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Danial G. Stroup

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## LAW AND LANGUAGE: CARDOZO'S JURISPRUDENCE AND WITTGENSTEIN'S PHILOSOPHY

DANIEL G. STROUP\*

In December of 1923 Benjamin N. Cardozo, then an Associate Judge of the New York Court of Appeals, outlined, in a lecture to the Yale University School of Law, what he felt to be the two greatest needs facing the law of his day:

The first is the need of some restatement that will bring certainty and order out of the wilderness of precedent. This is the task of legal science. The second is the need of a philosophy that will mediate between the conflicting claims of stability and progress, and supply a principle of growth.<sup>1</sup>

Cardozo thought that the newly-formed American Law Institute would meet the first of these necessities, but, in 1923, he felt the legal community was only beginning to realize the second deficiency, although he was encouraged by the growing awareness he saw year by year.<sup>2</sup> The judicial debates of the past two decades, however, between judicial activists and the champions of judicial restraint show that the legal community of today is painfully aware of the need for such a moderating philosophy, and yet, at the same time manifest that it is no closer to formulating such a philosophy than when Cardozo first stated the problem. A consideration of the nature of law suggests that perhaps an appropriate philosophy of law has not been found because it has been sought in the wrong places. Theories of jurisprudence, of the nature of man, of the nature of society, can provide no such philosophy, for these are the very points of contention in judicial debates. But law, whatever else it may be, is language, and perhaps in the philosophy of language can be found a more manageable, less metaphysical subject for discussion.

Law is language—not only language, but a very special kind of language, for law is an attempt to structure the realities of human behavior through the use of words. When a legislature passes a law or a court hands down a decision, it is altering the status of individuals, changing their relationship to other individuals, to possessions and objects, to the state. Legal language does not merely describe these

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\*Assistant Professor of Government, Center College of Kentucky. B.A., 1972, University of Dayton; M.A., 1974; Ph.D., 1977, University of Virginia.

1. B. CARDOZO, *THE GROWTH OF LAW*, 1 (1924).

2. *Id.*

relationships; it affects what it describes. When, for example, under the authority of the law, a minister or justice of the peace recites the legal formula, "I now pronounce you man and wife," he is indeed describing the relationship between the couple before him.<sup>3</sup> But few would say that this is the primary purpose or effect of his words. These words not only describe the relationship, they create it. Legal language is thus not merely descriptive; it is instrumental as well.

Indeed, it is this very instrumental character of legal language which presents the difficulty Cardozo discusses. If judges merely theorized in abstraction, they could speculate to their hearts' content about the nature of God, man, and society, and no one would care in the least; no one would seek a philosophy to form rules governing the use of such language. It is because the outcome of legal discourse carries such great consequence for the everyday lives of the population at large that the element of continuity in that discourse takes on such great importance. The predictability of all social relations, the assurance one has in exercising his rights, the security of his investments and economic endeavors, the confidence he has in his patterns of behavior and conduct toward his neighbor, all depend upon the stability and predictability of the law. At the same time, law must pattern human activities in such a way as to allow at least the great preponderance of members of the polity to meet their felt needs and express their most deeply-held values. A legal system must, therefore, provide some means for peaceful change of the patterns of behavior it enforces so that it can continue, in an orderly fashion, to meet the changing needs and values of those who live under it. Law must be stable, but not stagnant.

### THE CORRESPONDENCE THEORY

It is remarkable that this instrumental character of legal language, this power of legal words to structure reality, lies at the heart of all legal disputes, and yet is so seldom discussed by legal theorists. Legal language has traditionally been considered to be descriptive rather than instrumental; legal words are seen not as tools, but as names or labels for specified categories of rights and procedures. In this view of language there exists a one-to-one correspondence between words and objects in the real world. Once one accepts this view of legal language, the only legal questions remaining are whether a particular right or practice falls within a particular

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3. J. AUSTIN, PHILOSOPHICAL PAPERS, 222 (1961).

category, (e.g., is "liberty of contract" contained under the category, "due process of law," or is the right to a jury trial included within the category of "fundamental rights"?), and, which particular branch of the government is assigned the authoritative determination of the content of these categories.

Cardozo, in *The Nature of the Judicial Process*, outlines two schools of legal thought which, although diametrically opposed on most questions, are united in their regard for the descriptive nature of legal language.<sup>4</sup> Both schools agree that legal words are names or labels with specific referents in the real world, but clash vehemently over the source of these referents.

The first of these positions, which Cardozo attributes to Coke and Blackstone, holds that the referents for legal words are derived from sources beyond any individual judge or lawyer: that the legal principles and rules to which legal words refer are to be found in custom or in natural law.<sup>5</sup> The judge may occasionally need to uncover a legal principle hidden deep within the mysteries of custom, but he plays no creative role in this process; he is, in Blackstone's words, "the living oracle of the law," who undertakes the task of "examining the great outlines of the English law, and tracing them up to their principles,"<sup>6</sup> and thus discovers the same legal precepts which any man might find by likewise employing proper legal reasoning.

The relation between language and reality for such a theory is clear. Legal words are names for pre-existing entities which have a permanent and objective actuality. Again, as Blackstone notes,

What is generally denominated law-Latin is in reality a mere technical language, calculated for eternal duration, and easy to be apprehended both in present and future times; and on those accounts best suited to preserve those memorials which are intended for perpetual rules of action.<sup>7</sup>

By giving such legal principles objective and changeless existence, this school gives to law an element of stability and predictability. Blackstone found the eternal principles of natural law objectively embedded in the English Common Law, just as later American jurists were to find them in the Constitution. Any judge applying proper

4. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, 124-125 (1921).

5. *Id.* at 124.

6. W. BLACKSTONE, *COMMENTARIES ON THE LAW OF ENGLAND*, quoted in, D. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* (1958).

7. *Id.*

legal reasoning would find them always and everywhere the same. In this view, the law is changeless, so men may go about their daily business secure in the knowledge that their endeavors are protected from the caprices of the state. Similarly, the objectivity of the principles removes all notion of discretion from the hands of the judge. He need not decide issues on the cloudy basis of social, political, or economic philosophy, because he has before him the clear principles of the law. The judiciary is, therefore, safe from all criticism of its decisions because such matters are effectively out of its hands. The judges are only the oracles of the law and they can only proclaim what they find. Consider, for example, Justice Owen Roberts' statement of this view of the judicial process:

When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question.<sup>8</sup>

According to such a theory, all legal determinations come to be nothing more than logical deductions from pre-existing principles. The criticism of such a jurisprudence lies in its "persistent confusion between names and things,"<sup>9</sup> as Jerome Frank once expressed it. For those who hold such a view names are not mere conventional labels which humans attach to objects for purposes of reference. Beyond being labels, names are viewed as being expressions of the essences of things, and hence the name itself comes to have a reality, as Frank once again explains:

Every object . . . seems to possess a necessary and absolute name, one which is a part of the object's very nature. The name of an object is regarded as a property inherent in its essence, as real a part of it as its visual characteristics.<sup>10</sup>

By giving a name to an abstraction the jurist objectifies it, gives it a real existence. Is there really such a thing as a "suspect

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8. *United States v. Butler*, 297 U.S. 1, 62 (1936).

9. J. FRANK, *LAW AND THE MODERN WORLD*, 73 (1930).

10. *Id.*

category"?<sup>11</sup> Or a closed category of businesses "affected with a public interest"?<sup>12</sup> Or does the only reality in which these concepts partake inhere in the name itself? Yet, by naming and objectifying an abstraction, and by further positing that the rules which govern thought also govern reality, one implies that in manipulating words one is manipulating realities, when in fact, one is only manipulating one's own subjective categories.

This may well lead to a stable and logically harmonious law, but it also produces a rigid and detached law. This abuse of logic consists

in envisaging ideal conceptions, provisional and purely subjective in their nature, as endowed with a permanent objective reality. And this false point of view, which, to my thinking, is a vestige of the absolute realism of the middle ages, ends in confining the entire system of positive law, *a priori*, within a limited number of logical categories, which are pre-determined in essence, immovable in basis, governed by inflexible dogmas, and thus incapable of adapting

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11. Justice Harlan Stone first suggested that legislation directed at "discrete and insular minorities" (*e.g.*, religious, national, and racial minorities) might be subjected to "more searching judicial inquiry" under the Equal Protection Clause in order to protect minorities from prejudicial operation of the political processes. *United States v. Carolene Products, Co.*, 304 U.S. 144, at 152-53 n.4 (1938). As Professor Tribe notes, the Supreme Court has, so far, limited the application of this doctrine to "instances of prejudice operating to the detriment of racial and ancestral groups." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*. 1012 (1978). These include, among others, blacks, *Loving v. Virginia*, 388 U.S. 1 (1967); American Indians, *Williams v. Lee*, 358 U.S. 217 (1959); and those of Japanese origin, *Takahashi v. Fish and Game Comm'n*, 334 U.S. 410 (1948).

12. In *Munn v. Illinois*, 94 U.S. 113 (1877), the Supreme Court ruled that state regulation of the prices and practices of businesses did not deprive owners of their property without due process of law, because the public has an interest in the use of such property. Private property becomes "clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large." *Id.*, at 126. All businesses would, then, seem to be subject to governmental regulation. In *Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522 (1923), the Taft Court, more interested in protecting the rights of property, picked up *Munn's* terminology and reinterpreted it to draw a distinction between those businesses which were "affected with a public interest," and therefore were subject to governmental regulation, and those which were not. Businesses "affected with a public interest" were limited to a narrow and seemingly closed category which, in practice, included little more than public utilities. *Id.* at 535. During the Great Depression the Court returned to the broad understanding of this term as it was employed in *MUNN*, and allowed the State legislatures more latitude in dealing with the economic crises. *Nebbia v. New York*, 291 U.S. 502 (1934). "It is clear," wrote Justice Roberts, "that there is no closed class or category of businesses affected with a public interest. . . ." *Id.*, at 536.

themselves to the every varied and changing exigencies of life.<sup>13</sup>

When words take on a fixed and unchanging relation to their referents, when legal words have an absolute relation to certain pre-established rights and procedures, when legal principles are categorical imperatives, then law becomes rigidly incapable of adjusting itself to the real-life needs of those it is intended to serve. The result is a jurisprudence like that held by Justice George Sutherland, who, in the face of the realities of the Great Depression, could still maintain the absolute existence of a concept like "liberty of contract" on the grounds that "the meaning of the Constitution does not change with the ebb and flow of economic events."<sup>14</sup>

The danger is that such legal absolutism leads not to the antiseptic judicial process which its followers champion, but to the use of logic as a cloak for the conservative social principles of the particular judge. This deductive approach to legal reasoning would maintain that its conclusions are logically inescapable, that one—and only one—solution is logically consistent with preexisting principles. Such, however, is far from the case. The substantive meaning of "due process," the "separate-but-equal" interpretation of equal protection, the "dual-federalist" interpretation of interstate commerce are but a few of the "eternal" principles fabricated wholesale and introduced into the Constitution by a Court which held to such a doctrine of absolutism. The problem, as Jerome Frank indicates, is that

The court can decide one way or the other and in either case can make its reasoning appear equally flawless. Formal logic is what its name indicates; it deals with form and not with substance. The syllogism will not supply either the major premise or the minor premise. The "joker" is to be found in the selection of these premises.<sup>15</sup>

A syllogistic form does not necessarily prevent a judge from introducing his own predilections into law.

