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I

The debate over Supreme Court decisions interpreting the Constitution has focused attention upon the significance of judicial discretion. If the paramount duty of the Justices is to uphold the Bill of Rights, the exercises of judicial review may be justified by a theory of discretion which embodies liberal values. The Rights Thesis of Professor Ronald Dworkin is responsive to that need.[1]

Dworkin is sensitive to the criticism that a preference for liberal values is incompatible with the ideal of judgment according to law. He struggles to construct a theory of adjudication which justifies an insitutional preference for personal freedom without encourging arbitrary judicial activism. In a democracy, Dworkin asserts, citizens engaged in litigation seek a determination of their rights. They are entitled to receive from judges a conscientious judgment whether the law provides the claimed entitlements. If such rights exist, they are to be found within the body of laws which judges are authorized to apply to the resolution of controversies.

In "hard" constitutional cases, text and precedent will not, of themselves, provide an answer to the inquiry concerning rights. Yet the citizen is entitled to know whether the Constitution pro-

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1. R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977) [hereinafter cited as DWORKIN, TAKING RIGHTS SERIOUSLY]. An earlier version is Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

vides the right which is claimed. Earlier decisions may suggest that the text in issue was intended to promote fundamental human values such as personal liberty, human dignity, or equality. To fullfill his responsibility, an ideal judge (Hercules) will recognize that in such cases the content of the alleged constitutional right is unclear. Cognition depends upon judgments of political theory. The judge must construct in his own mind a theory concerning the fundamental values which the Constitution was designed to protect and verify his construct against the institutional detail of precedential development. If there is a "fit," this process of self-conscious reasoning leads to a definitive judgment whether the Constitution does, or does not, provide the right in question.[2]

The complexities of "hard" cases require a personal understanding of fundamental law. But the institutional context within which the quest occurs insures that the outcome will not be arbitrary. The fundamental law becomes known through a process of self-conscious reflection which "suspends" the judges' own presuppositions or background morality. If the theoretical construct supports the individual claim, rights "trump." They take precedence over most conceivable public policies which are antagonistic to the claim.

The psychological process described by the Rights Thesis reveals the deeper meaning of the Justices' obligation to uphold the Bill of Rights against majoritarian will. But the Constitution is itself a social product. There must be some connection between the reflections of the Justice seeking to discover fundamental law and the ultimate values of the community. Dworkin attempts to make such connections and thereby reinforces is argument that, in "hard" cases, discretion need not be arbitrary.

Hercules attempts to understand the meaning of human dignity as a constitutional value. Assuming that he does not himself consider it valuable, he can, nonetheless, observe its presence in a decisional pattern and place himself within the frame of mind of those who value the idea. And, should dignity be for him a matter of importance, he can develop a *personal* understanding of its *institutional* value:

> He will begin within, rather than outside, the scheme of values that approves the concept, and he will be able to put to himself, rather than to

2. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 1.

> some hypothetical self, questions about the deep morality tht gives the concept value. The sharp distinction between backgound and institutional morality will fade, not because institutional morality is displaced by personal convictions, but because personal convictions have become the most reliable guide he has to institutional morality.[3]

The process of self-conscious reflection will not assure unanimity of interpretation among the Justices. But divergence is not proof of subjective preference. There will be debate about what dignity, or any other fundamental value, requires. These differences, Dworkin claims, reflect varied conceptions of concepts of liberty which we, as a people, hold in common.

According to Dworkin, decisions reached through his model of constitutional adjudication are judgments according to law. The ideal judge is not relying upon his own preferences in constructing his theory of fundamental values. He is, admittedly, relying upon is own convictions. These are personal but not arbitrary. They arise, inexorably, whenever the individual Justice is discharging his adjudicative responsibilities. It is his sworn duty to uphold constitutional liberty and in these difficult cases he is using his best judgment as to what the Constitution requires.

* * *

In the Herculean model a fine line is drawn between personal moral convictions and perception of constitutional values. The subtlety of the distinction has lead some distinguished jurists to doubt the plausibility of the Rights Thesis. H.L.A. Hart, for example, questions whether it merely allows a judge "in the misleading guise of finding what the law behind the positive law really is to invest his own personal, moral, or political views with a spurious objectivity . . . ."[4] While such criticism has some merit, it does not sufficiently appreciate the value of Dworkin's account of how the Justices, in difficult cases, come to understand constitutional law. It is well known that Dworkin's theory is an attempt to apply principles of moral philosophy to constitutional law. But it has other philosophical antecedents which are not widely understood.

The Rights Thesis is a form of phenomenological investigation. Phenomenology seeks to disprove the contention that all knowledge is subjective and relative. It assumes an objective world which

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3. *Id.* at 128.

4. Hart, *Law in the Perspective of Philosophy: 1776-1976*, 51 N.Y.U. L. REV. 538, 551 (1976).

is experientially understood. Reality has meaning; a meaning for a comprehending subject.[5] As a descriptive account of constitutional adjudication, the Rights Thesis is faithful to these principles. The Herculean Justice, by self-conscious reflection, experiences the phenomenon of fundamental law. The Constitution exists; it has an objective reality. But its meaning depends upon the personal interpretation of the judge who must decide a "hard" case. As personal understanding occurs, the Constitution is not given a "spurious" objectivity. The Justice who must construct a political or institutional theory suggested by the precedents is not relying upon personal biases. Nor, strictly speaking, is he relying upon his own convictions.

This liberal theory of constitutional interpretation stands as a positive jurisprudential achievement. As a description of how judges come to understand basic law, it surpasses the cruder psychologism of the earlier American Legal Realists who are unable to explain intuitive judgments other than as expressions of personal bias. But the Rights Thesis is a theory of action as well as knowledge.[6] It purports to explain how a Justice of the Court, who has sworn to uphold the Constitution, should exercise his discretionary authority. At this level it is vulnerable.

II

Dworkin employs a theory of delegation to justify the liberal ideal of constitutional adjudication. In drafting the Constitution, the Framers embodied a theory of human dignity which they commissioned the judiciary to protect. Both precise and vague provisions were included in the text. For the interpretation of the latter, Dworkin argues, the Framers intended that the judges should be guided by a *concept* of fairness. They were, he contends, given the power to develop and apply their own *conception* of fairness as cases come before them. From these premises it follows that judges can properly enforce the Constitution only if they make up their own minds as to the meaning of imprecise constitutional

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5. E. HUSSERL, LOGICAL INVESTIGATIONS (J.N. Findley trans. 1970); M. FABER, PHENOMENOLOGY AND EXISTENCE (1967). Phenomenological psychology provides a method for the descriptive analysis of experience. It is also a deeply subjective experiential way of knowing. For a general discussion see H. JUNG, THE CRISIS OF POLITICAL UNDERSTANDING (1979).

6. *See infra* pt. II.

standards.[7]

The argument is logically coherent, but based upon a false premise. Constitutional authority is not derived from the Framers. They drafted the document; it was the people, in convention, who ratified the proposed text.[8] The source of delegated authority was concrete rather than abstract. This difference is essential to an understanding of the legitimate power of judges who are engaged in enforcing, as well as interpreting, the Constitution.

In a democracy, the people are sovereign. All governmental power, including that of the judiciary, is derived from their consent. Those who exercise such power must be accountable for its use. If any branch of government is not accountable, the principle of democratic sovereignty would be compromised. The people would not possess ultimate authority. It is difficult to apply these principles to the exercise of judicial review by federal judges. The normal mechanism for democratic supervision—periodic elections—does not apply. Their position in the structure of government is unique. They are, by deliberate design, independent officials. The Supreme Court is, in some sense, a political institution but the individual Justices are expected to exercise their authority in detachment from politics. They are not, in any literal sense, agents of the public. But if their power is literally absolute it is not democratic.[9]

Because of the latitudes of interpretation implicit in constitutional adjudication there is a real danger of the Court being practi-

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7. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 1, ch. 5.

8. Referring to the Philadelphia Covention which produced the Constitutional text, Chief Justice Marshall observed:

> [T]he instrument, when it came from their hands was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might be submitted to a Convention of Delegates, chosen in each State by the people thereof, under the recommendation of its Legislature, for their assent and ratification. This mode of proceeding was adopted . . . .
>
> From these Conventions the Constitution derives its whole authority.

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 403 (1819). The ratification of the Federal Constitution was an extraordinary event because it was the first concrete expression of the autonomy of the people; the people as constitutive power. *See* R. PALMER, THE AGE OF DEMOCRATIC REVOLUTION 3-24 (1954).

9. I develop these ideas in an earlier essay, Murphy, *The Supreme Court and Democratic Theory*, 17 SYRACUSE L. REV. 642 (1966) [hereinafter cited as Murphy, *Democratic Theory*]. *See also* C. MURPHY, MODERN LEGAL PHILOSOPHY: THE TENSION BETWEEN EXPERIENTIAL AND ABSTRACT THOUGHT (1978).

cally sovereign. Important constitutional decisions have a profound impact upon the nation as a whole. The question is whether such interpretations shall be willingly, or resentfully, obeyed. In the 78th Federalist, Hamilton saw the federal judiciary as an intermediary between the people and the legislature. The constant danger is that the Court will not act on behalf of the people but rather impose its will upon a reluctant public.

