national defense, railroad transportation, and the like). L. H. Chamberlain, The President, Congress and Legislation, New York, Columbia University Press, 1946. The prescriptions comprising the legal system of any body politic may be conveniently classified as supervisory, regulative, enterprising, corrective, executory. The first comprises the prescriptions referring to private agreements when the decision making machinery is invoked by one of the parties. The regulatory prescriptions relate to the features of the social system that are to be maintained by community intervention in private affairs. The enterprising prescriptions include the activities specialized to community wide institutions. The corrective provisions deal with acts destructive of the public order that are rooted in unconscious motivations. Executory arrangements are the special features of the decision process. Before an "authoritative" statement can be accepted as "law" it must be shown to have been applied in the past with at least a certain minimum frequency; or the expectation must prevail that it will be so applied in the future. Consult: George H. Deson and Harold D. Laswell, "Public Order Under Law: The Role of the Advisor-drafter in the Formation of Code or Constitution," Yale Law Journal 65 (1955) 174-195.

5 The invoking function is another important activity that has been neglected by political scientists and even by legal scholars. Throughout the context of government the problem continually arises of whom to proceed against in the name of the law and whom to dismiss with a warning and whom to ignore entirely. The patrolman, the police officer, the prosecuting attorney, the grand jury are largely specialized to invoking rather than making formal application of the law, or exercising the options of the body politic. Even when studies tell us how many people of what characteristics have been arrested, for instance, we usually find that the factual circumstances are left vague. Yet the key question for comparative research is "Under what factual circumstances does A invoke
In recent years the applying function has received more attention than before as a result of the growth of research on public and private administration. As usual two of the most general questions to be answered for a given participant are: Concerning whom are applications made? How is the participant involved in the applying activities of others? We answer these questions by taking note of the number of people in various positions in the total context who are reached by departments, commissions, courts and similar entities.

The key questions relating to the appraisal function are: Whose activities are appraised? By whom are one’s own activities appraised?

Prescription X in reference to B? The invoking function is not only exercised by public officials: it is prescribed that each private person shall conform his own conduct to the norm. What are the circumstances in which deviation occurs? In what proportion of these situations do public officials invoke the norms? Also, in what situations are norms invoked even when, from the standpoint of the scientists, there is no deviation? According to American institutional practice the initiation of criminal prosecutions is an official monopoly and prosecuting attorneys may regard themselves as better off if they withstand public sentiment and refuse to proceed (against strong entrenched interests). (Comment) Yale Law Journal 65 (1955) 209-234, "Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction."

Although we have trend figures telling us, for example, how many individuals or associations have been brought formally into the arena of a given court, commission, or department, we do not know the most important trends among them, such as how many are members of a culture that differs from the dominant one; or how many belong to upper, middle or lower positions in the class structure; or how many belong to what interest groups and organizations that cut across class lines (or do not contain all the members of a class); or how many can be said to have what kind of personality system. Consequently we are in no position to make a global assessment of the immediate (much less the ultimate) impact of the action taken by the court. For instance, the same number of dollars assessed as a fine is trivial to one man or association, and formidable to another. It is not true that all parties who lose cases believe that the court is crooked; yet an unknown number do. It is not even true that all parties who "get away with it" believe that they should. Not only do our studies of courts lack comprehensiveness and relevance: think of the present state of our knowledge of the impact of the tax services, the health services, and the like, on the community context (local, state, national, international).

Appraisals are designed to provide a flow of information about the working of past prescriptions—and to paint a picture of the aggregate situation (in such terms as efficiency in the use of appropriations, enforceability, and so on). The Congress, like any legislative body operating in a complex age, is dependent to a large extent upon self-appraisals made by public agencies. There are no satisfactory systematic studies of the appraising function. Any political scientist will, of course, appreciate Senator Paul H. Douglas's account of the roadblocks in his path in Economy in the National Government, Chicago, U. of Chicago Press, 1952.

Concerning termination: By whom are prescriptions brought to an end (as when they are suspended or amended)?