The problem is not that change is introduced into the Constitution, but that the means used to introduce that change may well tend

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13. B. Cardozo, *supra* note 4, at 47, quoting F. GEVY, *METHODE D'INTERPRETATION ET SOURCES EN DROIT PRIVE POSITIF*, vol. 1, at 127 sec. 61.

14. *West Coast Hotel v. Parish*, 300 U.S. 379, 342 (1937) (Sutherland, J., dissenting).

15. J. FRANK, *supra* note 9, at 66.

to bring the judiciary into disrepute. When faced with an unfavorable precedent the judicial absolutist may take either of two courses. He may simply proclaim that the previous court had erred in its attempt to find the law, so that the precedent is, in fact, not law at all. He is then free to assert his own interpretation as the one correct statement of the law on the point in question. Or, he may proclaim that his principle has indeed always been the law, and then warp and strain the precedents to demonstrate that, whatever the appearances might be, the Court has never held to the contrary. Such tacks are little calculated to gain respect for an institution which depends wholly upon its prestige and its reputation for fairness for the acceptance of its decisions.

Recognizing that the proposition that judges never make law is patently and demonstrably false, some legal theorists posited the exact opposite explanation of judicial behavior: that law is never made by anyone other than judges. This, Cardozo suggests, is the position of John Austin and John Chipman Gray, among others, and has at its base the doctrine of legal positivism, that is, the view that one may call law only that which is a command of a sovereign (*i.e.*, one who is customarily obeyed), and enforced by a sanction.<sup>16</sup>

Standing behind this, however, is a view of language which, in many respects, is not too far removed from that of the legal absolutists. Words are still seen as names, as labels for existing things. However, in this positivist view there is nothing absolute about the names assigned to objects. They express no essential nature of the thing named, no necessary relation to the referent, but only the conventional agreement of those who have given the names. The meanings of words flow not from Nature or from God, but from human beings. Likewise, logic is not the correspondence of an orderly, rational language to an orderly, rational world, but a conventional imposition of order on that language and world by men to meet their own needs.

Language imposes an order upon the universe; it does not necessarily reflect the already existing order of that universe. Since there is nothing essential about the definitions or principles of this language, disputes will almost of necessity arise concerning them. When these disputes concern matters of importance to the entire polity, when they concern the allocation of values within that polity,

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16. B. CARDOZO, *supra* note 4, at 125. See also J. AUSTIN, LECTURES ON JURISPRUDENCE, 4th ed. (1873), vol. 1, at 88-98 and J. GRAY, THE NATURE AND SOURCES OF THE LAW, 2d ed., (1972 reprint of 1921 edition) at 84.



then peace and harmony demand some authoritative definition of terms. In short, a sovereign is required to impose a solution through the authoritative definition of terms in the form of law.<sup>17</sup>

However, as Bishop Hoadly remarked in the Seventeenth Century, "Whoever hath an absolute authority to interpret any written or spoken laws, it is He who is truly the Law Giver to all intents and purposes, and not the Person who first wrote and spoke them."<sup>18</sup> This function of interpretation has been given to the courts; that is to say, the courts have been assigned the task of authoritatively determining the definitions of legal words, and thus, it may be argued that it is the judges, and only the judges, who make law. In contrast to Blackstone, Austin asserts that customs "are positive law (or law, strictly so called), inasmuch as they are enforced by courts of justice . . .".<sup>19</sup> Similarly, statutes must be interpreted and precedents may be overruled, so these may not properly be considered law until applied by a court. As Gray argues,

The true view, as I submit, . . . is that the Law is what the Judges declare; that statutes, precedents, the opinions of learned experts, customs and morality are the *sources* of the Law.<sup>20</sup>

Such an extreme view would raise the question of whether even judicial precedents would count as law.

When even the prior decisions of a court are not law but merely a source of law, it cannot truly be said that a judge determines law, but only says what law is in the particular case before him, as Frank explains:

[T]he law, with respect to any particular set of facts, is a decision of a court with respect to those facts so far as that decision affects that particular person. Until a court has passed on those facts no law on that subject is yet in existence. Prior to such a decision, the only law available is the opinion of lawyers as to the law relating to that per-

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17. The concept of sovereign as authoritative definer is from T. HOBBS, *LEVIATHAN*, 32 (1950). See also the chapter on Hobbes in S. WOLIN, *POLITICS AND VISION: CONTINUITY AND INNOVATION IN WESTERN POLITICAL THOUGHT* (1960).

18. J. FRANK, *supra* note 9, at 123.

19. J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED*, 30 (1954).

20. J. GRAY, *NATURE AND SOURCES OF THE LAW*, § 602 (1909), *quoted in*, B. CARDOZO, *supra* note 4, at 125-26.

son and to those facts. Such opinion is not actually law but only a guess as to what a court will decide.<sup>21</sup>

For such an extreme judicial nominalism there are no universal principles of justice whatsoever. The judge defines legal words and concepts in one particular concrete case rather than abstractly proclaim universal principles of law for all times and circumstances. Such a jurisprudence allows the judge to consider each case in its own social and economic context, to come to each case unhampered by the burden of the decisions of judges preceding him in similar situations. It allows the law to grow, to expand, to be flexible enough to meet new needs and conditions. It instills in the judge

the spirit of the creative scientist, which yearns not for safety but risk, not for certainty but adventure, which thrives on experimentation, invention and novelty and not on nostalgia for the absolute, which devotes itself to new ways of manipulating protean particulars and not to the quest of undeviating universals.<sup>22</sup>

In conducting their daily affairs and patterning their relations with their fellow citizens, however, men in most cases are not looking for adventure, experimentation, invention, and novelty from the law. They seek a definite, reliable statement of their rights and duties, of what they owe their neighbor and what they may legitimately expect from him in return. To know what is the law in a particular case only after it has been adjudicated by a court is to know law too late for it to serve as a guide for conduct in that situation. It is questionable what social role, if any, law can play when citizens are forced to go about their business capable only of "guessing" whether the judiciary will find their actions to be within the law. Such law can scarcely serve to structure patterns of human behavior within a society.

Even if one does not accept universal principles of justice, there is a utility in the following of precedent, which suggests that similar cases should be similarly decided. If nothing else, considerations of the economy of judicial time and energies would decide against a law so unsettled, to say nothing of the social discontent and hostility toward the judiciary which would be generated by the inconsistent resolution of similar cases. "If a case was decided against me yester-

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21. J. FRANK, *supra* note 9, at 46.

22. *Id.* at 98.

day when I was defendant," Cardozo explains, "I shall look for the same judgment today if I am plaintiff."<sup>23</sup>

Finally, one must question whether the exponents of a judicial relativism have not fallen into the very errors regarding the relation of language and reality for which they so vigorously attacked the judicial absolutists. They may very well argue that the legal categories they create have no objective existence, that they are the result of human convention and may just as easily be changed by human convention, but once they they have established their categories and their referents for legal words, they have often maintained them just as rigorously as any judicial absolutist. The very men who struggled to prove that the economic labels and categories formulated in the Nineteenth Century had no independent, objective existence would turn around and treat their own classifications as if they were actual existing entities. What difference, for example, is there between disallowing legislation regarding certain "suspect categories"<sup>24</sup> of individuals and allowing only that legislation which regulates a category of businesses "affected with a public interest"?<sup>25</sup> Is court-ordered busing to end racially-identifiable schools<sup>26</sup> any more to be found in the Fourteenth Amendment than the notion of "separate but equal"

23. B. CARDOZO, *supra* note 4, at 33.

24. See e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating state law which prohibited interracial marriage); *Virginia Bd. of Elections v. Hamm*, 379 U.S. 19 *aff'g* 230 F. Supp. 156 (1964) (striking down state law requiring separate lists of blacks and whites in voting, tax, and property records); *Anderson v. Martin*, 375 U.S. 399 (1964) (invalidating Louisiana statute requiring the race of candidates to be designated on all nomination papers and all ballots for primary and general elections); *Takahashi v. Fish and Game Comm'n*, 334 U.S. 410 (1948) (invalidating California statute which denied commercial fishing licenses to Japanese resident aliens). See *supra* note 11.

25. See *supra* note 12. The Taft Court (1921-1930) struck down a number of state laws which attempted to regulate the prices and practices of a number of businesses. These regulations were held to deprive owners of businesses of their property without due process of law on the grounds that the businesses so regulated were not "affected with a public interest." See e.g.: *Tyson and Brother v. Banton*, 273 U.S. 418 (1927) (striking down a New York law regulating the prices of theater tickets); *Ribnik v. McBride*, 277 U.S. 350 (1928) (invalidating a New Jersey regulating fees charged by employment agencies); *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929) (invalidating Tennessee law regulating gasoline prices); *New State Ice Company v. Liebman*, 285 U.S. 262 (1932) (invalidating Oklahoma law subjecting to state licensing all those engaged in the manufacture, sale, or distribution of ice).

26. *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979); *Keyes v. School District No. 1, Denver*, 413 U.S. 189 (1973); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). See *infra* note 72.

schools?<sup>27</sup> Does the Constitution distinguish between "fundamental" and "non-fundamental" rights<sup>28</sup> any more than it distinguishes between "direct" and "indirect" effects upon interstate commerce?<sup>29</sup> And yet each group treated its categories as if they were labels for existing realities and carried them to their logical conclusions (and beyond).

If words are seen only as labels, then, the kind of jurisprudence which results will depend largely upon whom (or what) one posits as the source of these labels. If, in the interest of predictability, one gives legal concepts and categories a divine or natural origin the result is a stable, but inflexible body of law. The expected reaction to such a rigid law is the restoration of elasticity by establishing human convention as the source of the content of legal words. However, depriving law of an immutable base sacrifices its qualities of consistency,

27. *Gong Lum v. Rice*, 275 U.S. 78 (1927); *Berea College v. Kentucky*, 211 U.S. 45 (1908); *Cummings v. Board of Educ.*, 175 U.S. 528 (1899).

28. This distinction has been employed by the Supreme Court to determine those provisions of the Bill of Rights which apply against the States through the Fourteenth Amendment's Due Process Clause. In *Palko v. Connecticut*, Justice Cardozo suggested that certain provisions of the Bill of Rights were "of the very essence of a scheme of ordered liberty." 302 U.S. 319, at 325. These were embraced by the concept of due process of law and therefore applied against the States. Others did not embody principles of justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental," 302 U.S. 319, 325, *quoting Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), and consequently did not bind the states. This distinction was used by the Warren Court to impose a number of restrictions on the States. *See e.g. Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusion of evidence obtained through unreasonable search or seizure); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel in all felony cases); *Malloy v. Hogan*, 378 U.S. 1 (1964) (privilege against self-incrimination); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to privacy); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to trial by jury for all serious crimes).