Accountability for the use of power is a measure of discretion. Dworkin acknowledges that the judges are accountable. He concedes that the public has a right to expect from the individual Justice a consistent and coherent judicial performance.[10] This is a corollary of his conception of the responsibility of judges. Particular judgments are not justified in isolation. They must be related to a more comprehensive theory of general principles. Such principles, dimly perceived in the precedents, are fully expressed in the political theory conceived by Herculean reflection. Consistency in the application of norms is essential to the impartial administration of justice.[11] As articulated by Dworkin, however, it functions more as a revelation of the inward disposition of the individual Justice than as the satisfaction of an external standard of justification.

Subjectively, consistency is a rigorous measure of personal morality. As such, it does not satisfy the requirements of public accountability in a democracy. Principles of democracy assume a reciprocal relationship between people and government. Any form of imposed ordering, or unilateral authority, is inimical to the idea of the consent of the governed. These principles have application to constitutional adjudication as well as to ordinary law making. When the Supreme Court is called upon to interpret the Constitution, it is as Dworkin claims, responding to the appeal of a citizen for a determination of individual rights. That is an essential, but incomplete understanding of the function of judicial review. In such circumstances, the Court is also involved in a process by which we, as a people, seek to bring our actions into conformity

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10. The models of decisions "presupposes that articulated consistency, decisions in accordance with a program that can be made public and followed until changed, is essential to any conception of justice . . . ." DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 1, at 162. Compare Dworkin's conception of public accountability with R. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION ch. 5 (1961). Wasserstrom argues for more objective criteria of evaluation. *See also* S. SHUMAN, LEGAL POSITIVISM: ITS SCOPE AND LIMITATIONS ch. 6 (1963).

11. N. MACCORMICK, LEGAL REASONING AND LEGAL THEORY (1978).

with our fundamental law. In this broader context, constitutional adjudication includes a "conception of the judges speaking directly to the people as participants in an endless public conversation on the nature and purposes of our law in all its application."[12] The written opinions are a colloquy between the Court and the People. As the public is directly involved in the understanding of fundamental law, the Justices must attempt to persuade them that the principles for which the decisions stand are part of the permanent values of our constitutional tradition. This places a burden of justification upon the individual Justices which is not satisfied by formal consistency of performance.

Persuasive justification, in a reciprocal relationship, is indispensible to the establishment of legitimate authority. As a non-representative institution, the Supreme Court through this form of justification, becomes accountable to the people. The Court, in interpreting the Constitution, must demonstrate that its decisions reflect its institutional competence and are compatible with our traditional values:

> Legitimacy follows from the involvement of the public in Court decisions so that the decision are largely accepted and followed, not so much because of the authority of the Court, but because of a general belief in the principles for which the decisions stand.[13]

This interpretation of the Supreme Court's authority may be criticized on the grounds that a social consensus is not the appropriate measure of judicial power. Such conventionalism cannot be reconciled with the judges' responsibility to enforce the Bill of Rights. As Professor Ely observed, "*[I]t simply makes not sense to employ the value judgments of the majority as the vehicle for protecting minorities from the value judgments of the majority.*"[14] When Hercules properly exercises his discretion, he cannot allow the will of majorities to take precedence over individual rights. He must diverge from popular morality, and indeed oppose it, if it is inconsistent with the deeper political morality which upholds our

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12. E. ROSTOW, THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW 88 (1962).

13. White, *The Supreme Court's Public and the Public's Supreme Court*, 52 VA. Q. REV. 370, 387 (1976).

14. Ely, *The Supreme Court, 1977 Term-Foreward: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 52 (1978). The question of consensus is developed more fully *infra* pt. V.

fundamental law.

This objection arises when there is a clear opposition between immediate public passion and the individual values which the Constitution was meant to secure. But such cases are exceptional. Generally, important constitutional cases are more indeterminate and of greater complexity. They are "hard" cases but in a deeper sense than as employed by Dworkin. They cannot be resolved by direct application of existing rules. But they are "hard" because they involve difficult adjustments between individual liberty and community values. These adjustments, which are the most perplexing aspects of life in a democratic society, lie at the heart of constitutional litigation. They call for a Herculean effort by Justices bound to resolve such controversies, but it is a heroism of a different order than that espoused in the liberal model of adjudication.

The weakness of the liberal account of judicial authority can be perceived when it is compared with other conceptions which are more responsive to the deeper levels of constitutional litigation. Herbert Wechsler's *Neutral Principles*[15] thesis is, in this respect, instructive. He asserts that the judge, at a critical point in the decisional process, must relate the case before him to other cases. There is a process of generalization: related cases contain a wide variety of fact situations but involve similar or analogous issues. For Wechsler, the perception of broad, comparable principles is essential to sound judgment. They guide the individual Justice to make a decision upon "grounds of adequate neutrality and generality."

In some respects the Wechslerian theory parallels Dworkin's. Both assert the importance of testing proposed solutions for consistency and coherence within the legal system. But there is an important difference in approach to the psychology of judging. For Wechsler, the search for general principles is not a straightforward effort towards comprehension of a decisive interest. What is revealed is an underlying structure of social values which are fundamentally antagonistic. A principled decision can only occur if the Justice addresses these adverse dimensions of the controversy. He must understand that, ultimately, the constitutional litigation

15. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959), *reprinted in* H. WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW (1961).

presents a "conflict in human claims of high dimension."[16]

There are similar insights in Justice Cardozo's understanding of the judicial function. He was also aware of the "hard" case and the dangers which are posed for the integrity of judicial office. With his sociological orientation, Cardozo tended to prefer the accepted standards of the community as the ultimate measure of judicial authority. But he also recognized the possibility of an acute disparity between contemporary mores and deeper societal norms. The obligation to establish the true relation between conflicting values was, to him, of the highest importance. He describes the subtle interplay between personal conviction and external reality as the conscientious Justice struggles to reconcile the ultimate conflicting values:

> [T]he distinction between the subjective or individual and the objective or general conscience, in the field where the judge is not limited by established rules, is shadowy and evanescent . . . . The perception of objective right takes the color of the subjective mind. The conclusions of the subjective mind take the color of customary practices and objectified beliefs. There is constant and subtle interaction between what is without and what is within . . . . [W]hether the impulse spreads from the individual or from society, from within or from without, neither . . . can work in independence of each other . . . .[17]

To these jurists, "hard" cases do not simply raise issue of rights. They present conflicts of values. More importantly, the responsible use of judicial discretion called for a deliberate consideration of those conflicting "human claims of high dimension." Here Justice Holmes is eloquent:

> I think it is most important to remember whenever a doubtful case arises, with certain analogies on one side and another analogies on the other, that what really is before us is a conflict between two social desires, each of which seeks to extend its domain over the case, and which cannot both have their way. The social question is which desire is stronger at the point of conflict. The judicial one may be narrower, because one or the other desire may have been expressed in previous decisions to such an extent that logic requires us to assume it to preponderate in the one before us. But if that is clearly so, the case is not a doubtful one. Where there is doubt the simple tool of logic does not suffice, and even if it is disguised and unconscious, the

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16. *Id.* at 34, *reprinted in* H. WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW at 47.

17. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 110-11 (1921).

judges are called on to exercise the sovereign prerogative of choice.[18]

The inevitability of choice among competing values is an intrinsic part of the interpretative process. When positive rules are unclear, resolution of contextual ambiguities requires a choice between competing versions of the rule. The decision maker must advance justifying reasons why one version of the ambiguities was chosen. There are general principles of legal reasoning which have particular application to constitutional adjudication. Dworkin's model accounts for selection among several interpretive possibilities. But they are limited by the *a priori* assumption that, in "hard" cases, the only significant question is whether the Constitution contains the claimed individual right. Choice between individual interests and social values is excluded, in advance, by the rigorous dichotomy between rights and policies.

It would be unfair to criticize the Herculean model as a resort to the "simple tool of logic" in the face of constitutional complexity. But where judicial discretion is reduced to a Herculean determination of rights, the form of thought employed corresponds closely to that approach rejected by Justice Holmes. The liberal ideal is a species of deductive justification. Constitutional adjudication occurs within the context of unexplained presuppositions. The reasoning is analytical and the norms which constitute the basis of judgment are moral axioms. Given values arise in the judicial consciousness and determine the will. Liberty, dignity, and respect are the object of judicial reflection and their meaning is personal to the individual Justice. As Hercules applies the perceived values he must respect modalities of coherence and consistency. And his intuitions must be verified by institutional detail. But *the judgment itself* (whether rights trump) is insulated from evaluation by external criteria.