Cyclical and Structural Changes

If our picture of the decision process were rather complete for a given body politic we could describe the functional interactions occurring among (and within) the participants. When stabilized such relations tend to display cyclical fluctuations. That is, we detect the presence of interdependent changes. Common experience tells us something about these patterns. The "reform wave" is an old story in the decision process of U.S. cities. Typically it begins as an appraisal. People stigmatize activities as lawless, immoral and wasteful. Intelligence media bring more information about how other cities freed themselves from corruption. The recommending function expands as civic clubs and other organizations busy themselves with the dissemination of reform demands. The result may be legislative prescriptions designed to tighten up or clarify public policy. Indictments are sought and obtained against corrupt officials (invocation). Efforts are made to improve the administration of the courts and of all agencies involved in the application function. A number of old arrangements may be terminated, including licensing provisions that have fostered "pay-offs" to law enforcement officers and political bosses. After the reform phase of a cycle we often observe the corruption phase. This may be characterized as involving less strict appraisal of conduct, and less conformity to the prescriptions incorporating public policy (reduced application). The other functions modify accordingly.

We are aware of the fact that cycles are rarely if ever "perfect"; they do not re-establish the original state of affairs completely. Political fluctuations are structural as well as cyclical; new patterns of interaction emerge and become relatively stable, and the level of
The recommending function, we may hypothesize, varies directly with the demand and inversely with the degree of recommendation. The demand for

(1) the base values at the disposal of the recommendation will be affected by such activities. During the nineteenth century the mass political party as a

structure highly specialized to the function of recommendation. The

network concerned with this activity, namely, the political parties, have

 necessità de propiedad: oposición de grupos, mèmes: asociación de comerciantes, e. f. p.:

stir up support among the workers.

The prescribing function rises and falls with (a) the demand for

prescription, and (b) the base values available. The demand depends

upon the expectation that legislation will affect values. In modern

government, in which the government is primarily an instrument

for realizing the goals of the political party, this demand has been

elevated by the increase in political consciousness and the concomitant

trend toward the creation of new institutional structures. These

structures have greatly influenced the growth of demands for legislation

and the demand for legislation has, in turn, influenced the growth of

political consciousness and the political parties.

The invoking function likewise depends upon demand and capa-

bility; and the demand is affected by the expectations that relate the

effectiveness of the invoking function to values. The tactic is to bring

the issue into court, often with damage to their

credit position while litigation drags on.

Big government is characteristic of the modern large-scale body

politics even in those countries whose big business, big labor, and

and the demand for recommendations. The applying function is

understood in the context of political wisdom, and the demand for

recommendations is a large field of political action because of the

expectation that regular courts will be slow, unacquainted with market

practice, and expensive.

Explanations of Changes of Function

In general the postulate holds that any change in the value position

of those who make the function is to be informed. (6) the base values

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practice, and expensive.
Intimately connected with big government and the Great Society is the expanded role of the appraising function. The demand has come largely from the expectation that a complex division of labor multiplies the dangers from corruption, inefficiency and indifferent administration. The international crisis carries with it grave apprehensions of subversive activity. The result has been to expand surveillance personnel.

The terminating function also assumes new significance in a complex social order which depends less upon tradition than upon explicit arrangements to define the reciprocal claims among individuals and organizations. Statutes and regulations require regular review in order to weed out the obsolete and the obsolescing.

Structural Changes

Functions rise and fall; they also change their structure, growing more or less centralized, concentrated, democratized, or legalized. Let us consider these changes from the point of view of maximization analysis. Fundamental hypotheses are parallel to those given above. Each response is favored by effective demands that are sustained by the expectation that values are at stake. If we think of all the structures that share in a given function as comprising a system of interaction—a political arena—it is clear that changes in the units of the system depend upon gaining potential support anywhere in the total context of the community. We have been particularly conscious of the trend to centralize many activities once regarded as exclusively local. Grants-in-aid to education, for instance, have come about as a result of changing expectations of many kinds. Businessmen, labor leaders, and teachers have recognized that the failure of relatively impoverished areas to provide educational opportunity is a drag on economic progress. The national security is at stake to the extent that illiterate or barely literate youth are unable rapidly to acquire the skills of modern warfare. There is resentment against the humiliations based upon the bad luck of being born in a poor district. Many have felt morally outraged at our failure to live up to the ideal of providing every child with a sound minimum education, followed by opportunity to develop latent talent into socially contributory skill. Health is also at stake. So, indeed, is enlightenment and the growth of sentiments of solidarity with the whole nation. (Studies have repeatedly shown the connection between education, civic knowledge, and patriotism.)

It will be noticed that I have made use of eight categories for the classification of the value-institution patterns of society: Wealth (economics), Power (national security, political democracy), Respect (freedom from humiliating discrimination), Rectitude (standards of ethical responsibility), Skill (and taste), Well-being (health), Enlightenment (history, civic knowledge), Affection (loyalty). It is convenient to describe all the preferences of individuals and groups in these terms. The values are sought by each of us for the primary ego ("I," "me") and for the component egos that we include with the primary ego to constitute the self (family, political party, nation, etc.). Our perspectives also include all matter of fact assumptions about the past and future (all of which are called "expectations").