29. In *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895), the Supreme Court held that under the Commerce Clause (U.S. CONST. art. I, § 8, cl.3) manufacturing was a local activity, not interstate commerce, and therefore beyond the reach of Congress. "Commerce succeeds to manufacture and is not part of it". Manufacturing or production, the Court ruled, affects commerce "only incidentally and indirectly." *Id.* The same distinction was employed by the Court in: *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (invalidating the Federal Child Labor Act of 1916); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating provisions of the National Industrial Recovery Act); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (invalidating the Bituminous Coal Conservation Act of 1935). This distinction was never explicitly overturned by the Court, although it was in practice rejected when the Court held in *NLRB v. Jones Laughlin Steel Corp.*, 301 U.S. 1 (1937), that the "close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry although the industry when separately viewed is local." *Id.* at 38. *See also Wickard v. Filburn*, 317 U.S. 111 (1942); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

and possibly, of justice. Neither position provides an adequate jurisprudence, and yet, each school is aware of its own deficiencies. When the situation has demanded it, absolutists have been just as willing to introduce change into the law as relativists have been to enforce consistency, no matter what intellectual somersaults it might be necessary to perform in order to do so. This in itself is evidence enough of the need for the type of mediating philosophy for which Cardozo calls.

#### CARDOZO'S SOLUTION

Cardozo attempted to answer his own question by admitting that judges do indeed legislate, but that they are limited to doing so only interstitially, that is, only in the gaps left by the other sources of law. As Cardozo explains:

I do not mean, of course, that judges are commissioned to set aside existing rules at pleasure in favor of any other set of rules which they may hold to be expedient or wise. I mean that when they are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance.<sup>30</sup>

Cardozo proposes that a judge uses any of four methods (or combinations thereof) in properly reaching a legal decision. The first of these is the method of philosophy, that is, the principle that law should develop along lines of logical progression. There is a presumption in favor of this method, Cardozo asserts, because it is only by resolving legal problems according to logic that unity and rationality can be drawn out of the "mass of particulars" and the "congeries of judgments on related subjects."<sup>31</sup> The value here is consistent and orderly development, and, although this value may often give way to social needs and values, in the absence of a better claim by any other value, logic is to be followed:

[H]olmes did not tell us that logic is to be ignored when experience is silent. I am not to mar the symmetry of the legal structure by the introduction of inconsistencies and irrelevancies and artificial exceptions unless for some sufficient reason, which will commonly be some consideration

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30. B. CARDOZO, *supra* note 4, at 67-68.

31. *Id.* at 31.

of history or custom or policy or justice. Lacking such a reason I must be logical. . . .<sup>32</sup>

Still, Cardozo acknowledges that there are cases where "sufficient reason" exists for departure from logic, and therefore turns to a consideration of other methods for determining the course of the development of the law.

The second and third methods—evolution and tradition—give rise to judicial decisions based on history and custom. These two methods appear almost to merge into one another, but Cardozo seems to indicate that history provides certain principles of law out of the past and points out the general direction of the development of the law, while custom sets forth the standards which determine how established rules are to be applied by the judges.<sup>33</sup> While not necessarily in themselves based upon logic, the principles derived from history and custom, once established, may serve as the given axioms from which other decisions may be logically deduced. In this sense, custom and history are closely aligned with logic in serving as a limitation on the creative role of the judge, or viewed more positively, join with logic to provide rules, principles, and precedents to guide the judge in his decision-making processes.

Not so the fourth method, sociology, which decides on the basis of the welfare, needs, and *mores* of the society, and provides for changing law to meet changing conditions. The principle behind the sociological approach to judicial decision-making is that "The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence."<sup>34</sup> Thus, every law may be called upon to account for itself as a means to some social end. Since this is the ultimate test of any law, the sociological method assumes the role of

arbiter between other methods, determining in the last analysis the choice of each, weighing their competing claims, setting bounds to their pretensions, balancing and moderating and harmonizing them all.<sup>35</sup>

This means, however, that rules, principles, or precedents which flow from the other methods of decision-making may have to be eliminated,

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32. *Id.* at 33.

33. *Id.* at 60.

34. *Id.* at 66.

35. *Id.* at 98.

or at least rendered sterile if they come into conflict with the welfare of society:

[W]hen the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history and sacrifice custom in the pursuit of other and larger ends.<sup>36</sup>

What Cardozo in fact maintains is that the judge must always choose the lines along which the law is to develop on the basis of the "comparative importance or value of the social interests that will be thereby promoted or impaired."<sup>37</sup> Adherence to logic, history, or custom can only be justified by the social interest in the uniformity and impartiality which is promoted by them. However, consistency is not the only social value of law, and the judge may frequently be called upon to determine whether adherence to precedent does not, in fact, impair the development of a much higher social good:

Uniformity ceases to be a good when it becomes uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfare.<sup>38</sup>

In trying to preserve the values of both stability and progress, then, Cardozo argues for a jurisprudence midway between complete absolutism and complete relativism, a jurisprudence which would require the judge to follow precedent and the logical development of principles whenever possible, and allow him to respond to the felt needs of the times whenever necessary. Cardozo is, no doubt, sagacious in his attempt to find such a midpoint, and his jurisprudence succeeds in moderating the extremes of absolutism and relativism, but without support from a theory of language which overcomes the difficulties of the correspondence view, he falls back into many of the errors of those two positions.

Cardozo sought to avoid the errors of absolutism, and therefore refused to grant a fixed, unchanging, independent existence to the referents of legal words.<sup>39</sup> As he said of the Fourteenth Amendment,

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36. *Id.* at 65.

37. *Id.* at 112, quoting VANDER EYCKEN, *METHODE POSITIVE DE L'INTERPRETATION JURIDIQUE* 59 (\_\_\_\_).

38. B. CARDOZO, *supra* note 4, at 112-13.

39. Consider, for example, his objection to the "tyranny of labels" in *Palko v. Connecticut*, 302 U.S. at 323.

"The content of constitutional immunities is not constant, but varies from age to age."<sup>40</sup> Finding no objective standard in pre-existing legal principles, Cardozo nonetheless did not suggest that the judge decide according to his own subjective standards of reason and justice, but rather demanded that objective standards be found in the life of the community in the same manner that the legislator finds them:

It is the customary morality of right-minded men and women which he is to enforce by his decree. A jurisprudence that is not constantly brought into relation to objective or external standards, incurs the risk of degenerating into what the Germans call "*Die Gefühlsjurisprudenz*," a jurisprudence of mere sentiment or feeling.<sup>41</sup>

Again, Cardozo's thinking is sound on this point. However, if one regards words only as labels or names, then how can their content change? How can they logically mean one thing at one time and something else at another? The answer, of course, is that they cannot. Cardozo himself admits that in making law to meet changing social needs the judge will find it necessary to "bend symmetry," to step outside of logic. Such considerations are, to Cardozo, sufficient reason for introducing logical inconsistencies into the law, but "[l]acking such a reason I must be logical. . . ."<sup>42</sup>

This suggestion that it is only by the employment of nonlogical means that a judge is capable of superseding precedent in the interest of social welfare leaves Cardozo vulnerable to attacks from legal absolutists who would assault such decisions in the name of a "principled," "logical" jurisprudence. It makes little difference that Cardozo has taken great care to insure that his judgments rest upon the objective standard of community values; the fact remains that his decisions cannot be justified logically—at least not if logic be considered as deduction from pre-existing principles—which means that his jurisprudence is completely defenseless at the very point at which it is most likely to be attacked.<sup>43</sup> Despite all his cautions, Cardozo's

40. B. CARDOZO, *supra* note 4, at 82-83.

41. *Id.* at 106.

42. *Id.* at 33.

43. Consider, for example, Justice Sutherland's stinging condemnation of the majority's introduction of a new meaning of the phrase "impairment of contract" in his dissent in *Home Building & Loan v. Blaisdell*, 290 U.S. 398, 448 (1934), or Justice Harlan's criticism of the "illogical" and "inconsistent" manner in which the majority assigned meaning to such words as "fundamental liberties" and "essential to a fair trial" in *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968).



judicial theory is no more secure on this point than that of the less circumspect relativist.

The correspondence theory of language leaves Cardozo open to criticism from the other extreme as well, for he also makes the mistake of treating words as labels for existing things in the real world, and therefore gives objective existence to subjective categories simply because they can be named. Again, Cardozo has attempted to minimize the rigidity which follows from such a language view by suggesting that the referents of legal words are not fixed and unchanging, but Cardozo at times was capable of standing shoulder to shoulder with Sutherland and McReynolds in strictly enforcing abstract principles and categories. In his concurring opinion in the *Schechter* case,<sup>44</sup> for example, Cardozo made it clear that he would vote to strike down social and economic legislation on the basis of a distinction which he thought existed between "direct" and "indirect" effects upon interstate commerce, and he could send Frank Palko to his death because he had given actual existence to a category of rights which were "of the very essence of a concept of ordered liberty," and did not find within that category the protection against double jeopardy which Palko had asserted.<sup>45</sup>

It should be apparent that Cardozo's jurisprudence is not responsible for his difficulties. Few men have brought greater wisdom, insight, or eloquence to bear on the question of defining the nature of the judicial process, and his careful moderation between the extremes of absolutism and relativism clearly marks out the direction on which one must search for a philosophy of law which provides for both stability and growth. What Cardozo's jurisprudence lacks, however, is the support of a philosophy of language which would give logical justification for the changes which it initiates in the interest of social welfare, and which would restrain the tendencies toward rigid classifications. The foregoing discussion suggests that any adequate theory of language will have to go beyond the view of words as simple labels, that investigation into the instrumental character of legal language is necessary to understand the judicial process fully. The judicial process as an activity will become more comprehensible by studying the legal language involved in that process as an activity. To provide some guidance in embarking upon such a task, I would like to suggest a consideration of the language theory of the Austrian philosopher, Ludwig Wittgenstein.

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44. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

45. *Palko v. Connecticut*, 302 U.S. 319 (1937).

WITTGENSTEIN'S THEORY OF LANGUAGE<sup>46</sup>

The correspondence theory of language suggests that the purpose of speech is to make descriptive assertions or propositions about reality. The proposition becomes, then, a picture or model of reality, with each word corresponding to or naming some real thing. Such propositions may be verified by checking them against the real world which they purport to represent. Such a language is taught demonstratively, that is, by repeatedly pointing to an object while reciting its name until the learner has mastered the names for himself and knows what objects they signify. Language, then, becomes a matter of the right ordering of names and precision in assigning definitions to them.

Wittgenstein argues that we must expand our concept of language, that this is but one way among many in which human beings used and learn language.<sup>47</sup> First, he suggests that not every word can be learned in this way. Such a method may do for teaching the meaning of words such as "man", "sugar," "table", and so on, but how does one point to a referent for a word like "today", "not", "but", or "perhaps"?<sup>48</sup> Does every word have a referent? Or is it only a certain kind of noun that can be taught this way?

Even for this limited category of nouns it is not clear that the demonstrative or ostensive defining of a word is sufficient to teach its meaning. Wittgenstein attempts to teach the meaning of the word "tove" to his readers. It matters not, he suggests, that we have never heard the word before, because the ostensive definition will *give* us the meaning of the word. He then points to a pencil and says, "This is tove,"—a simple ostensive definition. But how is his reader to interpret it? "This is tove" may mean any number of things:

- "This is a pencil",
- "This is a round",
- "This is wood",
- "This is one",
- "This is hard", etc., etc.<sup>49</sup>

But there is a more basic problem still. In learning its native language a child is not just learning words, but must first learn the

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46. My discussion relied heavily on H. PITKIN, *WITTGENSTEIN AND JUSTICE: ON THE SIGNIFICANCE OF LUDWIG WITTGENSTEIN FOR SOCIAL AND POLITICAL THOUGHT*, (1972).