Though the liberal Justice does not select between competing values, arguably he makes a more difficult choice. If Hercules' decision is principled, it is not arbitrary. He chooses to do what a moral person required to make a serious decision should do. He must act rationally, and rational choice is a search for general principles. A litigant asks whether the Constitution contains a claimed right. In responding, the conscientious judge must make his moral intuitions consistent with the fundamental principles to which we,

18. O.W. Holmes, Collected Legal Papers 239 (1920).

as a people, subscribe. He reaches a judgment which has universal range and categorical application.

The model of discretion advanced by Dworkin improves the moral quality of discretionary choice. It disciplines bias, promotes judicial disinterestedness, and supports institutional independence. Unlike models of adjudication which counsel the weighting of interests, Dworkin's seems to assure that constitutional judgments will be based upon enduring values rather than upon an individual judge's predispositions. Yet, although Herculean discretion can be stated in the strongest terms, the suspicion remains that the liberal judge ultimately relies upon his own value system in determining the scope of individual rights. That suspicion increases when the broader postulates of liberalism are taken into account.

An epistemology of social atomism, in which society has no independent reality, obviously encourages a conception of judicial authority which makes individual rights of decisive concern. The influence of Kantian ethics upon liberalism must also be taken into account if one wishes to fully appraise Dworkin's thesis. In "hard" cases, does Hercules make a judgment according to law, or does he rely upon his own conviction? From a Kantian perspective, the ideal is one of personal ethical autonomy. In making a moral choice the individual Justice should only obey norms which arise in his or her conscience and are capable of the broadest application. Dworkin transfers this ideal from the domain of moral philosophy to the exercise of the judicial office. In deciding "hard" cases Hercules strives to establish an ideal world of individual rights and affirm the values of autonomous personality. In constitutional cases law and morals coalesce. His obligation to interpret the Constitution is not delegated by external authority. The "political morality" which he ostensibly discovers are immanent laws of moral autonomy. The principles, or rights, which form the basis of decision originate in the conscience of the individual Justice. They are derived from his own will. Being principles, they are universalizable. Insofar as they are valid for him, they are valid for all reasonable men. Viewed from the heights of moral theory, Herculean discretion is personal but not arbitrary.[19]

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19. *See* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 1, at ch. 6, which recognizes the neo-Kantian contribution of Rawls. The immanence of Dworkin's morality is an extension of its phenomenological genesis. The rational subject encounters an object in thought and imagination and gives the object meaning. Reflection leads to action. The individual

The fallacy of this liberal ideal lies in its assumption that a model of personal moral conduct can be transferred *en toto* to an institutional context. It avoids the complexity of constitutional controversies and obscures questions of authority implicit in the use of judicial power. The subjective reasoning by which an individual Justice convinces himself that he has made a correct decision is not the same as the reasoning he must employ to persuade an external audience that he has reached a legitimate result. For this distinction to be understood, the psychological process by which one reaches a judgment must be distinguished from the justification of that judgment.[20]

The liberal model of adjudication is analytical. It reduces controversies to questions of personal rights and relies upon axioms of liberty, dignity, and respect as the decisive basis of constitutional judgments. This form of reasoning has only limited value in adjusting human relationships governed by fundamental law. These conflicts involve the clash of divergent values which are logically irreconcilable. The temptation is to select one value and determine its application according to an analytic thought process.[21] In Dworkin's thesis, a divergent problem is reduced to one of convergence by the exercise of an analytic, deductive process of thought. Such judgments are thought to be rational if they are logically coherent, based upon adequate generalization, and promote personal autonomy. Rationality, however, also encompasses other forms of reasoned justification. Reason includes every attempt to persuade others of the correctness of a moral proposition. Such justification is essential to the legitimacy of judicial review in constitutional litigation.

As we have observed, the Justices of the Supreme Court are in a reciprocal relationship with the People. In the written opinion they seek to persuade the People that their decisions are just and compatible with our national values and ideals. In "hard" constitutional cases ambiguities exist because there is an ultimate conflict

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strives to establish an ethical world by pressing for the concrete realization of the values which are ought objects for his conscience. FABER, *supra* note 5, at ch. VIII. On the general transition from transcedent religious commandments to the imperatives of practical reason and its effect upon theories of justice see CH. PERELMAN, THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT, II. (J. Petrie, trans. 1963).

20. *Cf. infra* pt. V where the inwardness of prudential judgment is developed.

21. For the distinction between divergent and convergent analysis. *See* E.F. SCHUMACHER, SMALL IS BEAUTIFUL: ECONOMICS AS IF PEOPLE MATTERED (1975).

of values. Generally, a choice must be made between them. An appeal to the values supported by the choice is a necessary, but not a sufficient or conclusive justification for the decision. The individual Justice must defend his choice by modes of reasoning and argumentation that respect the divergent character of the controversies. He must take into account the opposing scheme of values and explain how that opposition has been resolved in judgment. Interpreting the Constitution by analytical reasoning may be psychologically plausible. It is not responsive to the public dimension of authoritative adjudication.

III

The art of judging involves a recognition of the deep tensions between freedom and authority which are characteristic of life in a modern society. In a mature judgment, a choice must be made between competing values which reflect that tension. In Dworkin's thesis, rights if they exist, take precedence over most conceivable claims of public good. But, as Justice Brandeis observed, rights which are fundamental are not by their nature absolute.[22] Individual rights are of independent value, yet in a democratic society they are not realized in a vacuum. They must be reconciled with the legitimate authority of institutions of representative self government. The truly "hard" cases of constitutional law manifest the claims of political authority as they impinge upon individual liberty. Adjudication, at this level, requires a choice between the competing interests. When a choice is made, it must be justified by arguments which demonstrate that attention has been given to the opposition of values.

For constitutional decisions to be fully authoritative, they must be justified by dialectic, rather than analytic, reasoning. Dialectic reasoning assumes a basic agreement between speaker and audience with respect to the principles which bear upon the decision. Unlike the axioms used in analytical reasoning, the principles and values used in dialectic argument are not timeless, universal norms. They presuppose a moral community actually living in a given *milieu;* a community which comprehends the discordant principles to which reference is being made.

Dialectic reasoning is a form of external justification. It seeks to

22. Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring).

convince another, or others, of the *practical* truth of a given proposition. The reasoning must be logical and free of contradictions. But the weight of persuasion is not placed upon the inner consistency of the argument. As it addresses the contradictions between the opposing principles, the particular antagonism between liberty and order must be confronted and resolved.[23]

The purpose of dialectic reasoning is to win the approval of the audience to whom the arguments are addressed. In an opinion written to justify a constitutional decision, the individual Justice must convince his audience that the result is compatible with the shared conceptions of a life in a democratic society. Through such persuasion, the Court becomes accountable for the exercise of its power.

These constraints do not mean that judicial discretion is controlled by sociological pressures. The conception is not identical to the demeaning caricature drawn by Dworkin of a judge—Herbert—who sacrifices his independent judgment to majoritarian will. It does recognize, however, that the Constitution is a commitment to representative government as well as to individual liberty. The central idea is that in "hard" cases of constitutional law a responsible Justice, in exercising his discretion, must take into account important countervailing values which necessarily impinge upon individual freedom. And his written opinion must reflect his deliberative consideration of the dialectic clash of these fundamental interests.

The restraint upon discretion which we advocate in opposition to the liberal ideal can be illustrated by reference to some controversial cases. Consider, in the field of criminal procedure, *Stone v. Powell.*[24] In *Stone,* individuals were convicted of murder in separate state court proceedings and their convictions were affirmed upon appeal. In both cases, the prosecution relied upon evidence which the defendants claimed had been unlawfully obtained. The claims were rejected by the state courts. The convictions were collaterally attacked in the federal court. The lower federal courts overturned the convictions on the grounds that they had been obtained in violation of constitutional rights.

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23. CH. PERELMAN, *supra* note 19, at ch. X-XII. *Cf.* J.R. LUCAS, ON JUSTICE ch. 3 (1980).

24. 428 U.S. 465 (1976).

The Supreme Court reversed. The opinion of the Court, written by Justice Powell, reasoned that the exclusionary rule was a judicially created means of deterring illegal police behavior rather than a personal right. On balance, the Court concluded it should not be extended to collateral review. In the view of the majority, the costs of extending the rule were considerable, particularly because it diverted attention from ultimate questions of guilt or innocence.

Justice Brennan dissented in an opinion joined by Justice Marshall. In response to the Court's reasoning they advanced their own view of the ultimate issues:

> The Court . . . argues that habeas relief for non-'guilt-related' constitutional claims is not mandated because such claims do not affect the 'basic justice' of a defendant's detention, . . . this is presumably because the 'ultimate goal' of the criminal justice system is 'truth and justice' . . . . This denigration of constitutional guarantees and *constitutionally mandated procedures,* relegated by the Court to the status of mere utilitarian tools, must appall citizens taught to expect judicial respect and support for their consitutional rights. Even if punishment of the 'guilty' were society's highest value—and procedural safeguards denigrated to this end—in a constitution that a majority of the Members of this Court would prefer, that is not the ordering of priorities under the Constitution forged by the Framers, and this Court's sworn duty is to uphold that Constitution and not to frame its own.[25]

The dissent is a classical expression of a liberal conception of judicial review. There is a heroic view of the obligation to uphold the Bill of Rights against community pressures. The values asserted on behalf of society are contemptuously excluded as attention is focused upon a concern for individual rights. The dissent continues, in analytical fashion, to discover that the rights claimed have a constitutional basis and therefore "trump" all countervailing societal values.