If we study movements toward or away from highly "concentrated" structures for the performance of a function, we shall doubtless confirm the role of expectation in political change. A recurring feature of state government is a long range cycle initially characterized by the multiplication of boards and commissions, followed by reforms that consolidate such organizations. Then a new cycle begins. The coalition that brings about reform usually emphasizes the taxpayer's stake in efficiency and economy, the decent citizen's concern for honest rather than corrupt government; and the impetus is typically given by ambitious politicians who see an opportunity to build careers by exploiting discontent. Mass media often seize the initiative or join in the clamor as a means of boosting circulation, revenue, and reputation; there is also the journalist's concern with applying his

12 The fluctuating perspectives of demand, expectation and identification that foster and in turn are affected by operational activities are indicated in such accounts as Carter Goodrich, "Local Government Planning of Internal Improvements," Political Science Quarterly LXVI (1951) 411-445; Rudolf Schlesinger, Federalism in Central and Eastern Europe, New York, Oxford University Press, 1945.

13 All interactions among human beings can be classified in terms of values and practices, the latter being the patterns employed in shaping or sharing the values. Each individual or group (organized or unorganized) is continually indulging itself or others in terms of values; or it is depriving itself or others. The indulgence or deprivation always involves specific practices. The act of voting is a practice; and so, of course, are the other features of legislative structure and function. "Centralization" is a term that designates practices. "Democracy" is a term we use to describe shared power and specifies the events that are the value goals of our ideal political order. Detailed specification calls for an enumeration of the practices that are regarded as constituting a shared power relationship.
skill to a lively issue. The coalition of factors making for de-concentration is usually less inclusive than the coalition just described. The demand for a new commission may spring in part from distrust of existing leaders and patterns of government to cope with the specific problem that is in the public eye. A new agency may mean more patronage for the party, more prominent and powerful roles for certain individuals, more self-congratulation for achievement on the part of those who have become identified with a campaign. New agencies may enlarge, at least temporarily, the influence of the legislature in relation to the executive and the civil service by providing new joint appointments on a political basis. The result can be to strengthen certain local and functional interests in the legislature, the party and in the government as a whole. Power, wealth, respect, solidarity are all involved in such developments; minute analysis may show that all values are at stake.

Trends away from democracy often take the form of subtle extensions of bribery and coercion throughout the arena concerned with a given function. In many local communities we have seen functions gathered into a few hands. The intelligence facilities—the public media—have been monopolized or made subject to the dictates of a ruling clique. Recommending activities have been channeled into grooves congenial to the clique. No opposition party is permitted to operate; no unwelcome agitation is allowed. The prescribing function (and all the other functions) are similarly controlled. Often the outcome is the result of an overwhelming ownership element. Or it may rest upon physical force (power and control of well-being) rather than wealth, in the shape of gangs that levy tribute for protection. Other values may supply the base for an antidemocratic development (religion, for instance, which we include with rectitude).

Another structural change is toward or away from legality. Power is twofold: it is formal authority; it is effective control. Power is lawful when authoritative and controlling. The anti-democratic processes referred to above are instances of unlawful power in a body politic; but all deviations are not necessarily translatable in such terms. Some governmental structures survive in name and not in fact. They rubber-stamp decisions made by other organs in the same way that the electoral college passively registers the state electorates. What factors account for discrepancies between authority and control? We find instances of this in connection with some of the

centralizing, concentrating or de-democratizing changes sketched before.

In general it appears that the relative rise or fall of a given social structure depends upon its contextual linkages. When the demands and expectations of rising social formations and personalities attach relative importance to one structure rather than another, it is safe to predict that the preferred structure will rise. It is commonplace to say that the political strength of the new middle class groupings in modern society has usually worked to the advantage of specific institutions; e.g., the popular press, the political party, the popularly elected chamber of legislative bodies, due process of law, administrative careers open to merit, free speech concerning public officials, concern for private contractual relationships.

If any institutional structure becomes more powerful it is, by definition, indulged in terms of the power value (from our point of view as scientific observers of the decision process). Concurrently the declining institution is deprived in terms of power. We say that structure A is depriving B of power in the decision process. According to the maximization postulate we expect such changes to occur as a result of certain perspectives and capabilities (access to base values). A obtains base values when A is indulged by individuals and organizations in the social context. The base values available at any given time are used or withheld according to the strategical and tactical policies of the institution. The decision process within the institution can be functionally analyzed in the same way that the role of the institution itself can be examined in relation to the total community context.