47. L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*, 1-5 (1968).

48. L. WITTGENSTEIN, *THE BLUE AND BROWN BOOKS*, 77 (1964).

49. *Id.* at 2.

concepts behind those words. Only when a child has mastered the concept of color and knows that his teacher is using a color-word will the ostensive definition, "This is 'sepia'" have any meaning for him. "One has already to know (or be able to do) something in order to be capable of asking a thing's name."<sup>50</sup> The child learning a language is becoming familiarized with the world for the first time, is learning what counts as an entity in it; he is only beginning to order and categorize his world. It cannot be expected that he will be able to use correctly the word "kitty", for example, until kittens have come to exist in his world.<sup>51</sup> The child learning his native language is not to be viewed

as if the child came into a strange country and did not understand the language of the country; that is, as if it already had a language, only not this one. Or again: as if the child could already *think*, only not yet speak.<sup>52</sup>

Wittgenstein suggests that language is much more than a set of labels. Reference is but one way in which words are used, and a complete understanding of a word is an understanding of all its many functions. "Think of the tools in a tool-box," Wittgenstein instructs. "There is a hammer, pliers, a saw, a screw-driver, a rule, a gluepot, nails, and screws.—The functions of words are as diverse as the functions of these objects."<sup>53</sup> Wittgenstein is interested not in establishing the precise and unique "meaning" of a word, but rather, in establishing the ways in which the word may be used; and words have a variety of functions.

As a consequence, language comes to be seen as an activity rather than as a representation; the focus is upon its "performative" rather than its "descriptive" nature.<sup>54</sup> For example, I walk into my favorite restaurant and say to the waitress, "I'd like the roast beef with the baked potato and salad." I am not merely describing my culinary likes and dislikes, but placing an order. I tell my nephew, "I'll take you sledding when I come home for Christmas." I am not describing a future event, but making a promise. A Supreme Court justice writes, "Separate educational facilities are inherently unequal."<sup>55</sup> He is not thereby merely describing a condition in American schools,

50. L. WITTEGENSTEIN, *supra* note 47, at 15.

51. H. PITKIN, *supra* note 46, at 38.

52. L. WITTEGENSTEIN, *supra* note 47, at 16.

53. *Id.* at 6.

54. H. PITKIN, *supra* note 46, at 38.

55. *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954).

but is handing down an order which will significantly alter those conditions and the relationships of the children who attend those schools.

The performative character of language is especially apparent in legal language because certain bodies have been given an authoritative power to determine and alter personal relationships and behavior through the use of words. When for example, Chief Justice Hughes writes, in 1937,

Liberty under the Constitution is . . . necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process,<sup>56</sup>

he is, indeed, describing both liberty and due process. However, because of the authoritative nature of his description in this context, he is also radically altering the meaning of the qualities he describes by the very way in which he describes them, or, more importantly, by the way he uses them, for in using these concepts to an end for which they had never before been used—the upholding of state minimum-wage legislation—he changes not only the meaning of legal words, but the financial relationship between employer and employee.

For Wittgenstein, however, all language partakes of this performative character; all language is activity. “The whole, consisting of language and the actions into which it is woven,” the relationship between language and activity in a specific circumstance, Wittgenstein calls a “language-game.”<sup>57</sup> Thus, any of the many verbal activities one performs—ordering a dinner, making a promise, adjudicating a legal problem—may be considered a language-game. “Review the multiplicity of language games in the following examples, and in others:

Giving orders and obeying them-

Describing the appearance of an object, or giving its measurements-

Constructing an object from a description (a drawing)-

Reporting an event-

Speculating about an event-

Forming and testing a hypothesis-

Presenting the results of an experiment in tables and diagrams-

Making up a story, and reading it-

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56. *West Coast Hotel v. Parrish*, 300 U.S. 379, 391 (1937).

57. L. WITTGENSTEIN, *supra* note 47 at 5.

Play-acting-  
Singing catches-  
Guessing riddles-  
Making a joke; telling it-  
Solving a problem in practical arithmetic-  
Translating from one language into another-  
Asking, thanking, cursing, greeting, praying."<sup>58</sup>

One could, of course, imagine a language-game in which a teacher, pointing to an object, pronounces a word and a child repeats it. Such a description of the language-learning process, Wittgenstein would say, is "correct for a simpler language than ours,"<sup>59</sup> but it is scarcely sufficient for all the complex functions which our language performs. For example, I may be able to respond, "Tove," when Wittgenstein points to the previously-mentioned pencil, and I have therefore mastered the ostensive definition of "tove," but I can scarcely be said to know what "tove" means until I can go on independently and use it correctly in other language-games. Do I say that my grandmother gave me a pen and tove set for Christmas? Or that my chair is made of walnut tove? Or that I am wearing my tove-and-blue-striped tie today? Or that wagon wheels and sewerlids have a tove shape? Until I can respond correctly to these questions, I do not know the meaning of "tove." Knowing the meaning of a word, then, is knowing how it is to be used in all, or at least most, of the language-games in which it may be employed.

A language-game, as a combination of language and activity, may also be seen as the context or setting in which language is used. If knowing a word's meaning is knowing its use in a language-game, or a specific context, it follows that words have meaning only in an actual concrete situation or setting. Predetermined definitions, abstracted from any real situation cannot give words a meaning. Nor can that meaning be taught in an abstract pointing-and-reciting language-game. The child learns very few words from the process of ostensive definition. He learns language where he most frequently encounters language—in the speech of adults who are using words in real concrete situations.

Language, then, derives its meaning from its use in a context, in concrete situations. Words, however, are used in a great variety of situations, not all of which are necessarily mutually consistent. Therefore the meanings derived from these differing situations need

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58. *Id.* at 11-12.

59. L. WITTEGENSTEIN, *supra* note 48, at 77.

not be mutually consistent. Indeed, in a remark reminiscent of Cardozo's previously-quoted comment on the Fourteenth Amendment, Wittgenstein expresses the view that "It is not to be expected of [a] word that it should have a unified employment; we should rather expect the opposite."<sup>60</sup> The meaning of a word, then, may change with changes in its context.

Still, such a view is not easily accepted. There is a human "craving for generality," resulting from a disposition toward universalization and categorization, which runs counter to the rather untidy view that words may have any number of meanings according to their context. The demand is for precise definitions and rigid rules for applying them in language; this, it is felt, will bring clarity to our language. In response, Wittgenstein reminds his readers that "in general we don't use language according to strict rules—it hasn't been taught us by means of strict rules, either."<sup>61</sup> Indeed, such rules and definitions exist and are used only in very rare cases, if then: "we are unable to clearly circumscribe the concepts we use; not because we don't know their real definition, but because there is no real 'definition' to them. To suppose that there *must* be, would be like supposing that whenever children play with a ball they play a game according to strict rules."<sup>62</sup>

Nonetheless, we continue to formulate such rules and definitions to govern the use of our language. Yet, this is precisely where language problems begin, for in formulating such rules and definitions, one must abstract words from their contexts. "The language-game in which they are to be applied is missing." "Language," Wittgenstein says, "goes on holiday" in such a situation.<sup>63</sup> But words derive their meanings from the language-games in which they are used, and words outside of language-games are meaningless abstractions. All attempts to formulate language according to rules and definitions must, therefore, trail off into the confusion of abstraction:

The fundamental fact here is that we lay down rules, a technique, for a game, and that then when we follow the rules, things do not turn out as we had assumed. That we are therefore as it were entangled in our own rules.<sup>64</sup>

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60. L. WITTGENSTEIN, ZETTEL, para. 112 (1967), *quoted in*, H. PITKIN, *supra* note 46, at 91.

61. L. WITTGENSTEIN, *supra* note 48, at 25.

62. *Id.*

63. L. WITTGENSTEIN, *supra* note 47, at 19, 44.

64. *Id.*

Legal language, of course, is especially prone to this "craving for generality," given the social value attached to following precedent. Similarly, our conception of justice which demands that like cases be treated alike would also seem to require that judges lay down and faithfully follow rules for the use of legal words, particularly words with such vague and open meanings as "due process" and "equal protection of the laws". Yet, as Wittgenstein suggests, when the rules become more important than the context in which they are applied, "things do not turn out as we had assumed." When the context in which legal words are used changes drastically, cases with similar factual situations may not at all be alike, and to treat them as such might serve neither justice nor logic. Indeed, when legal language "goes on a holiday" and the judge rigidly applies precedent without consideration for the language-game, or context, in which the words of statute or the Constitution are being used, he may well find himself entangled in his own rules, making distinction after distinction in order to make the factual situation fit the precedent, and in the end, clearly losing touch with the real needs of the community.

Examples abound in American constitutional history. Chief Justice Waite, for example, attempting to preserve local economic control against the growing nationalization of American economic life brought on by rising industrialization, failed to find that the Chicago grain elevators were involved in interstate commerce despite the fact that they annually channeled thousands of tons of grain from Western farm states to the East.<sup>65</sup> In a similar attempt to save the rapidly-disappearing powers of the local Jacksonian community, Justice Miller made the somewhat tortured distinction between the limited rights and immunities of national citizenship which could be protected by

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65. In *Munn v. Illinois*, 94 U.S. 113 (1877), the Court upheld the so-called Granger Laws passed by an Illinois legislature dominated by agrarian interests. The laws regulated the practices of the Chicago grain elevators and established maximum rates for their services. The grain elevators were often in collusion with the railroads, since sidetrack privileges and permission to build upon the railroad's right of way was granted only at the railroad's discretion. As a consequence, virtual monopolies were established in the grading, pricing, buying, selling, transporting, and storing of grain. Obvious abuses resulted. See G. MILLER, RAILROADS AND THE GRANGER LAWS, 55 (1971); J. HICKS, THE POPULIST REVOLT: A HISTORY OF THE FARMERS' ALLIANCE AND THE PEOPLE'S PARTY, 74-78 (1931). Chief Justice Waite found that the elevators "stand . . . in the very 'gateway of commerce,' and take toll from all who pass." 94 U.S. at 132. At the same time, however, he found that state legislation aimed at prohibiting the abuses of such monopoly power might "incidentally" affect interstate commerce, "but not necessarily so." 94 U.S. at 135. Therefore, the Granger Laws were held not to infringe upon the Congressional power to regulate interstate commerce. See also *supra*, note 12 for a discussion of the due process considerations raised by *Munn*.

the Fourteenth Amendment and the much more extensive privileges and immunities of state citizenship, left wholly to the discretion of state governments.<sup>66</sup> Despite the drastic changes in conditions brought about by the Great Depression, the "Nine Old Men" continued to apply precedents rendered in a very different age when law was seen as an instrument to promote industrial growth and capital accumulation.<sup>67</sup> Still clinging to interpretations of the Commerce Clause and the Due Process Clause which had created an economic "no-man's land," un-touchable by either federal or state regulation, the Court refused to allow either Congress or the states to deal with the pressing economic problems of the Depression. While precedent was followed faithfully, the result was a scarcely-logical confusion of rather contrived distinctions between vague (and certainly not constitutionally-grounded) concepts like "direct" and "indirect" effects upon interstate commerce,<sup>68</sup> between "commerce" and "production,"<sup>69</sup> between businesses "affected

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66. *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873), upheld a monopoly established by the Louisiana legislature in the butchering business in New Orleans. The monopoly was granted, ostensibly as a means of regulating the dumping of offal into the water supply of the city. Non-monopoly butchers challenged the legislation charging, among other things, that it violated the Fourteenth Amendment of the federal constitution by abridging the privileges and immunities which they enjoyed as citizens of the United States, specifically, the right to follow an otherwise lawful calling. Justice Miller upheld the grant by distinguishing the privileges and immunities which one enjoys as a citizen of the United States from those enjoyed as a state citizen. Only the privileges and immunities of national citizenship were protected by the Fourteenth Amendment. The privileges and immunities of state citizenship, a broad and open-ended category which included the liberty to follow a lawful vocation, were protected, if at all, by state laws and constitutions. 83 U.S. (16 Wall.) 36, 73-80, (1873). "What the opinion said in effect was that the whole body of traditional rights of the common law and of state bills of rights still remained solely under the protection of the states." A. KELLY & W. HARBISON, *THE AMERICAN CONSTITUTION: ITS ORIGIN AND DEVELOPMENT*, 508 (4th ed., 1970).