The dissenting opinion reveals that proclivity to reduce problems of divergent values to questions of singular moral convergence which we have identified as a characteristic of liberal thought. There is also the tendency to justify as ethical imperatives the performance of duties imposed by the Framers of the Constitution. When the justificatory appeal is directed at a wider audience, however, the cogency of the argument is vulnerable.

Keeping in mind the underlying facts in *Stone v. Powell,* it sim-

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25. *Id.* at 523-24 (Brennan, J., dissenting).

ply is not true that citizens at large would be appalled by the majority decision. That is because it gives weight to values which the public legitimately expects judges to take into account in exercising the power of judicial review. Justice involves the punishment of wrongs as well as the vindication of rights. And *the administration of justice* includes within its objectives the accurate determination of guilt. These goals cannot justify a clear, serious infringement of individual liberty. Yet wise judges can recognize the bearing of societal values upon the exercise of their discretion without neglecting their duties to uphold the Bill of Rights.

The liberal model of discretion is objectionable because it avoids the difficulties of choosing between the individual and societal interests by its exclusive concentration upon rights. For Dworkin, claims of right, if they have constitutional basis, take precedence over most conceivable claims of public good. The preference is, in part, a reflection of the cumulative experience of judicial enforcement of the Bill of Rights. But it also is an attempt to read into the Constitution liberal conceptions of individual autonomy which are not rooted in our traditions.

Liberalism articulates a vision of human nature which understands the individual as a self-sufficient being. Postulating a radical antagonism between the individual and society, it refuses to recognize the bonds which exist between them. It assumes that personal legal entitlements can be articulated without reference to the individual's involvement in community. Dworkin's remark that, in a criminal prosecution, the individual is entitled to an acquittal if he is innocent but that society is not entitled to a conviction[26] if he is guilty is a cogent revelation of the liberal mind.

In the domain of civil liberties there are other examples of "hard" cases which go beyond the model proposed by Dworkin and suggest a more complex conception of judicial discretion. In difficult cases the weight of precedential development may require a decision in favor of individual rights. However, if the full import of divergent values within the institutional record is taken into account, a particular controversy may be more difficult to resolve.

The Skokie march cases are illustrative. Neo-Nazis claimed that they were entitled, by the Bill of Rights, to march in a village having a large Jewish population which included survivors of the Hol-

26. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 1, at 100.

ocaust. Recent Supreme Court precedents broadening the first amendment right of expression seemed to compel the conclusion that the march was sanctioned by the Constitution.[27] An earlier decision, *Beauharnais v. Illinois*[28] had upheld the power of the state to prohibit group libel. As Justices dissenting from a denial of certiorari in the Skokie case pointed out, *Beauharnais* was never clearly overruled.[29] If the societal values advanced by *Beauharnais* were taken into account there may have been greater doubt as to the rights of the Nazis to march. The earlier case had recognized a community interest in proscribing communications which promote racial hatred and strife. This objective, designed to promote mutual respect as well as social peace, is now in an international convention. In the Skokie controversy, a more careful reading of the whole precedential record may not have changed the ultimate outcome. It would have made greater demands upon the exercise of discretionary choice.[30] It is difficult to grasp such subtleties when a strict dichotomy is maintained between principles and policies. Fortunately, some Justices with liberal convictions will not allow such dogmatism to interfere with the exercise of their responsibilities.

The opinion of Justice Stevens in *Young v. American Mini Theatres*[31] is an example of such independence. An ordinance of the city of Detroit required the dispersal of motion picture theaters which exhibit sexually explicit "adult" movies. The district court upheld the ordinance. The Court of Appeals for the Sixth Circuit reversed. It held that the ordinance violated the first amendment. The Supreme Court granted certiorari. In an opinion by Justice Stevens, a shraply divided court held that the ordinance was constitutional. The rationale was that the ordinance was a valid regulation of the time, place, and manner of exhibiting the film rather than a censorship of content. There was also a recognition of the general interests which the ordinance sought to advance. While these interests had some empirical justifications—as in the preservation of property values—there were deeper reasons

27. Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978).

28. 343 U.S. 250 (1952).

29. Smith v. Collin, 439 U.S. 916 (1978) (Blackmun, J., dissenting).

30. *See generally*, W. Berns, The First Amendment and the Future of American Democracy 190-205 (1976); A. Bickel, The Morality of Consent 76-77 (1975).

31. 427 U.S. 50 (1976).

for sustaining the community regulation. In that context of urban renaissance, the ordinance reflected a striving to improve the quality of life. The policy behind the ordinance was one of cultural progress. Whether that social interest was incompatible with first amendment values is also a close question, as the various opinions make clear. But it is also clear that in *Young* more was at stake than the defense of individual liberty from the assault of mass prejudice. There was rather a divergence between the goals of the group and the aims of the individual. For the Justices to *resolve a controversy* the legitimate aims of the community, as well as those of individuals, had to be weighed in judgment.

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Liberalism maintains a separation of the individual from society to prevent threats to civil liberties. Dworkin's distinction between principles and policies is a means of reinforcing that resolve. It is designed to assure that individual rights will not be subordinated to a public good. Policy is for legislatures. Courts should be concerned with principles.

There are two evils to be avoided. Where fundamental moral rights of individuals are at stake, a great wrong is done if courts permit the infringement to occur. In a "hard" case it is also wrong, according to Dworkin, to choose a public good rather than to extend an individual right. Inflation of the right is the proper course; indeed, the only moral course, if one takes rights seriously. Otherwise, one inflicts an insult upon the individual. A sense of equality is also offended because the weaker members of the human community are entitled to the same concern and respect as the more powerful who gain control of the political process.[32]

The weight of a right lies in its power to withstand collective goals. In "hard" cases, where personal liberty conflicts with collective will, individual rights should be preferred. The Constitution expresses the preference; moral theory gives it deeper validity. Judges should give decisive weight to principles which appeal to our intuitive sense of right. And enforcement of principles is the fulfillment of a deontological obligation. We are ethically enjoined to respect the choices of the individual with regard to conceptions of the good.

In close cases, individual entitlement which have a constitutional

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32. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 1, at 198-99.

basis should be expanded. The justifications one can muster to support policy are not of comparable moral standing. The general interest has no intrinsic value. Legislative policy simply manifests the social pressure which the powerful bring to bear upon insubmissive minorities. For liberalism, ends are always the objectives of particular individuals. It refuses to acknowledge communal values. At worst, legislative policy reflects prejudice; at best, it is an aggregate of individual desires. To concede that groups, as such, have intelligible aims would jeopardize the central theme of liberal political and legal theory. The individual would cease to have primacy in social life. It would also threaten the psychology of liberalism.

Deference to policy suggests a return to the idea of objective good. Liberalism is committed to the subjectivity of values. If the good is relative to the wants of distinct individuals, it seems incoherent to allow the jural acts of a social group to be a source of superior value. Such a deferrence would countenance a revival of natural law. The natural law tradition maintains that an order of values exists which is external to the individual will. If such norms exist, they will be reflected in the general laws of a particular community. But democracy is agnostic towards ultimate ends. Its fundamental law cannot be interpreted with direct reference to transcendent norms. These objections to policy are appealing. They can be refuted only if one keeps in mind the temporal dimension of constitutional law. Whether the Justices of the Supreme Court should, in deciding constitutional cases, take social policy into account is a question which can be resolved without direct consideration of metaphysical perspectives.

Law is a phenomenon of culture. Policy is a part of that culture. As the teleological dimension of a legal system it involves a striving for general ends. Public policy refers to the objectives of society and government rather than to objective moral systems. As an index of group purposes it implicates the highest general values within an existing community rather than an external timeless ideal to which law ought to conform.

While not immune from politics, the broadest societal ends are not an aggregation of subjective desires. Nor are they adequately understood in terms of utilitarian calculations designed to maximize the satisfaction of interests. The policy objectives of a society reflect its efforts to create a civilized existence. Since the work of

Roscoe Pound the identity of policy objectives has been a major task of sociological jurisprudence.[33] The broadest objectives: security of persons and institutions, conservation of resources, protection of general morals, the pursuit of economic, political and cultural progress; these ends, together with the interest in the individual life, provide the juridical elements of a civilization. These objectives appear in constitutional litigation. Conscientious judges, seeking to reach a wise decision, cannot avoid their influence.

Sociological Jurisprudence enhances our understanding of the breadth of constitutional adjudication. But sociology cannot be a standard of judgment. The valuation of the individual life as a social interest is objectionable and it is to the credit of liberalism that it insists upon the unique worth and dignity of each person. Further, the responsibilities imposed upon judges called upon to resolve constitutional controversies transcend sociological considerations. The bearing of social values upon constitutional interpretation can be recognized without making them a measure of judical discretion.