**Intensive Methods: The Supreme Court**

The factors explaining the political role of an institutional structure can be examined by intensive methods. A comprehensive investigation of institution X would cover such interactions as these: During a given period what institutions and individuals external to X were indulged or deprived by X (in terms of what values and in reference to what patterns)? What institutions and individuals external to X were sources of indulgence or deprivation for X? What component institutions and individuals within X were indulged or deprived through their participation in X? What base values and strategies were employed by X in affecting others? What values and strategies were employed by outsiders in influencing X? What is the internal
decision process of X (functionally described) and which participants had how much impact upon outcomes? What base values were at the disposal of these participants and what strategies were utilized in manipulating them? What were the perspectives (value demands, expectations, identifications) of X in relation to the outside environment? What were the perspectives of the participants in the internal decision process of X?

Let us take the Supreme Court as an instance. In the exercise of the prescribing function the Court may impose a power deprivation upon other structures that participate in this function by setting aside a Federal statute or a state statute, or by refusing to give effect in the United States to a statute enacted by a foreign government or to accept an interpretation advanced in the name of international law. The lower courts are affected when they are overruled. The Court may provide a power indulgence by accepting such prescriptions. The consequences of the Court's action may go very much farther in terms of power (and all other values). It is commonly said that the decision of the Court in the Dred Scott case and in other controversies was an exacerbating factor in the Civil War crisis. It is obvious that more than the immediate parties to a controversy are indulged or deprived, since the repercussions ramify throughout society by influencing expectations, demands, identifications; and also by affecting operations that involve values. The production and distribution of wealth is influenced in a measure by the decisions affecting foreign trade, interstate commerce, social security burdens, and the like. Respect is at stake in all that affects social discrimination. Health (well-being) is directly involved in public health questions and indirectly in many more. Controversies over freedom of the press immediately concern enlightenment; rectitude is involved in "criminal" questions; skills are at stake in whatever affects technical education; and affection is influenced by all that touches upon the family, intimacy and sentiments of solidarity with larger units.\(^{14}\)

The Court performs a positive intelligence function when public attention is focused upon its deliberations and decisions, and when a contribution is made to understanding the significance of important social trends and future contingencies. The factual technique of the "Brandeis brief" has facilitated this intelligence role. The Court also deprives the public of information, as when the Justices support some privileged communications.\(^{18}\)

The Court is chary of advocating specific policies. But it provides a forum in which the recommending function is partially exercised. The forum serves the invoking function especially since the parties put forward their claims by alleging that they are in harmony with practices must be re-defined as indulgences or deprivations of the Court. For instance, lawyers may explicitly criticize the Court for its recent holdings (which is a deprivation of the Court). More commonly, the lawyers try to indulge the Court as a whole (or a majority) by declaring that what they want in the present litigation is in harmony with the magisterial action of the Court in all truly relevant cases. The predispositional factors that are invoked to explain the response of the Court are of two kinds: the predispositions with which the Court enters the situation ("first order explanation"); the factors accounting for these predispositions ("second order explanation"). Herman Pritchett has accurately described the alignment of the Supreme Court in given cases (which is a description of the response). When he demonstrates that various Justices during a given period are predisposed to take a "liberal" position, he is explaining the response in a given case (or run of cases) by referring to the way in which Justices had been conditioned prior to the case (or cases). Civil Liberties and the Vinson Court, Chicago, U. of Chicago Press, 1954. If he, or any other scholar, tries to account for these predispositions we have an example of a "second order" explanation. It is generally recognized that the Supreme Court can increase its deprivational weight upon the Congress and the President (as in dealing with New Deal legislation). This may have the effect of provoking counter-attack; in turn this can lead the court to a cycle of concurrence, partly from a demand to protect its own power position from being formally curtailed.

