In recent years there has been a welcome increase in the attention paid by behavioral scientists to the legal system. A great deal of it—like much jurisprudential thought—has been process oriented. Theorists have been concerned with the way in which decisions are made—in whether precedent, race, education, social background, personality, or some other factor predisposes a judge toward one side or another in particular controversies. Scholars have, of course, been extremely interested in the output of legal institutions, but they have often limited their definition of output to results or decisions and have not concerned themselves with another kind of formal output—rules of law.

A decision (or result) is a unique application of preexisting rule. A rule is a general statement capable (or at least apparently capable) of application to more than one concrete situation. Rules may be as important a product of legal institutions as decisions. A great number of institutions make up the legal system (including courts, legislatures, and administrative bodies); these institutions are engaged in making and applying law, in producing both decisions and rules. Some fresh attention to rules—how they change, what institutional regularities they exhibit, what their relationship is to actual behavior of institutions, and what life-cycles they follow—may illuminate some social characteristics of legal institutions left dark in the course of research and theory devoted to the decision-making process.

I. RULES OF LAW

A. General Introduction

The common word “rules” has a variety of meanings. We speak of rules of law and also of rules of the game of checkers and rules of personal behavior (as when a person says, “I go to bed at midnight as a rule” or “I make it a rule to avoid fried foods”). In general, the word “rule” is used in law to describe a proposition containing two parts: first, a statement of fact...
(often in conditional form) and, second, a statement of the consequences that will or may follow upon the existence of that fact, within some normative order or system of governmental control. Or, as Roscoe Pound has put it, a rule is a "legal precept attaching a definite detailed legal consequence to a definite detailed state of fact." Pound's definition is accurate enough for present purposes. It is broad enough to include statements of common-law doctrine as well as statutory provisions, administrative regulations, ordinances, decrees of dictators, and other general propositions promulgated by legitimate authorities which are intended to govern or guide some aspect of social or individual conduct. All of these propositions may be called legal "rules" in that they all append legal consequences to given facts.

It is very clear that some of the propositions enunciated in appellate cases are (or purport to be) rules. Thus, the famous case of Hadley v. Baxendale asserts as a rule:

Where two parties have made a contract which one of them has broken, the damages . . . should be such as may fairly and reasonably be considered either arising naturally . . . from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation parties, at the time they made the contract, as the probable result of the breach of it.

To a certain set of facts (a broken contract), this rule appends certain consequences (a particular measure of damages). Statutory phrases or sentences are also rules. The heart of the federal patent law—"[w]hoever invents or discovers any new and useful process . . . may obtain a patent"—is a rule. The consequences of a rule may sometimes be omitted from the verbal formulation. But if the rule is to be operational, the consequences must be there, even if not expressed. "Thou shalt not kill" is a rule of law under the definition used here if (and only if) there is an implication that he who kills will or may be visited with consequences imposed upon him by some authority sanctioned by law. Most of the consequences mentioned so far have been punishments, but they just as easily may be rewards, as in the case of the patent rule quoted, or an outright subsidy or bounty to one who performs a given act. For example, a statute of Arizona authorizes a bounty to a person who kills a coyote and displays its skin to the proper authorities.
Rules can be classified or analyzed in innumerable ways. They can be and often are examined in accordance with their subject matter—that is, from the standpoint of the kind of conduct they are directed toward: rules of criminal law, marriage and divorce, business, property, contract, and the like. All rules are directed toward conduct, and the kind of conduct they are concerned with can be called the substantive aspect of the rule.

In addition, however, rules have what might be called a formal aspect. Rules differ from each other in more than their subject matter. There are certain highly abstract categories into which rules can be sorted and classified. These correspond to the most basic and abstract categories of legal relationships. Thus, some rules grant rights, some grant privileges, some permit, some forbid, and some give positive commands. Some rules say “may” and some say “shall.” Some rules of evidence set up (in legal jargon) rebuttable presumptions; others, conclusive presumptions. Differences among rules in regard to these dimensions are differences in form.