In constitutional adjudication the protection of individual rights is a paramount objective. The justices must not legitimize public order values which cannot be reconciled with the principles of liberty protected by the Constitution. Constitutional litigation involves the administration of justice as well as the protection of rights, but attention to broader purposes does not require judicial submission to social realities. Rather, it points to the range of deliberation which is required in order to choose among conflicting interests. And the obligation to adjudicate can not be reduced to a balancing of interests for purposes of achieving social harmony.

There is a deep, constant tension between liberty and order. The resolution of conflicts between such divergent values is not amenable to percise delineation. Any calculation or maximization of interests obscures the indeterminancy of complex constitutional controversies. The significance of judicial discretion cannot be grasped by theories of adjudication which either reflect an *a priori* preference for individualism or an advanced commitment to an objective of social equilibrium. In "hard" constitutional cases judicial discretion is not bounded by either law or social morality. It does not

33. R. POUND, III JURISPRUDENCE §§ 93-99 (1959).

follow, however, that it must be arbitrary.

IV

The activism of the Warren Court reopened public debate over the limits of the power of the Supreme Court to interpret and enforce the Constitution.[34] The Warren Court had penetrated more deeply than its predecesors into the institutional purposes of judicial review. Accentuating the Bill of Rights, and broad values of fairness and equality, it renewed the responsibility of the Court to protect the individual from the arbitrary power of state and society. This orientation, which emphasizes the worth and dignity of the individual, coincides with the dominant ideals of liberalism. Professor Dworkin's theory of judicial discretion can be understood as an attempt to give a philosophical justification to this view of constitutional adjudication.

In a case which allows for discretion, the liberal model advises a judge to concentrate his energies upon the issue of individual rights. If, by self-conscious reflection, he determines that the entitlement claim has constitutional status, rights "trump." The personal interest prevails over most conceivable assertions of social value and public good. The Herculean decision is mandated by the judge's duties to uphold the Constitution and to show equal respect to each member of the community. The Rights Thesis attempts to interpret an institutional function in a manner that is most advantageous to individual autonomy. The attempt is unsuccessful primarily because it strives to transpose principles of liberal political and psychological theory into a *milieu* which is unreceptive to its absolute claims.

Dworkin is correct in asserting that in a democracy there is an expectation that courts will speak to claims of right. But in constitutional litigation there is the further expectation that they will also recognize broader values and respect the processes of repre-

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34. *See, e.g.*, A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); C. BLACK, THE OCCASIONS OF JUSTICE (1963); A. COX, THE WARREN COURT: CONSTITUTIONAL DECISIONS AS AN INSTRUMENT OF REFORM (1968); L. HAND, THE BILL OF RIGHTS (1958); S. HOOK, THE PARADOXES OF FREEDOM (1962); McCloskey, *Reflections on the Warren Court*, 51 VA. L. REV. 1229 (1965); Murphy, *Democratic Theory*, *supra* note 9; E. ROSTOW, *supra* note 12; H. WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW (1961).

sentative government.[35] There is an institutional relationship between Court and People which liberal theory tends to avoid. Justices possess no inherent right to be obeyed. Constitutional interpretation is legitimated by modes of persuasion which surpass the liberal model of self-justifying analytical reasoning. The deepest flaw, however, of the Rights Thesis is that it does not grasp the complexities of choice inherent in the exercise of discretion in "hard" cases of constitutional litigation.

A "hard" case engages judicial discretion because relevant legal rules and precedents are not of themselves decisive. At that point, according to the liberal ideal, judicial attention should be directed towards ascertaining the constitutional status of claimed rights. The model does not include values other than personal entitlements within the matrix of decision. But, where a controversy cannot be resolved by reference to existing rules, the conflict is intractable. There are clashing divergent values at the heart of the dispute. In these circumstances to exercise discretion is to make a choice among the competing interests. The core idea is that of selection between discordant values. A Justice with such options has a personal responsibility to select among several possible courses of action. He is not bound to decide the controversy one way or another.

The primary objection to Dworkin's approach to constitutional litigation is that it does not fully account for the exercise of discretion. The Rights Thesis conceals the magnitude of the controversy to be resolved because it restricts responsibility to a decision whether the Constitution provides the right claimed.[36] To exercise choice impartially between competing values, however, a judge must acknowledge the presence of, and give fair recognition to, the competing interests. Such recognition cannot be expressed in a way which prejudices the outcome.

There is an historical preference for civil liberties in constitutional experience. But it does not justify a Herculean use of discretion in truly "hard" cases. At the opposite extreme, the recognition of the policy dimensions of a controversy does not legitimize a balancing of interests. In such cases discretion is unbounded. Individ-

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35. J.H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

36. *Cf.* N. MACCORMICK, *supra* note 11, at ch. IX; Greenawalt, *Policy, Rights, and Judicial Decision*, 11 GA. L. REV. 991 (1977); Greenawalt, *Discretion and Judicial Decision: The Elusive Quest For the Fetters that Bind Judges*, 75 COLUM. L. REV. 359 (1975).

ual Justices are free to render the decision they choose. When a "hard" case of constitutional law engages irreconcilable values, the controversy cannot in a strict sense, be resolved in a principled manner. A choice between the divergent interests cannot be made with reference to a broader, more comprehensive principle.

A Justice faced with a conflict between individualistic and social values can decide in favor of the social interest on the assumption that such deference best accords with the limited role of the Court in the overall plan of government. Justice Frankfurter's approach to legislation is illustrative. He would defer to policy if the law being constitutionally challenged was one which rational legislators could have reasonably enacted.[37] Such deference is objectionable. It does not adequately consider the responsibilities of a Justice bound to uphold the Bill of Rights. It also fails to account for the inner tensions which are experienced during the course of adjudication.

Reflection upon a pending controversy may change judicial perception of the value of the individual right affected by a law challenged as unconstitutional. Briefs and argument may reveal a deeper harm than first perceived. A greater burden of justification will then be imposed upon the legislature to justify the infringement. If countervailing considerations are not convincing, the Justice may feel bound to invalidate the challenged policy. A Justice deciding a "hard" case in this manner can justify his choice by appealing to the deepest constitutional ideals. Passing beyond the bound of text and precedent he may try to give effect to our deepest values.[38]

In such cases, it may appear that the Justices inevitably fall back upon their own personal conceptions of right. A conscientious Justice may be convinced that principles of liberty, dignity, or equality protected by the Constitution have been infringed by a challenged policy. He may also conclude that his own intuitions are not widely or publicly shared. There may be ambiguities in the public conscience, or lack of a general consensus on fundamental values. More likely, the value, in its broadest meaning, may be generally recognized but not with respect to the specific question before the Court. Neither legal nor social norms are determinative.

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37. F. FRANKFURTER, OF LAW AND LIFE (1965).
38. Grey, *Do We Have An Unwritten Constitution?* 27 STAN. L. REV. 703, 706 (1975).

In such cases, we seem to be inexorably drawn towards an arbitrary judicial discretion.

Where conscience dictates a decision which has no support in public morality, the intrusion of the subjective values of the judge seems inevitable. The burden of adjudication compels the Justice to make his view of the democratic ethos the measure of decision. The responsibility to decide, in these circumstances, implicates his own moral judgment. This conception of free, discretionary choice follows upon collapse of the liberal thesis that, in "hard" cases, discretion is bounded by law.[39] This alternative conception parallels, in some respect, Dworkin's thesis. It highlights the bearing of the Justice's personal understanding of fundamental principles. But it avoids the inflation of individual rights which is characteristic of the liberal conception of adjudication. The conscientious Justice is now perceived as addressing the divergent values in their full antagonism, yet honestly deciding that there is an impermissible infringement upon rights which the Constitution was designed to secure. His own valuation of the right in issue has tipped the scales against the impinging policies.

Without some qualification at this point, the alternative model of discretion is practically indistinguishable from the liberal ideal. A Justice would seem to be setting his own understanding of the democratic ethos against the conception of the legislature. It is difficult to differentiate this approach from a conception of the Supreme Court in which the Justices are desirous of changing the law according to their own convictions. To employ the criticism previously directed against liberalism, it may be said that judges exercising such indeterminate discretion are using their power to impose their own personal standards upon the public under the guise of constitutional interpretation.

We have established that in constitutional cases judicial discretion is not exclusively directed towards a determination of rights. Nor does it terminate in a balancing of interests. The Justices of the Supreme Court are not bound to decide a "hard" case in any determinable way. It is therefore, tempting to assume that the only remaining alternative is for discretion to culminate in a personal

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39. *Cf.* Jaffe, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 HARV. L. REV. 986 (1967). *See also*, Griswold, *The Supreme Court, 1959 Term—Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81 (1960).

value judgment. There are, undoubtedly, instances in which an individual Justice must make his own perception of values decisive, even if his determination will diverge from that prevalent in the community. But such instances are exceptional. The complexities of adjudication are such that this alternative cannot plausibly serve as a general account of judicial discretion in constitutional cases.