67. P. MURPHY, *THE CONSTITUTION IN CRISIS TIMES: 1918-1969*, chaps. 1-5 *passim* (1972).

68. See *supra*, note 29. The Supreme Court in *Schechter Poultry Corporation v. United States*, 295 U.S. 495, 546 (1935), invalidated the Live Poultry Code established by the Roosevelt Administration under the National Industrial Recovery Act of 1933. Among other things, the code imposed minimum wage and maximum hours provisions on the poultry industry. The Schechter brothers, operators of a slaughterhouse in New York City, successfully argued that these and other provision of the poultry code were unconstitutional as applied to their business. "The persons employed in slaughtering and selling in local trade are not employed in interstate commerce," wrote Chief Justice Hughes. "Their hours and wages have no direct relation to interstate commerce." *Id.* at 548.

69. See *supra*, note 29. The Supreme Court, in *Carter v. Carter Coal Co.*, 298 U.S. 238, 309-10 (1935), invalidated the Bituminous Coal Conservation Act of 1935. Under authority granted by the Act, the Roosevelt Administration had established a code



with a public interest" and those which were not,<sup>70</sup> between undue state "burdens" on interstate commerce and permissible "aids" to commerce,<sup>71</sup> and so on, and so on. And, in a more recent example,

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for the coal industry which regulated prices, trade practices, and labor relations, including hours and wages. The Act also imposed an excise tax on mined coal, but exempted those who accepted the terms of the code from paying 90% of this tax. These regulations, the Court held, were an attempt by Congress to regulate production, not commerce, and hence were not permitted under the Commerce Clause. "Extraction of coal from the mine is the aim and the completed result of local activities. Commerce in the coal mined is not brought into being by force of these activities, but by negotiations, agreements, and circumstances entirely apart from production. Mining brings the subject-matter of commerce into existence. Commerce disposes of it." *Id.* at 303-04.

70. See *supra* notes 12 and 25. In *New State Ice Co. v. Liebman*, 285 U.S. 262, 273 (1932), during the Depression years, the Court invalidated an Oklahoma law declaring the ice industry to be affected with a public interest and therefore subject to state licensing. Under the law, licenses could be denied if applicants could not demonstrate public need for their services. The Court held that the ice industry did not involve a public interest and that the Oklahoma legislation, therefore, violated due process by depriving applicants of the liberty to follow a lawful calling. *Id.* Contrast this with the Court's use of the Fourteenth Amendment in the *Slaughterhouse Cases*, discussed *supra* note 66.

71. The distinction made here grows out of a post-Civil War gloss on the rule of *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851). The ante-bellum Court had struggled with the rather metaphysical question of whether the regulation of interstate commerce had been granted exclusively to Congress. Justice Curtis, in the *Cooley* decision, focused not on the metaphysical "nature" of the commerce power, but on the more concrete question of the nature of the subject being regulated. *Id.* at 311-17. The *Cooley* case held that certain questions affecting interstate commerce required national uniformity, and thus belonged exclusively to Congress. Other matters affecting interstate commerce required local diversity and therefore might be regulated by the States, at least until Congress stepped in to deal with the question: "[I]t is not the mere existence of such a [commerce] power, but its exercise by congress, which may be incompatible with the exercise of the same power by the States. . . ." *Id.* at 319.

In the period after the civil War, a Court more interested in clearing away obstructions to national commerce reinterpreted the *Cooley* rule to hold that Congressional inaction on a matter affecting commerce among the States "is equivalent to a declaration that interstate commerce shall be free and untrammelled." *Welton v. Missouri*, 91 U.S. 275, 282 (1876). This, effectively, made the Congressional commerce power exclusive, a result clearly not intended by *Cooley*. Moreover, in *County of Mobile v. Kimball*, 102 U.S. 691 (1881), the Court transformed *Cooley's* distinction between questions requiring national uniformity and questions requiring local diversity into a distinction between "regulations" of commerce, which were left exclusively to Congress, and "mere aids" to commerce, which were permitted to the States. *Id.* at 697. Without admitting so, the Court returned to the metaphysical question of defining the "nature" of commerce. In the words of Justice Field, "The subjects indeed upon which Congress can act under this [commerce] power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation, affec-

one might argue that the Supreme Court's "entanglement" in the problem of busing is the result of taking the principles of *Brown v. Board of Education*<sup>72</sup> to very logical extremes.

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ting alike all the states; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities." *Id.* Exclusively reserved for Congressional regulation was "all that portion of commerce with foreign countries or between the states which consists in the transportation, purchase, sale and exchange of commodities." *Id.* "Mere aids" to commerce, which might be provided by the States, include only such things as "harbor pilotage, buoys and beacons to guide mariners to the proper channel in which to direct their vessels." *Id.* (A good summary of late Nineteenth Century cases employing this distinction is found in *Leisy v. Hardin*, 135 U.S. 100, 119-20 (1890)).

*Di Santo v. Pennsylvania*, 273 U.S. 34 (1927), provides a good example of a Twentieth-Century case which employs this general line of reasoning. Here, the Court struck down a Pennsylvania statute which sought to license persons selling tickets for passage to foreign countries and to require proof of character of applicants for licenses as a means of preventing fraud. Without reference to *Cooley*, the Court held this to be a "prohibited regulation" of commerce, an infringement of the "complete and paramount power" of Congress over the subject. *Id.* at 37. The *Di Santo* case was explicitly overturned by the Roosevelt Court in *California v. Thompson*, 313 U.S. 109 (1941). Here the Court cited *Cooley* and returned to the original meaning of that case when it held that:

... there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce, but which because of their local character and their number and diversity may never be adequately dealt with by Congress. Because of their local character, also, there is wide scope for local regulation without impairing the uniformity of control of the national commerce and without materially obstructing the free flow of commerce which were the principal objects sought to be secured by the Commerce Clause.

313 U.S. at 113.

72. In *Brown v. Board of Educ.*, 347 U.S. 483 (1954), the Court held, "Separate educational facilities are inherently unequal," and therefore racially segregated schools could not be maintained by the States under the Fourteenth Amendment. *Id.* at 495. A year later, after hearing additional argument on the question of implementation, the Court charged local school districts with the responsibility of making "a prompt and reasonable start toward full compliance" with the desegregation decision. *Brown v. Board of Educ.*, 349 U.S. 294, 300 (1955). Federal district courts were to supervise this implementation, and, if need be, were to function as courts of equity in fashioning remedies for violations of Equal Protection by State school systems. *Id.*

In *Green v. New Kent County School Bd.*, 391 U.S. 430 (1968), the Court struck down a "freedom of choice" plan employed by a Virginia school district, which established no racially separated schools by law, but simply permitted each student to attend the school of his (her) choice. Since the plan, in operation, did little to change the racial balance of the schools, racially identifiable schools continued to exist in New Kent County, although they were no longer required by law. This, the Court held, was not sufficient to meet the requirements of the *Brown* decision. School boards operating state-compelled dual systems at the time of *Brown* were "clearly charged with an affirmative duty to take whatever steps might be necessary to convert to

The point, then, is this: a court may follow precedent precisely and still be out of context, in which case its decisions will scarcely make sense, regardless of how "logically" they may be developed from pre-existing precedents. Whenever language is divorced from the language-game, or context, in which it appears, language simply becomes an airy abstraction with no relation to reality. This may be fine for mathematicians or for formal logicians, but a more exacting standard must be demanded of judges. "Law, being a practical thing," as Mr. Justice Holmes observes, "must found itself on actual forces."<sup>73</sup>

#### LAW AS A LANGUAGE

The contribution of Ludwig Wittgenstein, then, is that he allows us to view law in exactly this practical, instrumental sense. This is particularly crucial in a common law system where legal concepts have emerged from the resolution of actual conflicts and are not deduced from abstract "general principles of law," as in the civil law tradition.<sup>74</sup> Wittgenstein allows us to see law as a language with a vocabulary all its own, to be learned and used just as any other language. The meanings of legal words, like the meanings of words in any other language, depend upon their use in a particular context. When the context changes, the meaning may change as well. Viewing law as a language, and viewing language from Wittgenstein's perspective, allows us to see legal and constitutional change as a normal and expected consequence of the way in which we use words.

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a unitary system in which racial discrimination would be eliminated root and branch." 391 U.S. 430, 437-38 (1968).

In *Swann v. Charlotte Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), the Court ruled that district courts might require the transportation of students by bus as one of those steps which might be necessary to convert to a unitary system. *Id.* at 30. In cases involving school systems in Denver, Colorado and Columbus and Dayton, Ohio, the Court further extended this line of cases by holding that "state-compelled dual systems" were not only those in which segregation was required by law at the time of *Brown*. Many Northern school districts had employed pupil assignments, faculty and staff assignments, gerrymandered attendance districts, and discriminatory selection of sites for new schools as more subtle means of maintaining dual school systems. Such practices were also found unconstitutional by the Court, and school districts engaging in them were likewise under an "affirmative obligation" to "take whatever steps might be necessary to convert to a unitary system." As in school districts where segregation had been statutorily mandated, such steps might include district-wide busing. *Keyes v. School District No. 1, Denver*, 413 U.S. 189, 201-02 (1973); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 at 452-53 (1979); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 535-36 (1979).

73. O. W. HOLMES, *THE COMMON LAW*, 213 (1881).

74. J. MERRYMAN, *THE CIVIL LAW TRADITION*, 65-72 (1969).

As evidence of this proposition, consider the way in which law is taught in American law schools. The law student must be introduced to the language of the law just as a child must be taught its own native language. "Torts" and "laches" have no more real existence to the neophyte law student than "kittens" have to the infant. They must be taught not only names, but the legal concepts behind them, and not only concepts, but the accepted ways in which these concepts can and will be used in real legal situations. The law student does not merely study pre-established definitions of legal terms. Instead, he or she studies the ways in which practitioners—judges and attorneys—have used these words in real-life situations. In much the same way, Wittgenstein suggests, children learn language not from demonstrative definitions, but from hearing words used by adults in actual language games. Becoming a competent practitioner of the law, then, is a matter of knowing how lawyers and judges use legal language in all, or at least most of the legal contexts in which it is likely to be employed. As Holmes notes, "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."<sup>75</sup> He who can make intelligent predictions about how the courts will use legal language in actual legal language-games has mastered legal language.