\(^{14}\) Note that we do not "explain" the factors contributing to the impact of the Court by describing who is indulged or deprived and with what effect. These are the "responses" of the Court; they must be explained by "environmental" and "predispositional" factors. The environmental factors include the arguments of counsel, the testimony, the rules of order and evidence actually used in the official proceedings; and the unofficial exposures of the Court to conversation, the press and other influences outside official proceedings. For purposes of systematic comparison such environmental

\(^{18}\) How do we explain the rise of the "Brandeis brief," a factor that has augmented the role of the court in the national intelligence process? In recent decades the American school of realistic jurisprudence has influenced the teaching in American law schools. But the point of view was already functioning before it became a labelled body of doctrine. And the expansion of the factual brief preceded the doctrine. (See on American legal realism the selections from Cardozo, Haines, Hutcheson, Llewellyn, Frank and F. S. Cohen in chapter 6 of Cohen and Cohen, Readings in Jurisprudence and Legal Philosophy, Prentice-Hall, New York, 1951.) Concerning value conflicts between the demand for enlightenment and the requirements of respect, rectitude and the like, consult (Comment) "An Informer's Title: Its Use in Judicial and Administrative Proceedings," Yale Law Journal 63 (1953) 206-232; Richard Donnelly, "Judicial Control of Informants, Spies, Stool Pigeons, and Agents Provocateurs," Yale Law Journal 60 (1951) 1091-1131.
the authoritative language of statutes, treaties, previous Court decisions, the opinions of commentators and the like.16

So far as the applying function is concerned this is the major role of the Court, since it is the tribunal authorized to make final determination of how community prescriptions apply to particular circumstances.17

The appraising function is implemented whenever statements are made about the effects of public policy and their causes. When public authorities are party to a controversy they are unescapably subject to appraisal by the Court and by one another, as well as by the attentive public. But the Court goes considerably beyond appraisal since it makes final applications. The appraising function, like the intelligence function, is limited to the making of factual statements; strictly speaking, no applications, prescriptions or recommendations are part of it. It differs from the intelligence function only by subject-

16 From the standpoint of interests who seek changes in the Constitution or in basic legislation the arena of the Court is perceived as a step in a total campaign. Our procedures of litigation can be used to make the point that “lesser” remedies have been exhausted and that “major” innovations are needed. We need studies that show what is [sic] under what circumstances defeated parties appeal successfully to the legislature, or fail in the attempt to reach a post-court arena. Concerning citation patterns see J. H. Merryman, "The Authority of Authority: What the California Supreme Court Cited in 1950," Stanford Law Review 6 (1954), 615-673.

17 Most of the scholarly work on the Court is concerned with the applying function. The response of the Court is sometimes traced to characteristic features of American culture, although this line of study is in its infancy (Llewellyn, for instance). Class factors may be invoked, especially economic position and perspectives (Charles A. Beard, of course, was the great innovator of this line of analysis). Interest factors—not identical with class—are commonly referred to (notably in the work of John R. Commons). This category also includes the perspectives prevailing among law teachers, judges and practitioners (rather abundantly documented in The Journal of Legal Education). See also Leonard H. Goodman and Richard W. Rabinowitz, "Lawyer Opinion on Legal Education; A Sociological Analysis," Yale Law Journal 64 (1955) 537-555. Scholars are keenly aware of the role of individuality in the history of the tribunal. As a rule, however, biographers have had no notable competence in the study of personality systems and have not discriminated the "personality" from the "personal." I have been referring to predispositional factors. Environmental influences also are continually studied, such as the effect of evidentiary rules upon what gets to the focus of attention of the decision maker and activates his predispositions. Scholarship is also directed toward examining the impact upon law (with special reference to prescription and application) of "institutional complexes" such as "capitalism." See Max Weber on Law in Economy and Society, ed. by Max Rheinstein, Cambridge, Harvard University Press, 1954; Karl Renner, The Institutions of Private Law and Their Social Functions, ed. by O. Kaban-Freund, London, Routledge and Kegan Paul, 1949.

matter (the causes and consequences of past public policy), or by the assumption of responsibility for using the normative standards of public policy for characterizing the facts. An inspector, for instance, performs a "pure" function of appraisal when he reports on the apparent legality or economy of administrative conduct without adding a recommendation or invoking another decision maker to apply authoritative prescriptions. Many such reports traditionally lie idle, or are tabulated and further reported, with no known result. The appraisal statements made by the Court or to the Court are typically imbedded with advocacy (invocation) or final judgment (the opinions elaborated by the Court to make the decision more acceptable to the losers).18

The terminating function figures continually in court decisions, since controversy often poses such questions as when "war" ends, and when emergency prescriptions are no longer effective.