In major constitutional controversies there are myriad jural factors which responsible Justices must consider before making a judgment. In cases involving freedom of expression, for example, the presence or absence of prior censorship, direct or indirect regulation, criminal punishment or injunctive relief—these and related variables bear upon, and influence, the ultimate judgment.[40] At times there are broader contingencies. The difficulty of delineating circumstances in which federal injunctive relief can appropriately be applied to pending state actions reflects nuances of which a conscientious jurist must be aware. Principles of self-restraint developed to assure that judicial power is only applied to justiciable controversies may be applicable[41] and principlies of statutory interpretation may impose a prosaic restraint.[42] At certain junctures, general facts about the social structure and dynamics of the nation may have legitimate relevance.[43] These and comparable examples

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40. See the survey in Smith v. United States, 431 U.S. 291 (1977) (Stevens, J., dissenting).

41. *Compare* Younger v. Harris, 401 U.S. 37 (1971) *with* Dombrowski v. Pfister, 380 U.S. 479 (1965) *and* Hicks v. Miranda, 422 U.S. 332 (1975). *See also* Comment, *The Younger Abstention Doctrine: Bleak Prospects for Federal Intervention in Pending State Proceedings*, 19 DUQ. L. REV. 313 (1981).

42. Principles of statutory interpretation reflect a deeper tension between the judicial branches of government. This is particularly true when deference to the legislature will impair the Court's ability to exercise its inherent remedial powers. *Compare* Boys Market Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970) *with* Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962). For a more recent example see City of Milwaukee v. Illinois & Michigan, 451 U.S. 304 (1981).

More difficult problems have arisen in connection with judicial interpretation of civil rights statutes. The desire to affirm rights may compel judges to "discover" an advantageous legislative purpose under doubtful circumstances. *Compare* Jones v. Alfred Mayer Co., 392 U.S. 409 (1968) *with* Runyon v. McCrary, 427 U.S. 160, 189 (1960) (Stevens, J., concurring). *See also* United Steel Workers v. Weber, 443 U.S. 193, 219 (1979) (Rehnquist, J., dissenting); County of Washington v. Gunther, 452 U.S. 161 (1981). Professor Dworkin had addressed these issues. *See How to Read the Civil Rights Acts*, N.Y. Rev. of Books, Dec. 20, 1979, at 37.

43. Some of the opinions of Justice Powell are a contemporary expression of this phenomenon, which has its roots in the famous "Brandeis Brief." *See, e.g.*, Regents of the Uni-

of perplexity suggest the presence of deeper levels in constitutional litigation. In turn, they affect our understanding of the degrees and range of judicial discretion.

Fuller comprehension reveals an indeterminate quality to "hard" cases. In constitutional litigation, as we have seen, a controversy may involve an implacable opposition between opposing principles. The exercise of discretion to resolve such conflicts requires a choice between competing values if not the interposition of the individual judge's own sense of right and wrong. More often, however, there is a quality of inconclusiveness which makes prevailing models of adjudication inadequate as explanations of the responsibilities implicit in the exercise of discretion.

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In the 78th Federalist, Hamilton called for an independent judiciary which would exercise judgment rather than impose its own will. This wider sense of responsibility is a measure of discretion. It suggests that constitutional adjudication includes, but surpasses, a determination of rights. It cannot be controlled by social norms. And it is an authority which must be distinguished from a volitional model of discretion in which the judge's own values become the decisive element of decision.

The capital punishment cases, considered in the aggregate, provide a unique opportunity to consider some of the broader notions of judgment which correspond with the indefiniteness of constitutional litigation. *Gregg v. Georgia*[44] was a "hard" case. There the Justices of the Supreme Court had to face directly the question whether the imposition of the death penalty by the states could be reconciled with constitutional prohibitions against cruel and unusual punishment. The Court upheld the Georgia law and the imposition of the death penalty upon the accused. The judgment of the Court was expressed in the opinion of Justice Stewart. From the perspective of Dworkin's thesis, Stewart's opinion could be characterized, pejoratively, as that of the inferior type of judicial

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versity of California v. Bakke, 438 U.S. 265 (1978); Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 482 (1979) (Powell, J., dissenting). The degree to which general social facts are legimate sources of decision is, of course, controversial. *See* Ely, *supra* note 14, at 5, 12-14. Here I make only the modest claim that social realities may be relevant in particular context and I refer to Justice Powell's opinions for illustrative purposes.

44. 428 U.S. 153 (1976). Furman v. Georgia, 408 U.S. 238 (1972) held the death penalty statutes were arbitrarily applied.

personality: "Herbert"; a judge who, when faced with a "hard" case, defers to the community moral standard. By contrast, the dissenting opinions of Justices Brennan and Marshall could be described as "Herculean." While the opinion for the Court recognizes the communal demand for retribution expressed in legislative policy, the dissenting Justices frame the issue in terms of human dignity. They rest their choice upon their own conception of the human person.[45]

The decision upholding the constitutionality of the death penalty falls short of the liberal standard of judicial action. It is not, however, indefensible. The opinion of Justice Stewart evidences an awareness of the complexity of the controversy and the reality of the opposition between conflicting basic principles. There is a recognition that the litigation involves more than the question whether the death penalty can be reconciled with the values of human dignity protected by the eighth amendment. Fair consideration is given to competing considerations of federalism and retributive justice. Further, the deferences which the opinion accords to communal values and state authority is not decisive. They do not determine the judgment. Justice Stewart, and those joining the majority, exercised an independent discretionary judgment. They made a careful assessment of the issue of proportionality of punishment and a due process review of the actual conviction and sentence of death.

The opinion for the Court in *Gregg* evidences a sensitivity to the divergence of values which we have argued is an intergral part of a major constitutional controversy. Because the judgment takes account of the basic antagonism, the opinion written to justify the decision has a more authoritative quality that if it had avoided the complexity. The reasoning is persuasive because it is dialectic. It demonstrates that competing values are impartially evaluated and the pressure of the divergence is manifest in the attention with which the opinion addresses the opposing fundamental interests of the individual and the community.

To defend the judgment of the Court in *Gregg v. Georgia* is not, however, to imply full agreement with the result. In terms of the moral questions raised by the imposition of the death penalty, the

45. 428 U.S. 153, 227 (1976) (Brennan, J., dissenting). *Id.* at 231 (Marshall, J., dissenting).

majority could have tipped the balance in favor of the convicted felon. Evolving standards of decency reflect an increasing awareness of the value of human dignity. And the views of church leaders are, in significant measure, moving towards a condemnation of the practice.[46] Even if changes in moral opinion had not crystalized, a decision of unconstitutionality might be based upon the alternative model of discretion we have outlined. Without a general consensus, it is arguable that the individual Justice is bound to make a reasoned judgment as to the requirements of the democratic *ethos*. But neither the majority decision upholding the death penalty, the Herculean judgment as to human dignity, nor the alternative decision based upon personal moral conviction, exhausts the possibilities of choice. Because of the profound moral, social, and institutional issues inherent in this type of controversy, the potentials of reflective judgment are not fully achieved.

A Justice of the Supreme Court may be conscientiously convinced that the eighth amendment does not, of itself, bar capital punishment. But, as the cases subsequent to *Gregg v. Georgia* have demonstrated, this does not end his responsibilities. As one who exercises a power of judicial review, he must also assure that such punishment is not arbitrarily applied. In *Furman v. Georgia*,[47] decided before *Gregg*, it was held that the discretion of sentencing bodies was not properly guided. In the post-*Gregg* era, a majority of the Court has sought to apply general principles of procedural fairness to the capital punishment cases. The results are not entirely satisfactory.

For the Justices of the Supreme Court to properly exercise judgment they must employ a discretion adequate to the responsibility imposed upon them by the Constitution and the demands of appellate adjudication. Such a discretion cannot be governed by *a priori* finality, either as in Dworkin's Rights Thesis, or standards of utilitarian, instrumentalist or social balance. It must be responsive not only to the complexity, but also the inconclusive nature of "hard" cases of constitutional law. It is this latter indeterminate quality which is characteristic of major constitutional controversies.

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46. *See* U.S. Catholic Bishops, *Statement on Capital Punishment*, 10 ORIGINS 373 (1980). A Methodist view appears in 5 E/SA 17-48 (1977). *See also* Pugsley, *Reflections on January 17, 1977*, 37 CHRISTIANITY & CRISIS 15 (1977).

47. 408 U.S. 238 (1972).

The cases following *Gregg v. Georgia*, mark the attempts by the Court to reconcile its legitimization of the death penalty with its obligations to due process and the proper administration of justice. Issues ranging from proportionality[48] to fifth amendment safeguards[49] have been briefed, argued, and decided by the Court. While the extent of this development is uncertain, the ultimate question of constitutionality persists. Justice White has expressed his concern that liberalization of sentencing procedures may have brought the Court to a position which cannot be reconciled with *Furman's* condemnation of unfettered discretion.[50] More recently, the issues raised by Justice Rehnquist concerning expedition of the process of review[51] illustrate the difficulties which the Court experiences in its efforts to constantly assure that justice is done.