As Holmes' very practice-oriented definition suggests, the meaning of law in a common law system is determined only in the context of an actual case or controversy requiring judicial resolution. Unlike the civil law tradition, no attempt is made to set down *a priori* a code to define the meaning of law in every particular instance in which it is likely to arise.<sup>76</sup> The meaning of law, instead, is allowed to arise out of particular legal disputes, and thus has grown and evolved and changed in response to the realities of its environment. There are, of course, written statutes and a written Constitution in the United States; but, under our legal custom it is the judiciary which deter-

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75. O. W. HOLMES THE PATH OF THE LAW, in COLLECTED LEGAL PAPERS, 173 (1921).

76. Even within the civil law tradition, the notion that the judge merely mechanically applies a code to some particular fact situation is true only in theory. As John Henry Merryman describes the role of the civil law judge,

Like the common law judge, he is engaged in a vital, complex, and difficult process. He must apply statutes that are seldom if ever, clear in the context of the case, however clear they may seem to be in the abstract. He must fill gaps and resolve conflicts in the legislative scheme. He must adapt the law to changing conditions. The code is not self-evident in application, particularly to the thoughtful judge.

J. MERRYMAN, *supra* note 74, at 44.

mines the authoritative meaning of these when questions arise in the form of an actual legal dispute. "It is emphatically," as Chief Justice Marshall asserted, "the province and duty of the judicial department to say what the law is."<sup>77</sup> Because we have adopted this pragmatic, case-by-case process for determining law the judge is constantly brought back into touch with the real-life circumstances in which law is to be applied. It is not an abstract legal code which an American judge employs in resolving these disputes, but ultimately a Constitution—a Constitution which, as Chief Justice Marshall demands we never forget, was "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs."<sup>78</sup>

What, then, does Wittgenstein contribute toward the formulation of a "philosophy that will mediate between the conflicting claims of stability and progress, and supply a principle of growth"? Most importantly, Wittgenstein frees legal words from the tyranny of rigidly fixed meanings and thus, unlike the proponents of the correspondence theory, provides a philosophy which *allows* for growth. If the words in the Constitution are no more than names in one-to-one correspondence with pre-existing objects or concepts, then the meaning of the Constitution is fixed and unchanging. The Constitution becomes something like the Standard Meter in Paris—an immutable standard, encased in glass, protected from all contact with any force in its environment which might alter it, and inflexibly holding all human activity to its iron standard. The judicial experience during the days of the Great Depression should alone provide sufficient refutation for a language theory which affords so little room for growth and change in the light of pressing social needs. Yet, even if the correspondence theory were not fraught with such disastrous social consequences, it would still be inadequate for the simple reason that human beings just do not use words in this way—and judges are no exception. Consider, for example Chief Justice Marshall's comments found in the midst of a very Wittgensteinian exegesis of the word "necessary" in *McCulloch v. Maryland*: "Such is the character of human language that no word conveys to the mind, in all situations, one single, definite idea."<sup>79</sup>

Wittgenstein demands that we must not look for the meanings of words in fixed definitions. Instead, he suggests, "let the use *teach*

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77. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

78. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

79. *Id.* at 414.

you the meaning."<sup>80</sup> Words are not pictures or labels of concepts; words are tools, the meaning of which is to be taken from the use to which they are placed in an actual context. Likewise, the Constitution is a tool, an instrument, formed by the polity in order to meet the needs placed upon it by existing circumstances and by its own conception of the nature of the social union. Or, perhaps more accurately, the Constitution is a box of tools—as in Wittgenstein's example—with functions as diverse as those of a hammer, pliers, a saw, a screwdriver, a glue pot, nails, and so forth. In one age, society chooses to use the Constitution as a tool for the development of a national economic market.<sup>81</sup> At another time it is used to ward off the possibility of a head-on sectional confrontation.<sup>82</sup> One generation uses

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80. L. WITTGENSTEIN, *supra* note 47, at 212.

81. *See supra* note 71. Consider also, as an example, the Supreme Court's use of the Commerce Clause in the late Nineteenth Century to strike down state attempts to give competitive advantages to local businesses or to regulate national corporations doing business within their borders; *see e.g.*, *Robbins v. Shelby County Taxing District*, 120 U.S. 489 (1887), (invalidating state licensing of all salesmen not having offices in Shelby County, Tennessee); *Norfolk & W. Ry. Co. v. Pennsylvania*, 136 U.S. 114 (1890), (invalidating Pennsylvania's tax on foreign corporations for the privilege of maintaining an office in the state); *Railroad Co. v. Husen*, 95 U.S. 465 (1878), (invalidating Missouri restrictions on importation of cattle); *Leisy v. Hardin*, 135 U.S. 100 (1890), (invalidating Iowa law which prohibited importation of liquor in original packages); *Brimmer v. Rebman*, 138 U.S. 78 (1891), (invalidating Virginia statute which required state inspection of all meat not killed within one hundred miles of point of sale). Interestingly, such an interpretation of the Commerce Clause coincides with the development of the railroad system as a national network of distribution.

Contrast this national view of the Commerce Clause with the more local view found in ante-bellum cases. Consider, for example, *Pierce v. New Hampshire*, 46 U.S. (5 How.) 504 (1847), upholding a state prohibition of importation of liquor in original containers; overturned by *Leisy v. Hardin*, discussed above. Consider also the regulations of pilots in Philadelphia's harbor upheld by the Court in *Cooley v. Board of Wardens* 53 U.S. (12 How.) 299 (1851), discussed *supra* note 71. Specially of note in this context is the fact that the Court here permitted Pennsylvania to discriminate in favor of local industry by exempting ships engaged in the Pennsylvania coal trade from the elaborate pilotage regulations sustained by the Court. *Cooley*, 53 U.S. (12 How.) at 313.

82. The Taney Court found great difficulty in determining the meaning of the Commerce Clause. Witness the eight separate opinions in the *Passenger Cases*, 48 U.S. (7 How.) 283 (1849), and the nine separate opinions written in the six cases decided in 1847 as the *License Cases*, 46 U.S. (5 How.) 504 (*See supra* note 81 for the discussion of *Pierce v. New Hampshire*.) However, the Court could come to some fundamental agreements about the use of the Clause. Whatever its meaning, it was clear that the members of the Court agreed that the Commerce Clause would not be used to prevent Southern States from barring abolitionists, freed slaves, and other potential "troublemakers" from their borders. *See Groves v. Slaughter*, 40 U.S. (15 Pet.) 449 (1841), especially the opinion of Justice McLean, probably the strongest nationalist on the Court at the time: "The power over slavery belongs to the States

it to implement the industrializing process by freeing the entrepreneurs from all restraints,<sup>83</sup> while the next generation uses it as a tool for the governmental regulation of industry.<sup>84</sup>

It follows from this instrumental character of language that there can be no such thing as an antiseptic, a political judicial decision. If words are tools, all uses of language will be purposive. It becomes impossible for a judge to render a decision without advancing or retarding some political, economic, or social interest. The judge, then, must not simply seek to remove himself from politics, for this is impossible. What the judge must do, however, is to enter into politics always keeping in mind Cardozo's admonition that "the final cause of law is the welfare of society."<sup>85</sup> The judge, then, in adjudicating a dispute involving the interpretation of the Constitution, must select from among all the possible uses of the tools in the constitutional toolbox, that one which will most clearly advance the welfare of society in that given context.

It makes no sense, then, to search for the *meaning* of the Constitution, or of some particular clause of it, as if the words themselves had some fixed, inherent meaning, or as if the Founders had some clearly-defined intention behind their words. The most important clauses of the Constitution admit of any number of interpretations. Yet, as Ronald Dworkin suggests, that does not mean that such clauses

respectively. It is local in character and in its effects; and the transfer of sale of slaves cannot be separate from this power. . . .The right to exercise of this power by a State is higher and deeper than the Constitution." *Id.* at 508. See also Justice Wayne's assurances to the South that "should this matter of introducing free Negroes into the Southern States ever become the subject of judicial inquiry, that they have a guard against it in the Constitution. . . ." *The Passenger Cases*, 48 U.S. (7 How.) at 428.

83. Consider, for example, the Court's substantive due process approach to cases like: *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating New York maximum hours legislation); *Coppage v. Kansas*, 236 U.S. 1 (1915) (invalidating Kansas law prohibiting "yellow dog" contracts); *Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924) (striking down a Nebraska law intended to prevent fraud by requiring standard weights for loaves of bread); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) (invalidating minimum wage legislation for women in the District of Columbia); *Weaver v. Palmer Bros., Inc.*, 270 U.S. 402 (1926) (invalidating Pennsylvania statute prohibiting use of shoddy in manufacturing mattresses).

84. For example, *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), upholding Washington minimum wage legislation, overturning *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Phelps Dodge v. NLRB*, 313 U.S. 177 (1941), upholding provisions of National Labor Relations Act which prohibited as an unfair labor practice an employer's refusal to hire an individual solely because of his labor union affiliation, overturning *Coppage v. Kansas*, 236 U.S. 1 (1915).

85. B. CARDOZO, *supra* note 4, at 66.

should be regarded as "botched, or incomplete, or schematic attempts" to lay down more detailed conceptions of equality, or fairness, or governmental power.<sup>86</sup> The fact is, he points out, that the framers of the constitution and its amendments deliberately chose such vague standards as "equal protection," "due process of law," or "interstate commerce," even though they might have adopted more precise, more specific standards. That they did not choose more detailed standards, Dworkin argues, does not mean that they intended later generations to be bound by the standards of their own day. Because the framers of the Fourteenth Amendment, to use Dworkin's example, did not specify, or perhaps even intend, that racially segregated educational facilities should be considered constitutionally unequal, is not determinative upon those who deal with the problem one hundred years later in a far different setting.

Consider, Dworkin suggests, the example of a father who admonishes his children not to treat others unfairly, but has in mind no specific of unfair treatment, nor gives his children any standard more precise. In such a case the father would expect that the children would apply this concept of fairness in situations which he had not foreseen. The father would also stand ready to admit that a particular act which he thought fair at the time might turn out, in another context, not to be so, or vice versa. "I might say," Dworkin explains, "that I meant the family to be guided by the *concept of fairness*, not by any specific conception of fairness I might have had in mind."<sup>87</sup> Similarly, the general *concepts* embodied in the Constitution are capable of being actualized in any number of specific *conceptions*, depending upon the situations in question. Much as Wittgenstein might have suggested, Dworkin teaches that the general principles of the Constitution are not simply labels for precise categories of rights and responsibilities, but are, instead, "appeals to moral concepts"<sup>88</sup> whose meanings must be established in applications to particular concrete situations.

Regardless of what the Founders might have intended, then, each generation has interpreted the Constitution to mean whatever it had to mean in order to meet the values and needs of that generation, whether or not these meanings were logically consistent from generation to generation. The interstate sale and transportation of coal<sup>89</sup> or

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86. R. DWORKIN, *TAKING RIGHTS SERIOUSLY*, 136 (1977).

87. *Id.* at 134.

88. *Id.* at 136.