Every structure engaged in the decision process is subject to indulgences or deprivations originating elsewhere. The Supreme Court has repeatedly been under political attack by other organs of government who share the prescribing function, for instance. It is continually being reported upon in various public, professional and private channels of communication. The slightest idiosyncrasies of the nine judges are likely to be known (or imagined) by the Bar throughout the entire country. Lawyers, political scientists and others frequently propose and advocate changes in the place or procedures of the Court in our system. The Bar and the law schools in particular are focussed upon the doings of the tribunal and appraise it constantly. The position of the Court as an organ of government, and of the individual Justices, is perpetually altering—even though slightly—in terms of power, respect and other values. Lawyers try to enhance their own position by contributing to the Court, by practicing before it, by clerking for a Justice, or by contriving to reach the Bench. The Court thus draws upon skill, vigor (well-being), enlightenment, and a reputation for integrity (rectitude). It has typically been an object of sentimentalization (affection) among Americans who are trained

18 From the standpoint of a contextual jurisprudence the Court is frequently confronted by appraisal problems, since the issues before it depend upon assessing the results of official action according to the major policies of the system of public order. However, the appraisal function is characteristically obscured by legal technicalities that transform the candid assess ment of factual results into a more complex mould. The parties to a controversy are continually calculating the probable effect of each "fact" statement upon the interpretation to be given by the Court of the formal prescriptions that are pertinent to the issue. The result is to multiply incentives to distort the factual picture.
to think of judicial review and the Court as distinctive achievements of American society. Although the emoluments are substantial they are not in proportion to power or prestige.\(^{19}\)

In common with any stable institution the Court has great significance for those who are explicitly connected with its operation. For most of the Justices the Supreme Court is the culminating peak of their lives. They see in it the power role that they want; they revel in prestige; they are challenged by the skills required; they are financially comfortable and able to adjust the tempo of their participation to physical limitations; they find the work of the Court a great source of enlightenment on the dynamic processes of American society; they are aware of their ethical obligations and opportunities; and most of them are fiercely loyal to the institution and often on congenial terms with their colleagues. This, of course, is not the whole story. For some men the Court is a stepping stone to the Presidency and they remain politically frustrated as long as they fail to make it. The prestige and the ethical standing have their costs, which are varying degrees of isolation from mankind and the avoidance of spontaneity. And it is not to be assumed that the Justices are always on good terms with colleagues, or that they are complacent about their degrees of skill and enlightenment. Some of them suffer from anxieties that make their lives a continuing tribulation. Even the financial provisions may require downward adjustment of living standards.

At any cross-section in time, then, we may inventory the base values at the disposal of the Court for maintaining (or even advancing) its power position. The authority derived from the wording of the Constitution and consecrated by a century and a half of active use is a potent asset. This is power as a base of power. The clear title to authority is sustained by the willingness of the significant elements of American society to supply the obedience, respect, ethical confidence, loyalty, skill, and physical facilities (wealth, well-being) required. At any given time the unqualified commitment of the Justices to the Court is a major asset.

Now it is notorious that base values are shiftable since they are the perspectives and capabilities of people. They are seldom invoked to the full during any period, hence they are chiefly potentialities. And potentialities can only be accurately assessed in reference to future circumstances. At any given time the scholarly observer must imagine future contingencies and estimate the way in which existing predispositions will work out. To some extent these estimations can be grounded on past responses (by and to the Court, for instance).

There are some circumstances in which the Supreme Court might become the focus of the entire process of decision. Imagine a catastrophe in which the Justices survive and are able to establish contact with one another, the remaining fragments of top officialdom, and wider audiences. Under the pressure of shock and urgency the Court might exercise emergency functions of every kind, concentrating all effective control in its hands. The Court might inaugurate a legislative (prescribing) process that resembles the procedure of a court by separating the personnel charged with making the final judgment from the personnel that presents the policy alternatives for judgment. Problem panels could thus be constituted to cope with particular fields requiring action. The Court might use the remnants of the old Senate and House as an electoral college for new Justices, but develop a method of plebiscite (directed to leaders of organizations in various areas) to confirm choices and legitimate emergency management.

I shall not pursue this hypothetical construct further. But it shows some of the possibilities to be explored when one examines the potentiality of existing predispositions to respond to various configurations of indulgence and deprivation in the environment.

It is, I think, apparent that the maximization postulate enables us to formulate many hypotheses to serve as guides to inquiry. At the same time the complexity of the social context is such that the number of conditioning variables in any situation is vast. In this regard our problems deal with factors of the same order of magnitude as the number of molecules in physico-chemical interactions. The operational indexes of our elementary units are undergoing continual change. The indexes by which we describe the same perspectives today do not necessarily remain the same tomorrow.

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**Continuing Intelligence and Appraisal**

One implication is that it is important to perfect our systems of continuing intelligence and appraisal. This requires a systematic plan