In cases of major constitutional importance, an initial decision may be followed by subsequent cases which place serious strain upon its viability. Not only is the range of the basic precedent called into question; later litigation may also challenge the wisdom of the fundamental judgment. A Justice of the Supreme Court may be convinced that capital punishment is not inherently incompatible with human dignity. However, upon reflection, he might also realize that the actual imposition of the penalty seriously threatens individual rights, and that the appellate process cannot assure their protection. Such consideration may lead him to conclude that the practice must be held to be unconstitutional.

These observations are not made to recommend an actual outcome, but rather to illustrate a general proposition concerning the nature of judicial discretion in "hard" cases of constitutional law.[52] Such cases, at least in the aggregate, are marked by qualities of uncertainty which makes their resolution refractory to exact standards of judgment. These uncertainties must be reflected in mod-

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48. Coker v. Georgia, 433 U.S. 584 (1977).

49. *E.g.*, Bullington v. Missouri, 451 U.S. 430 (1981). Estelle v. Smith, 451 U.S. 451 (1981). *See also* Gardner v. Florida, 430 U.S. 349 (1977).

50. Lockett v. Ohio, 438 U.S. 586, 621 (1978) (White, J., concurring in part, dissenting in part).

51. *Compare* Estelle v. Jurek, 450 U.S. 1014 (1981) (Rehnquist, J., dissenting) *with* Coleman v. Balkcom, 451 U.S. 949 (1981) (Stevens, J., concurring). *See also* Spinkellink v. Wainwright, 442 U.S. 1301 (1979).

52. The difficulties which the Court has experienced balancing defamation claims against first amendment principles is a comparable example. *See* Herbert v. Lando, 441 U.S. 153 (1979).

els of discretion which seek to measure the legitimate authority of the Supreme Court. *The Justices possess a full discretion to decide what, under the circumstances, should be the law. This is not the same as the power to make judgments according to law.*

V

There are important continuities, as well as differences, between our view of discretion and that of Dworkin. There is a common insistence upon the ultimate personal responsibility of the individual Justice whenever existing legal sources are not, of themselves, dispositive. We have tried to demonstrate that Dworkin is wrong in seeking to narrow choice to a determination of rights. In response to a "hard" case a Justice must recognize the divergent clash of values which has provoked the constitutional controversy. But our disagreement runs deeper. It touches the complexity of constitutional cases and the responsibility of the Justices who must resolve them.

For "hard" cases of constitutional law to be fairly adjudicated full attention must be given to the basic antagonism which underlies the controversy. Such disputes also have an inherent complexity. Because they are inconclusive, their proper resolution is uncertain. There is an intricate texture to "hard" cases and the discretionary acts by which they are resolved have a comparable indeterminateness.

The assertion that at certain critical points in the judicial process judgment is not controlled by law is unacceptable to jurists of either a liberal or conservative persuasion. When uncontrolled discretion is perceived to exist our sense of limited government is offended. *Quis custodiet ipsos custodes?* But the fear of judicial absolutism cannot be moderated by denying the realities. The real task is to explicate the moral qualities of an open, indeterminate choice.

The uncertainties surrounding complex cases of constitutional law may lead to decisions guided by personal whim or caprice. Against such a prospect, one can interpose institutional and political constraints. The general expectation is that the Justices will exercise their authority in a manner consistent with the trust they have assumed. Authoritative links between the Court and People can be established in the colloquy of the written opinion. This unique form of persuasion sets some limits on the "sovereign pre-

rogative of choice." Collegiality and professional respect also restrain the exercise of supreme judicial power. However, in the final analysis, the moral character of the individual Justice is the decisive measure of discretion.

Upon finding existing law uncertain, Dworkin's Hercules moves towards the realm of political morality. The situation calls for an exercise of discretion which terminates in a decision concerning institutional rights. By a process of self-conscious reasoning he must seek to discern the ultimate principles which sustain the Constitution. The judge must develop a theory of government which best explains the value of the contested claim to liberty, human dignity, or equal respect. Different judges, as they develop their own conceptions, may reach different conclusions. But each must believe that the theory he has devised is the best explanation of the conflicting precedents. The Justice who exercises a Herculean discretion also believes that a uniquely correct solution for the controversy can be derived from the theory he has constructed.[53] If the understanding of constitutional theory confirms the claimed entitlement, rights "trump."

The immediate objection is that complex constitutional litigation cannot be reduced to an issue of rights. The broader conflict between individual and society, as well as jural uncertainties, call for a more sophisticated model of discretionary judgment.[54] We have employed concrete examples to illustrate our disagreement. The deeper weakness of the liberal model can only be fully perceived at the level of ethical theory.

The Rights Thesis is premised on the idea that constitutional claims raise moral issues. To adjudicate is to make a judgment which should conform to accepted criteria of moral reasoning. To make such a judgment requires a certain separation or distancing of the decision maker from the actual controversy which must be resolved. The Herculean mind turns from the concrete antagonism and reasons back to some single conception which will resolve the intractable contradictions which inher in the intricacies of litigation. The juridicial ascension advocated by Dworkin reflects a theory of action characteristic of neo-Kantian ethical reasoning. It

53. *See* Dworkin, *No Right Answers?* in LAW, MORALITY, AND SOCIETY 58 (1977); *Symposium,* 11 GA. L. REV. (1977).

54. Greenawalt, *Policy, Rights, and Judicial Decision,* 11 GA. L. REV. 991 (1977).

arose in response to a problem of modern ethics which has particular relevance to the problematic exercise of judicial discretion.

Qualities of right and justice are features of moral discourse. In moral judgments their purpose is to guide choices. But evaluative terms cannot have a descriptive meaning. They cannot be identified with anything said to have moral qualities. For the Emotivists, evaluations are simply expressions of subjective emotional preferences or aversions. Ethical judgments are, strictly speaking, meaningless. They are effusions of sentiment rather than rational utterances.[55]

Moral Prescriptivism is a response to Emotivism. It identifies ought statements as a characteristic of moral judgments. Normative utterances are imperative. They prescribe a course of action. Their primary purpose is to commend, rather than describe, the object of the valuative statement. They call attention to a standard which is invoked as a principle of choice. It is the reference to standards or principles which gives the action a rational aspect. One is able to give reasons for moral judgments. And the rational, unemotional quality of moral statements increases as judgments are explicated with reference to higher, universal, norms. It is this capacity for universalization which imbues moral choices with ethical significance.[56]

There are important parallels between these developments in moral philosophy and the concerns in legal philosophy over the nature and limits of judicial power. Early in this century, the inevitability of judicial choice had been accepted. It was gradually assumed that exercise of the power was essentially an emotional experience. A federal district judge announced that his decisions were primarily impressionistic and subjective.[57] The beginnings of Legal Realism brought increased attention to the role of personality in judicial administration. For the Realists, the biases and antipathies of the individual judge were the crucial factor in judge-made law. Legal rules and principles were "pseudo-authoritarian pegs" upon which to hang conclusions reached by irrational means.

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55. A.J. AYER, LANGUAGE, TRUTH, AND LOGIC (2d ed. 1962). *See also* C.L. STEVENSON, FACTS AND VALUES: STUDIES IN ETHICAL ANALYSIS (1963).

56. R.M. HARE, THE LANGUAGE OF MORALS (1952). For a critical appraisal, see McInerny, *The Poverty of Prescriptivism*, 17 AM. J. JURIS. 80 (1972).

57. Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929).

The Legal Realists refused to attach meaning to law beyond the individualistic decisions of judges. Their description of the judicial process was similar to the Emotivist claim that moral judgments express no more than personal approval or disapproval of factual situations. And the reaction to the charge of meaninglessness in the jurisprudential realm was comparable to what was occurring in the related discipline of ethics. Prescriptivism affirmed the possibility of giving reasons for moral decisions. If choices were based upon normative principles, ethical discourse could be raised above pure emotion. Scholars reacting to Legal Realism insisted that received ideals were as important as the subjective features of judicial behavior. Pound argued that it was impossible to divorce what lawmakers did from what they felt they ought to do.[58]

The effort to rehabilitate judicial discretion on terms of rational criteria has been applied to evaluations of the work of the Supreme Court. The Reasoned Elaboration mode of criticism, in its demand for rationally articulated grounds of decisions, exemplifies this approach. The Wechslerian call for principled decision making is a further expression of the same tendency. Dworkin's Herculean model is best understood by direct reference to these developments in ethical and legal theory which are designed to improve the quality of judgments.