89. *Carter v. Carter Coal Co.*, 298 U.S. 238, 309-10 (1936).



the products of child labor<sup>90</sup> does not count as commerce for one generation, but the operation of a neighborhood restaurant<sup>91</sup> has been regarded as interstate commerce by another generation. A generation fearful of the slave uprisings that could occur if states were not allowed to ban "undesirables" from their borders agrees that such absolute restrictions on interstate commerce do not impose undue burdens on interstate commerce,<sup>92</sup> while a later generation, attempting to end state-imposed racial discrimination, finds that a state may not regulate the seating arrangements of passengers on interstate buses without unduly burdening interstate commerce.<sup>93</sup> "Equal protection of the laws" means state-imposed *apartheid* to one generation,<sup>94</sup> "affirmative action" to another.<sup>95</sup> The Due Process Clause has served, in one generation, as a check upon everything *but state procedures*.<sup>96</sup> One generation uses Due Process to restrict the activities of labor unions,<sup>97</sup> the next generation to protect them.<sup>98</sup> As Cardozo observed,

90. *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

91. *Katzenbach v. McClung*, 379 U.S. 294 (1964).

92. *New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837). For a more explicit discussion of the question, see *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449 (1841). In his concurring opinion in this case, even a nationalist as strong as Justice McLean was obliged to recognize that every state had the right to "guard its citizens against the inconveniences and dangers of a slave population," and that this right was "higher than the Constitution." *Id.* at 508.

93. *Morgan v. Virginia*, 328 U.S. 373 (1946).

94. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

95. *Green v. New Kent County School Bd.*, 391 U.S. 430 (1968), made clear the burden upon local school boards to eliminate dual school systems where they had resulted from intentional segregative actions. *Id.* See also *University of Ca. Bd. of Regents v. Bakke*, 438 U.S. 269 (1978) (upheld the right of state universities to use race as a factor in attempting to achieve a more diverse and balanced student body).

96. Consider, for example, Justice Brandeis' complaint, registered in 1920: "I cannot believe that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and to enjoy property." *Gilbert v. Minnesota*, 254 U.S. 325 (1920) (Brandeis, J., dissenting).

97. See *Coppage v. Kansas*, 236 U.S. 1 (1915) and *Adair v. United States*, 208 U.S. 161 (1908) (striking down state and federal laws prohibiting "yellow dog" contracts). See also *Truax v. Corrigan*, 257 U.S. 312 (1921), in which the Supreme Court invalidated an Arizona statute which prohibited state courts from issuing injunctions in cases involving labor disputes. As applied in this case the law had the effect of permitting the boycotting of a restaurant by striking employees and their peaceful picketing near the premises. This resulted in a substantial loss of business by the restaurant, and so, the Court ruled, deprived its owner of property without due process of law.

98. In this area, as in others, the Supreme Court made an abrupt about-face in the years following 1937. See e.g., *Phelps Dodge, Inc. v. NLRB*, 314 U.S. 177 (1941), (overturning *Coppage v. Kansas*, 236 U.S. 1 (1915), and *Adair v. United States*, 208 U.S. 161 (1908)). See also *Senn v. Tile Layers' Union*, 301 U.S. 468 (1937) in which the

"Hardly a rule of today but may be matched by its opposite of yesterday."<sup>99</sup>

The meaning of the Constitution, then, has been determined by the needs of each generation as that generation has perceived them, and not according to some pre-established meaning defined by generations past. The logic of this is not in the consistent use of words across time, but in the use of words in a manner appropriate to the context in which they appear. Still, while this instrumental theory of language allows law to respond to social, political, and economic changes, it is also important to see that it also introduces an element of stability into the law. The fact that words may take on any number of meanings, or functions, in a variety of settings does not mean that the judge is free to assign just any meaning to a word in a particular context, for the judge, in any particular case, is always bound and limited by that particular context, that is, by the social, economic, and political realities of his day. The judge, as Cardozo warned must always "seek a conception of law which realism can accept as true."<sup>100</sup> The judge is not, Cardozo firmly maintained, "a knighterrant, roaming at will in pursuit of his own ideal of beauty or goodness."<sup>101</sup> Judges do not "substitute their own ideas of reasons and justice for those of the men and women whom they serve."<sup>102</sup> Instead, judges base their decisions upon the objective "standards or patterns of utility and morals" which are found "in the life of the community."<sup>103</sup>

Here again, Wittgenstein's thesis plays an important role, because the judges themselves live, breathe, and partake of the atmosphere which gives meaning to legal words, the same atmosphere in which the community lives and breathes. "Our judges are not monks or scientists," as Chief Justice Warren observed, but participants in the living

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Court upheld a Wisconsin law not substantially different from the Arizona statute invalidated in *Truax v. Corrigan*, 257 U.S. 312 (1921). *Thornhill v. Alabama*, 310 U.S. 88 (1940), struck down an Alabama statute which prohibited the publicizing of the facts of a labor dispute in the vicinity of the business involved, even by peaceful means such as picketing or distributing pamphlets. This the Court held to be a violation of the First Amendment's freedom of expression as applied to the States through the Due Process Clause of the Fourteenth Amendment. (*See supra*, note 28). *Thomas v. Collins*, 323 U.S. 516 (1945) struck down a Texas law subjecting all labor unions to licensing and registration by the State. This was also held to be in violation of the First Amendment as made applicable against the States through the Due Process Clause.

99. B. CARDOZO, *supra* note 4, at 26.

100. *Id.* at 127.

101. *Id.* at 141.

102. *Id.* at 88.

103. *Id.* at 105.

stream of our national life, steering the law between the dangers of rigidity on the one hand and formlessness on the other."<sup>104</sup> Despite the detached image of the judge, they do not stand above and apart from the activities upon which they pass judgment. Judges come from society, share many of its values and preconceptions, and, in the United States at least, are chosen to reflect those values and preconceptions. The disputes between advocates of judicial activism and judicial restraint seem to assume an inevitable conflict between judicial and societal values, whereas in actuality the periods of real judicial activism have been relatively infrequent.<sup>105</sup>

The judge's use of legal language is conditioned by the same social, political, and economic context as that of the rest of society, shaped by the same preconceptions and prejudices. That context imposes upon the judge as well as the rest of society a view of the way society is organized, of the most important ends of the social union, of the rights and responsibilities of citizens toward each other and toward society as a whole. As Cardozo observed:

There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James's phrase of "the total push and pressure of the cosmos," which, when reasons are nicely balanced, must determine where choice shall fall. In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.<sup>106</sup>

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104. E. WARREN, *The Law and the Future*, 52 FORTUNE 106 (1955), quoted in H. ABRAHAM, *THE JUDICIAL PROCESS*, 321 (1975).

105. For example, Henry J. Abraham characterizes only the following periods in American history as showing "Tendencies toward judicial supremacy": 1801-1829 (Marshall's judicial nationalism); 1857 (The Fuller Court); 1935-36 (Nine old men attack the New Deal); 1954-1957 (Civil libertarian action by the Warren Court). H. ABRAHAM, *supra* note 104, at 343. Nearly one-third (33 of 110) of the Acts of Congress voided by the Supreme Court as of 1977 were declared unconstitutional during these periods of "judicial supremacy." *Id.* at 286-293.

106. B. CARDOZO, *supra* note 4, at 12-13.

A judge, like any other human being, is a child of his times, and, like any other human being, sees the world through the eyes of his times. His decisions will be informed by principles which, in the words of Justice Holmes, he "cannot help believing,"<sup>107</sup> simply because he cannot see the world in any other way. In most of his decisions, Cardozo adds, the judge is merely "stating an experience as to which there is no choice."<sup>108</sup>

The basic stability of the context in which legal words are to be used imposes another limitation upon the judicial definition of such words. The social, political and economic environment in which law operates simply is not so erratic as to allow the constant redefinition of legal terms. It would clearly be impossible for human beings to live together and conduct their affairs in an environment so unsettled and unpredictable. And even if the environment were in such flux, we would be prevented from seeing it as such by the "craving for generality" described by Wittgenstein, and the psychological need for the kind of structural framework described by Cardozo, in which "every problem finds its setting."<sup>109</sup> Without some underlying world view, some organizational philosophy to define the proper relations among human beings, the world becomes a vast, disordered swirl of atomistic, unrelated events. Each generation embodies such a world view in the legal precedents which form the organizational framework for human relations in its society, and there is, necessarily, as Cardozo observes, both a legal and a psychological presumption in favor of those precedents. Human beings are generally incapable of living with erratic fluxuations in something so basic as the underlying organizational principles of society. Such precedents may be allowed to atrophy; they may be changed incrementally; they may be distinguished from later cases and permitted to evolve in new directions, but seldom has society sustained or permitted the sudden wholesale redefinition of the basic goals and purposes of the social union. Consider, for example, the sixty years of social, economic, and constitutional evolution which were required before the Supreme Court could redefine the underlying societal principles contained in a precedent like *Plessy v. Ferguson*.<sup>110</sup> Consider also that, twenty-five years later, both society and the judiciary are still working out the implications of the overturning of that precedent and adjusting to the changes which it brought about in daily life.

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107. O. W. HOLMES, *Ideals and Doubt*, in COLLECTED LEGAL PAPERS, 304 (1921).

108. B. CARDOZO, *supra* note 4, at 12.

109. L. WITTGENSTEIN, *supra* note 48 at 17; B. CARDOZO, *supra* note 4 at 12.

110. 163 U.S. 537 (1896).

Thus, even more important than the fact that the context of legal words changes but slowly and incrementally, is the fact that society is even slower to perceive those changes. The psychological reluctance to tamper with the underlying principles of society leads to the attempt to resolve all social problems within the established framework whether it is fully capable of handling them or not. It is generally easier and psychologically more comfortable to redefine the problem to fit the framework than to call into question something so basic as the foundation of society.<sup>111</sup>

Thus, it is not every environmental change that will lead to a massive redefinition of legal terms, but, in general, only social, political, and economic upheaval of a magnitude sufficient to cause the re-evaluation and rejection of a heretofore received world view.<sup>112</sup> Only when a context has changed to the point that the old world view and its accompanying definitions of terms no longer make sense is a judge entitled to find new uses and new meanings for such words. When the context has changed to such an extent that the old definitions and precedents are in fact deprived of their meanings, the judge has little choice but to devise new meanings for old legal and constitutional terms in light of changed values and needs.

Such cataclysmic events do occur, but they are not common. For example, the Missouri Controversy and the rise of the sectional crisis spelled the end of John Marshall's judicial nationalism and gave way to the states' rights oriented Constitution of ante-bellum days.<sup>113</sup> The

111. An informative comparison could be made here with Thomas S. Kuhn's discussion of the reluctance of a scientific community to reject a paradigm, or organizational framework, even in the face of mounting evidence that the paradigm can no longer solve the scientific problems set for it or adequately explain observed facts. See, T. Kuhn *The Structure of Scientific Revolutions*, INTERNATIONAL ENCYCLOPEDIA OF UNIFIED SCIENCE, 66-76 (2d ed. 1970).

112. As Kuhn notes in the scientific context, a new scientific theory emerges only when the existing paradigm, with all its presuppositions, is no longer adequate to handle the scientific problems presented to it. A novel theory, and a corresponding new paradigm, emerges "only after a pronounced failure in the normal problem-solving activity. . . . The novel theory seems a direct response to crisis." T. Kuhn, *id.* at 74-75.