In addition, all rules have a jurisdictional aspect, or an aspect of distribution of power. This is an aspect of legal rules that is sometimes overlooked. A legal rule, as we use the term here, attaches consequences to facts. But consequences do not attach to conduct by themselves; someone must manipulate the strings. Each rule, to be a meaningful rule, must carry with it a ticket to some person, agency, or institution, authorizing, permitting, forbidding, or allowing some action to take place. Each rule has its institutional and distributive side as well as its formal and substantive side. It distributes, or redistributes, power within the legal system or within the social order. Without this aspect, a rule would be a mere exhortation, essentially empty or rhetorical, like the preamble to a statute.

The distributive aspect of a rule is often implicit. An ordinary criminal statute, for example, contains no explicit jurisdictional statement; it merely defines certain conduct as criminal and assesses punishment for commission of that crime. The jurisdictional aspects of the ordinary criminal law rule are implicit and, in actuality, quite complex. They can be understood only by understanding the institutional context and the history of the common-law system. This tells us that appellate courts will have some responsibility for administration of the law—for example, by deciding its outer limits of applicability. Primarily, however, the law will be carried out by policemen, district attorneys, trial judges, and other operational arms of the criminal process. Other statutes or rules are addressed in the first instance to lawyers, or to judges, or to administrative officials. In many, but by no means all, cases the rule explicitly grants power or authority. Still other rules may be addressed to doctors, plumbers, or private citizens generally, authorizing, preferring, or forbidding certain behavior. Here too, however, there is ultimately in the background an explicit or
implicit grant of jurisdiction to some governmental authority to take the steps necessary to implement the provisions of the rule.

The three aspects of a rule just discussed are interrelated. Substantive, formal, and distributive aspects of a rule cannot really be understood in isolation and cannot be sharply distinguished from each other. Nonetheless, it is useful to analyze rules according to these aspects in order to see more clearly the way aspects of rules respond to specific social and institutional conditions.  

B. A Note on Rule Skepticism

One reason why more jurisprudential and sociological attention in the last generation has not been paid to rules is because rules no longer enjoy quite the favor they once did. Indeed, it is fashionable in the academic world to decry them. Many legal realists described themselves as “rule skeptics,” and legal education is heavily influenced by rule skepticism. Many students begin, naively, with the notion that rules of law are always precise and that these rules can be easily and mechanically applied to clear-cut situations. Much professorial energy is directed toward dispelling these notions and toward demonstrating that certainty in the law is an illusion, since life is far too complex to be summed up in little maxims. As a result, legal scholarship is strongly influenced by the attitudes of rule skepticism, and the bulk of scholarly writing today is rule skeptical, in one way or another.

Rule skepticism, reduced to the extreme, means either (1) that some pretended rules are not the true operating rules; or (2) that some rules are unreal in the sense that they are varied, misused, or ignored as they are applied and that those who apply rules actually govern in their discretion, using the rules as mere handles or shams. The first of these two possible meanings is not an objection to the study of rules, but only a call for more
sophistication in the study. Indeed, many of the realists were rule skeptics only in a limited sense; they recognized that their job was not to destroy rules, but to gain more precision in understanding the true operational rules. In particular, these realists refused to accept the assumptions of an older stratum of American legal thought. Langdell believed that only a few simple "principles" underlay the common law; the student or scholar who grasped these had mastered the "science" of law. Karl Llewellyn, on the contrary, thought that rules were or ought to be many and various. Modern life is so highly complicated that rational policy goals could be sensibly administered only through a great variety of rules and approaches designed to fit the great variety of situations presented to the courts. If one looked closely and carefully enough at what judges really said and did, one often found a more sophisticated and varied formulation of the rules than Langdell would have thought possible or desirable, or at least more sophistication in choosing rules to apply or in classifying situations.

The second meaning of rule skepticism is a more fundamental objection to the reality of legal rules, because it goes to the heart of the problem of government. Laws on paper are meaningless; they must be enforced or applied. At the cutting edge of law, rules devolve upon human operators, not machines. In their hands rules may become a mockery. Thus, for example, a criminal statute may say that he who commits assault suffers such-and-such a penalty. No exceptions or mitigations are mentioned. But the policeman who finds two men brawling in a bar may close his eyes and ignore the fight, break up the fight and say nothing further, or arrest the two men and throw them in jail. The district attorney may decide to let both of them go or book them for trial. At trial the judge may dismiss the case if he wishes. Therefore, the statutory rule is (so the argument goes) in part or in whole unreal. The policeman, the district attorney, the judge—these govern, not the rule.