The use of judicial discretion advocated by Dworkin is similar to the universalizing method of Moral Prescriptivism. Legal as well as ethical, judgments are justified by the degree of abstract generalization they reflect. In "hard" cases, the ideal judge corrects his intuitions by reference to higher, and more universal principles. Infinite regress is avoided when the individual Justice then constructs in his own mind a theory of political morality which best explains the uncertain legal problem presented for decision. If the ideal normative construct confirms the claimed right, discretion is then completed in judgment.[59]

Earlier, we criticized the Herculean model as inadequate when measured by standards of public accountability. The analytical

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58. Pound, *The Call For A Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931). For this general summary I draw upon G.E. WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT ch. 2 (1978).

59. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 1, at 115-213. *See also* H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969 (1977); N. MACCORMICK, *supra* note 11, at ch. X.

reasoning it employs admittedly lends coherence and consistency to patterns of decisions. However, as we pointed out, the divergent character of such controversies requires dialectic reasoning to justify their adjudication. Our present criticism questions whether the Herculean model, as a form of principled decision making, is suitable for the rendering of practical judicial judgments.

Adherence to principle is a necessary aspect of sound judicial administration. It prevents particularistic judgments, promotes coherence, and assures formal equality. But while necessary it is not sufficient. It does not reach the deeper complexities of "hard" cases. Here principles conflict in circumstances of great uncertainty. Such cases cannot be resolved by appeal to a higher, more comprehensive principle. Nor is the movement from abstract universalization to concrete judgment—as advocated in a Herculean judgment—an adequate means for dealing with the complex, divergent, and practical nature of the issues presented to the Justices of the Court.

Ethical Prescriptivism, whether used in ethical or legal discourse, is an imperfect guide to moral decision. It does not respect the indeterminant and contingent nature of practical life. The range of practical action is unlimited and choices must be made among a multiplicity and variety of circumstances. A theory of good judgment must be responsive to these realities. Reliance upon general norms is indispensible. But the inflexibility of universal principles makes them unsuitable as a complete guide to action. A further specification is required. There is a need for the explication of a moral habit which develops the ability to know what is to be done in a singular situation. This is prudence, or practical wisdom.[60]

As a virtue of practical action, prudence makes general moral ends determinate. It is a mode of knowledge of the practical, rather than the speculative order. It also makes reason the measure of will. As Llewellyn observed, judges experience a felt need to do justice. Yet, as a moral disposition, the desire to achieve justice and right is incomplete. It needs to be perfected by an operative reason which can discern the requirements of action in a concrete

60. O'Neill, *Prudence, the Incommunicable Wisdom, in* ESSAYS IN THOMISM 187 (1942); J. DABIN, *General Theory of Law* in LEGAL PHILOSOPHIES OF LASK, RADBRUCH AND DABIN (K. Wilk, trans. 1950); Murphy, *Justice and Judgment,* 23 BUFFALO L. REV. 565 (1974); Mulvaney, *Political Wisdom,* 1973 MEDIEVAL STUDIES 294.

situation. Tempering immediate inclinations, prudence seeks to reconcile opposites and harmonize discordant values within the limits of the possible. Characterized by balance, circumspection, and foresight, it is a form of considered judgment. As such, it is applicable to the problem of judicial discretion.

Juris-prudence, or wise law making, fills the gaps which arise when judges must exercise the power of adjudication under circumstances in which judgment is not controlled by existing law. It has particular application to the "hard" cases of constitutional law which, because they are inconclusive, require the exercise of an open discretion by the Justices of the Supreme Court. As a measure of judgment, prudence upholds freedom of decisional choice while preventing the arbitrary use of absolute power. It counsels restraint while forbidding inordinate caution which would condone injustice. And it supports judicial independence. Prudential judgment is not controlled by antecedent principles or sociological standards. It is, in its own way, as indeterminate as the jural problem that it must resolve.

The proper resolution of a constitutional controversy is uncertain and the content of the decision to be rendered is not predetermined. Existing rules do not resolve the conflict. And *what the rule shall be* cannot be discovered as an abstract speculative truth or ascertained through an imaginative construct of ideal political theory. The Justice in a "hard" case has a burden of choice. He must make a practical discernment of what is the just resolution of the controversy after all of its elements are fairly considered. Such a choice is free but not arbitrary. If based upon the totality of the case presented for adjudication, it has a reasonable and objective foundation.[61]

Such a discretion, while attentive to contingencies, is guided by principles. Those of judicial method, concern for institutional competence, justiciability, standing, and the weight of precedential history, are real, even if self-imposed restraints. They have continuous relevance and place genuine boundaries to the use of supreme judicial power. Rational qualities of consistency and coherence, expressed as principles of formal justice, also impose constraint.[62] And prudential judgment is subject to the substantive principles of

61. *See* J. DABIN, *supra* note 60.
62. N. MACCORMICK, *supra* note 11.

constitutional law.

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The assumption that, in constitutional cases, the Justices discern and apply the will of the people makes supreme judicial power compatible with the ideal of popular sovereignty. Insofar as such litigation raises questions of ultimate principle, the Supreme Court has an institutional responsibility to discover the basic values and ensuring standards of constitutional law and apply them in resolving these controversies. "Reason, not Power"[63] is expected in peformance of the supreme judicial office. It is hoped that the Justices, disengaged from the passions of politics, will separate the ultimate moral principles of society from prevailing community prejudices.

The pursuit of principles having any societal form seems inconsistent with judicial review which is designed to protect the individual from the majority and its values. It may also be incompatible with judicial independence. When a "Herbert" defers to contemporary social morality embodied in legislation he abdicates his authority. The Justices' attempt to find society's set of ultimate moral principles seems to involve a more profound relinquishment of responsibility. It is particularly objectionable when decisional authority is given an instrumentalist gloss. Social realities cannot be allowed to take precedence over constitutional duties. From these perspectives the Justices, in devising rules for decision, must determine for themselves the present meaning of political principles previously adopted by the nation and embodied in the constitutional text.[64] But the duty to uphold the Constitution can preclude all reference to social values only if one assumes that the document reflects a purely individualistic social contract. Such an assumption is, as a matter of history, false. The Constitution is the expression of a whole people acting as a body politic. Any reference to basic values must take into acount their public as well as their personal nature.[65]

The premises of constitutional law are antecedent to adjudication and impose upon the Justices the unique responsibility to ascertain the contemporary meaning of enduring principles. The

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63. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 247 (1973).

64. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 252-53 (1972).

65. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

scope of the principles, and the means by which they are to be discovered, still must be determined. The liberal solution is to limit principles to rights. But principles cannot be so restricted, nor can they be rigorously distinguished from policies. Principles and policies often interlock since both embrace general norms which may, under varying circumstances, be thought to be desirable.[66] From a liberal standpoint it is advantageous to label a general objective "policy" in order to prevent it from having any decisional weight. But the objective—for example, punishment of wrongdoers—may properly be called a principle. And, as we have seen, it is the divergence of value, the opposition between those upholding a social interest and those affirming individual right, which characterizes the most difficult constitutional case.[67]

The principles which are most fundamental may be those which determine individual rights. But the ascertainment of such principles does not occur in isolation, at least if they are not to be identified with the personal convictions of an individual Justice. The discovery of principles is to come through the "painful intellectual effort of judgment"[68] and the ideal of understanding constantly conflicts with emotional preference. The search for ultimate principles, seen as an aspect of prudential judgment, is measured by reflective reason pursued in a collegial institutional setting.

When basic values become relevant to constitutional litigation it is incumbent upon the Justices to bring to consciousness the moral principles of community life which ultimately sustain the Constitution. The Justices are the agents of this development. Fundamental ideals are unwritten, indefinite, and unorganized. They run deeper than the preferences of contemporary society. And they are beyond the comprehension of isolated individuals. They can be only understood, in terms of practical wisdom, by thought, reflection, and experience. At critical points, when the Justices must decide "hard" cases of constitutional law, the discovery and articulation of such principles is essential to the exercise of discretion.[69]

To discern the meaning beyond the written constitution is a dif-

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66. Here I follow the analysis in N. MacCormick, *supra* note 11, at ch. IX.

67. *See supra* pt. II and accompanying notes.

68. Griswold, *supra* note 39, at 93.

69. *Compare* Grey, *Do We Have an Unwritten Constitution?* 27 Stan. L. Rev. 703 (1975) *with* J.C. Murray, We Hold These Truths: Catholic Reflection on the American Proposition ch. 4 (1960).

ficult, if inevitable, judicial task. It involves an understanding of the limits of power in the most complex of human relationships and antagonisms which can arise in a pluralistic, democratic society. One must take account of the fundamental rights whose security the document was designed to secure and the institutional developments which accompany the progress of civilization.

Each individual Justice must make up his or her own mind as to the content and scope of the principles of ordered liberty which sustain the Constitution. The process is radically personal. When viewed as an expression of virtue, it is not arbitrary. The exact perception of basic values is incommunicable. It is dependent upon the unique personality of the one having the responsibility of judgment. But there is a measure of accountability. In the colloquy of the written opinion the Justices seek to persuade the public that their interpretation of the consensus is legitimate. Here the vision of the seer is tested by the wisdom of the community.