113. The economic Panic of 1819 highlighted the economic differences of the various sections of the Union, as it brought the agrarian interests of the West and South into conflict with the industrial and banking interests of the Northeast. See G. DANGERFIELD, *THE AWAKENING OF AMERICAN NATIONALISM: 1815-1828*, 84 (1965). More startling, and more divisive, was the first Northern attack on slavery in the Missouri Controversy of 1820. The rancor raised by the efforts of Northern representatives in Congress to prevent Missouri's admission to the Union as a slave state abated only when a compromise could be reached by allowing Maine's admission as a free state. See A. KELLY & W. HARBISON, *supra* note 66 at 260-68. As would be the case until the

Industrial Revolution and the establishment of a national network of distribution tolled the death knell of the local Jacksonian community. When the agrarian community no longer formed the focus of American economic life, the ante-bellum precedents which embodied its values and principles could only be seen as a restriction upon the growth of American industry, and so the way was cleared for a wholesale redefinition of legal and constitutional terms in the Gilded Age.<sup>114</sup> The

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disastrous decade preceding the Civil War, the ultimate questions of the nature of the federal Union and of the right of Congress to prohibit slavery in the territories were not confronted directly, for fear of splitting the Union.

Until the calamity of its decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), the Supreme Court may likewise be seen as following a similar course in avoiding the ultimate questions of federalism and the limits of state and national power. This is true, as R. Kent Newmyer has demonstrated, even of John Marshall, despite his reputation as a judicial nationalist. See, R. K. NEWMYER, *THE SUPREME COURT UNDER MARSHALL AND TANEY*, at 81-88 (1968).

For example, Marshall passed up the opportunity in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 206 (1824), to assert an *exclusive* national commerce power. The New York steamboat monopoly in question in this case was struck down, not because the States had *no* authority over interstate commerce—a question unnecessary to resolve in this case—but because the State power, whatever it might be, could not be exercised in conflict with a valid exertion of congressional power over interstate commerce. The relevance of this question for the regulation of the slave trade is obvious. See *supra*, note 82. Marshall showed even greater deference to the States in *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827). Although the Court here used the Commerce Clause to strike down a Maryland tax on the importation of wholesale goods, Marshall went out of his way to assert in *dicta* that the police powers of the states were an “express exception” to the constitutional prohibition of undue State burdens on interstate commerce. “Indeed,” wrote Marshall, “the laws of the United States expressly sanction the health laws of a state.” *Id.*, at 444. In *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829), Marshall took this conception of a state police power even further by sustaining Delaware’s authorization of the damming of a navigable stream in order to drain a marsh, allegedly for health purposes.

A similar retreat from rigid judicial nationalism can be seen in the Marshall Court’s interpretation of the Contract Clause. *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), treated state grants of corporate status as inviolable contracts which could not be altered or rescinded within the limits of the Constitution. Yet, in 1830, Marshall rejected the contention of a Rhode Island bank that exemption was implicit in its corporate charter, and that, therefore, state taxation was an impairment of contract. *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514 (1830). This precedent was used by Chief Justice Taney to support his rule in the *Charles River Bridge* case that ambiguities in corporate charters ought to be interpreted in favor of the State. *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 548 (1837).

Finally, consider that Marshall passed up the opportunity in *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), to apply the Bill of Rights to the States and to subject to the scrutiny of federal courts all of a State’s dealings with persons within its jurisdiction.

114. See, R. WIEBE, *THE SEARCH FOR ORDER: 1877-1920*, chap. 3, (1967). The ante-bellum deference to state and local control of commerce gave way in the Gilded Age

Great Depression, however, showed the fallacy of maintaining a constitutional system solely for the benefit of the industrial class; and, the Roosevelt Court re-evaluated legal and constitutional terms to allow for governmental regulation of business and protection of consumers and labor unions.<sup>115</sup> Finally, the growth of a mass-consumption economy and the rising demands of groups long excluded from the full benefits of American life again forced a reconsideration of the nature and purpose of the social union and the introduction of a more egalitarian Constitution by the Warren Court.<sup>116</sup>

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to the use of the Commerce Clause as a device for clearing away state and local obstacles to a national market. *See supra*, notes 71 and 81 and cases discussed therein. State and local governments, as a consequence, lost control over a wide range of matters traditionally within their authority. (At the same time, the Court was also restricting Congressional control over the national economy by giving a very narrow definition to the term, "commerce." *See supra*, note 29.)

Consider also the change in the use of the Contract Clause. From 1824 to 1850, the Supreme Court negated only one law affecting state grants to individuals and corporations. *Gordon v. Appeal Tax Court*, 44 U.S. (3 How.) 133 (1845). Between 1860 and 1896, the Court found seventeen such laws to be unconstitutional impairments of the obligation of contract: *The Binghampton Bridge*, 70 U.S. (3 Wall.) 51 (1866); *McGee v. Mathis*, 71 U.S. (4 Wall.) 143 (1867); *Home of the Friendless v. Rouse*, 75 U.S. (8 Wall.) 430 (1869); *The Washington University v. Rouse*, 75 U.S. (8 Wall.) 439 (1869); *Wilmington Ry. v. Reid*, 80 U.S. (13 Wall.) 264 (1872); *Humphrey v. Pegues*, 83 U.S. (16 Wall.) 244 (1873); *Pacific Ry. Co. v. Maguire*, 87 U.S. (20 Wall.) 36 (1874); *New Jersey v. Yard*, 95 U.S. 104 (1877); *Farrington v. Tennessee*, 95 U.S. 679 (1878); *Northwestern University v. Illinois*, 99 U.S. 309 (1878); *Hall v. Wisconsin*, 103 U.S. 5 (1880); *Asylum v. New Orleans*, 105 U.S. 362 (1881); *Louisville Gas Co. v. Citizens Gas Co.*, 115 U.S. 683 (1885); *Mobile & Ohio R.R. v. Tennessee*, 153 U.S. 486 (1894); *Bank of Commerce v. Tennessee*, 161 U.S. 134 (1896); *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U.S. 650 (1885); *New Orleans Water-Works Co. v. Rivers*, 115 U.S. 674 (1885). *See list of State Acts Held Unconstitutional in L. JAYSON, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, 1623-1768 (1972).*

115. Consider the expansion of the national commerce power discussed in note 29, *supra*, and the restricted interpretation given due process in this period in cases discussed in notes 12 and 84, *supra*.

116. For examples, *see* discussion of Equal Protection cases in note 72, *supra*, and of cases applying the Bill of Rights to the States in note 28, *supra*. The Burger Court has not retreated entirely from the civil libertarian stands of the Warren Court. In fact, it might best be characterized not by its activism or its restraint, but by the uncertainty of its direction. For example, the Burger Court has recognized that a woman has a right to privacy in her decision to carry a pregnancy to term, *Roe v. Wade*, 410 U.S. 113 (1973), and has struck down state interferences with that right, *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). At the same time, the Court has refused to require state or federal governments to fund abortions, *Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977), or to perform such operations in tax-supported hospitals, *Poelker v. Doe*, 432 U.S. 519 (1977). The Burger Court has recognized that capital punishment does raise federal constitutional questions, *Furman v. Georgia*, 408 U.S. 238 (1972), has limited its application to those convicted of

These, then, are considered to be the great "constitutional revolutions" and the periods of greatest judicial activism in American legal history. It is not surprising to find them occurring at times of great disruption and uncertainty in politics, in economic development, and in society in general. When the context in which words are used becomes uncertain, the meanings of the words themselves becomes uncertain. When judges are asked to apply in such a context words with such amorphous definition as "equal protection" or "due process," they can do little more than fashion new meanings for such words, tailoring those meanings to the needs and values of a newly-emerging context as well as they can perceive it. This, in essence, is what was done by the Taney Court, the Fuller Court, the New Deal Court, and the Warren Court. However, when the context becomes more settled, its needs and values more clearly defined and the legal precedents embodying these values established, then judges will follow those precedents. Nor will most judges, as products of their times, have much inclination to do otherwise, for the assigned meanings of the words will then make sense within their context. There will be no tension between precedent and the perceived needs and values of society and judges will see the need only to refine precedent and apply it to the factual situations that might arise. While judicial activism may characterize the troubled times of "constitutional revolution,"

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murder, *Coker v. Georgia*, 433 U.S. 584 (1977), and has set demanding procedural requirements for its imposition, *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Lockett v. Ohio*, 438 U.S. 586 (1978), but it has not ruled the death penalty *per se* to be unconstitutional. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976). The Burger Court has not expanded the list of suspect categories, *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976), or of fundamental rights requiring strict scrutiny under the Equal Protection Clause, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). It has, however, created an intermediate level of Equal Protection scrutiny for cases involving gender-based classifications. *Craig v. Boren*, 429 U.S. 190 (1976). It has ruled that the University of California at Davis may not reserve 16% of the seats in its medical school for minority applicants, *Regents v. Bakke*, 438 U.S. 265 (1978), but it has permitted Congress to require that 10% of the money allocated under the Public Works Employment Act of 1977 be used to buy goods and services from minority contractors. *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

It might be argued that in all these instances, the Burger Court has merely reflected the basic uncertainty and inconsistency of the American public and the intractable nature of the problems it faced. In this regard, the judicial branch has been no more (and no less) without direction than the political branches. To this date (February, 1984), the American electorate has chosen for only four years of Warren Burger's tenure as Chief Justice to place both the Presidency and the Congress in the hands of the same political party. Consistency in policy is scarcely to be expected under such circumstances.



*stare decisis* most definitely marks the more settled periods of "normal law" which intervene.<sup>117</sup>

### CONCLUSION

This paper has attempted to examine the ways in which we use language in the hopes of shedding some light on the way in which judges use legal language. More precisely, the paper is an investigation into the possible value of language philosophy in formulating and supporting a jurisprudence that comes to grips with the two seemingly-conflicting social needs of stability and growth. Mr. Justice Cardozo wisely resolved this conflict by accepting judicial legislation as a necessary and inevitable part of the judicial process. Judges may legislate, Cardozo asserted, but only in accord with the *mores* of society, and only when necessary to meet social needs. Judges are free to legislate whenever necessary, but must follow precedent whenever possible.

By introducing Ludwig Wittgenstein's philosophy of language into this discussion, I have attempted to show that Cardozo has, in actuality, done nothing more than describe the way in which we all use language in our everyday lives. What Cardozo has made a necessary and natural part of the judicial process, Wittgenstein has made a necessary and natural part of the use of language. Words derive their meanings from their use in a particular context. The same word may, therefore, take on a range of meanings depending upon the use to which it is put and the context in which it is used. The meanings of legal or constitutional terms may likewise change as changing social needs and values dictate a new use of a word in a new social, economic and political context. Yet, at the same time, the meaning of a word is limited by its context. It is not just any meaning which judges may assign to legal and constitutional terms, not just any values which they may write into law, but, as Cardozo demands, only those meanings which accord with the values and needs of the society. Nor may judges casually reject the established meanings of such words, for stability itself is a social value. Change may be introduced only in those relatively limited circumstances where

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117. Compare with the distinction Kuhn makes between "normal science" and science during periods of crises. See Kuhn, *supra* note 111.

Also compare with the distinction Robert Dahl makes between "incremental" and "comprehensive" social change. R. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT, 264 (1967).

a word's meaning, assigned in one context, no longer makes sense in light of the values and needs of a new and changed context.

A jurisprudence based on a contextual theory of language, then, frees the judge to introduce change into law when necessary, but restricts closely the kinds of change he may introduce and the circumstances under which he may do so. As such, it is a step toward Cardozo's quest for a "philosophy that will mediate between the conflicting claims of stability and progress, and supply a principle of growth."