To examine the problem more closely let us go back to a consideration of the nature of a rule. A rule is a direction; it is a tool for carrying out some task of government. Government can be effectuated either through personal surveillance or through formal directives to other persons (rules). Control exclusively through personal surveillance would be possible only for very simple societies. As society and government become more compli-

8. "Law, considered as a science, consists of certain principles or doctrines.... [T]he number of fundamental legal doctrines is much less than is commonly supposed.... If these doctrines could be so classified and arranged that each would be found in its proper place... they would cease to be formidable from their number." C. Langdell, Cases on Contracts viii–ix (2d ed. 1879).
cated, specific functions are allocated to this agency or that person, and bureaucratic organization necessarily replaces personal rule. At this point, rules enter into the structure of government. There is always, however, an operating level—a level at which laws are personally administered—by a policeman, for example. Yet, if it is true that administration at this level is never governed by rules, then government is not merely difficult, it is impossible—and no country, state, city, hospital, army, or large corporation can be run with any semblance of plan.

What is meant, then, is not that the policeman and other operating units of a system disregard formal rules altogether, but that they sometimes completely disregard them, and other times displace them a little. They may in some cases not disregard them at all. One of the major accomplishments of behavioral scientists—and of the legal realists—has been to highlight the gap between living law and book law. But this gap is not constant; it varies from region to region, from field of law to field of law, from time to time. However, the extent to which discretion is allowed and the extent to which it is actually exercised are social factors which, if we knew enough, could be explained by general laws of behavior.

Moreover, as an empirical proposition, it is probably not true that most legal rules are "unreal" in the sense that they are not or cannot be translated into behavior or enforcement. Most legal rules are in fact obeyed by those to whom they are addressed. Violations of the rules are promptly and efficiently punished. The general meaning of rules is in many—probably most—cases clear enough to form the basis of behavior. Nevertheless, there is a view among some students of the legal process that most rules are inherently uncertain and that most legal concepts are flexible and variable in meaning. The view among some students of the legal process that most rules are inherently uncertain and that most legal concepts are flexible and variable in meaning. In the United States, habits of thought inculcated during the course of legal training may encourage this point of view. Law students learn by debating the application of doctrine to extremely difficult borderline situations derived from cases reviewed by appellate courts. One object of this exercise is to train the students’ minds in legal thought and develop skills of advocacy, and this object, it is believed, is best accomplished through the examination of difficult questions, rather than easy questions and well-settled law.

In fact, however, if one views impartially the whole of the legal system, it can be differentiated into three major areas. Some of the substantive content of the legal system consists of rules which are dormant—that is, there is no attempt at conscious, consistent enforcement. Other parts raise classic problems of uncertainty. These are the unsettled, but living, problems of law—such as the question of what constitutes due process of law.

A third—and vital—part of the legal system consists of rules which are well settled in the special sense that they are acted upon by many persons in a particular manner and their applicability to given situations is not challenged. "Well settled" may mean, then, not that a dubious situation cannot be imagined or that the application of a rule is inherently free of doubt, but that it is actually free of doubt as a matter of ordinary, patterned human behavior. If most of the operating (as opposed to the dormant) rules of the legal system were not well settled in this sense, many of the normal processes and activities of life that people carry on with reference to legal rules would be profoundly altered. In a complex social and economic system, a legal system on the model of law school appellate cases would be insupportable. There are strong needs to know what is lawful and unlawful in our common, everyday actions. We need to know, for example, whether we are validly married if we go through certain forms (valid in the sense that our claim to validity will be either unchallenged or highly likely to survive any possible challenge). We need to know the permissible ranges of speed. Moreover, in business affairs, we need to know that a deed in a certain form executed in a standard manner truly passes title to a piece of land. If every such transaction had to be channeled through a discretionary agency, the economic system could not survive in its present form. A market economy and a free society both impose upon the legal system a high demand for operational certainty in parts of the law which regulate important aspects of the conduct of everyday life and everyday business.

The legal system must therefore limit operating rules which do not govern—that is, which do not in themselves provide a clear-cut guide to action on the part of those persons to whom the rule is addressed. Some rules do provide the possibility of a clear-cut mandate; others do not. There is a significant difference between a rule which provides that no will is valid unless it is signed by two witnesses and a rule which provides that wills need or do not need witnesses, depending upon the circumstances and the demands of equity and good faith. Rules of the latter sort (discretionary rules) are tolerable as operational realities only in those areas of law where the social order or the economy can afford the luxury of slow, individuated justice. If there is a social interest in mass handling of transactions, a clear-cut framework of nondiscretionary rules is vital.

Of course, it has to be emphasized once more that when one speaks of the needs of the social order and the economy, one is speaking of opera-

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12. Custom may dictate, of course, that we can exceed a posted speed limit by five or so miles per hour with impunity; but this is itself an operational certainty.
tional realities, rather than of the way rules look on paper. Some awesome paper rules are for practical purposes dead. Some rules which appear discretionary on paper may not be truly discretionary in their manner of application, and vice versa. Some formally discretionary rules do not imply discretionary practice because the discretionary feature of those rules is jurisdictional only; it is a delegation to some lower agency, which in turn may adopt nondiscretionary rules. Suppose, for example, a rule of law which purports to impose a punishment upon any person who sells “unwholesome” and “diseased” food. “Unwholesome” and “diseased” are critical terms in this rule, but they obviously have no single objective meaning. Who shall decide what they mean? If the rule is statutory and if it is silent as to mode of enforcement, we may assume that the usual processes of criminal justice will provide whatever enforcement is needed or wanted. If policemen, district attorneys, and private citizens feel the law is being violated, they may invoke the criminal process. Ultimately, an appellate judge may put some additional meaning into the terms, though it is not likely that the problem will be litigated often enough for him to do so in a very precise way or that he will have the means at his command to frame intelligent regulations. He might, however, hold that some specific practice is a purveying of “unwholesome” food as a matter of law.

On the other hand, the task of enforcing these provisions may be handed over to an officer of the executive branch and his staff or to an administrative agency. In Wisconsin, for example, at the end of the nineteenth century it became the “duty” of the dairy and food commissioner “to enforce the laws regarding . . . the adulteration of any article of food or drink.”

The statutes defined “adulteration” in broad language. For example, food was adulterated if “any substance or substances have been mixed with it, so as to lower or depreciate or injuriously affect its strength, quality or purity . . . .” Under these statutes the commissioner and his staff might assume the task of laying down further rules capable of clear obedience; or they might delegate rulemaking power further down the administrative hierarchy.

Similarly, in the development of American labor law, factory regulation began with vague general rules requiring employers to maintain a “safe” place to work; these rules were fitfully enforced through the medium of tort law when employees sued for personal injury damages and complained that the employers had failed in their safe-place duty. Yet when factory regulation was vested in an administrative agency, this did not necessarily mean greater specificity in the basic standard. The 1911 Wisconsin statute which created an industrial commission stated simply

15. Wis. Stat. 1898, ch. 56(b), § 1410(a).
that every employer had to "furnish employment which shall be safe" and had to "furnish and use safety devices and safeguards, and . . . methods and processes reasonably adequate to render such . . . place of employment safe . . . " The commission was given specific power to make rules and prescribe the proper conduct of employers. Therefore, the commission might decide, for example, that a factory is safe only if it has windows of a certain kind and proportion, a sprinkler system, and a fire-retarding floor. Assuming that these regulations are valid, the factory owner who wishes to or is forced to conform to the law would know his rights just as if the statute were, in origin, nondiscretionary. The statute, in other words, is discretionary in form, but in operation it vests power in a subordinate agency, which in turn has the choice of issuing discretionary or nondiscretionary rules. The agency conceivably might issue discretionary regulations to its line officials, and a particular inspecting officer or examiner might in practice turn these regulations into nondiscretionary rules. A factory owner might demand to know from an examiner exactly what he must do to comply with the statute, and the officer may give him instructions, perhaps coupled with an assurance of immunity if he follows these instructions.

As a general proposition, we may guess that there is a strong tendency within the legal system toward the framing of nondiscretionary rules at some level and that it is strongest where it is socially important to have mass, routine handling of transactions, which are channeled through some agency of the legal system, or where relative certainty of legal expectation is important. A rule can be nondiscretionary in operation so long as it is formally nondiscretionary at any one rulemaking level of the legal system (which has many, many such levels) or if it is nondiscretionary at the point of application. Consequently, the legal system may have many more discretionary rules formally speaking than operationally speaking.

C. Who Makes the Rules?

The discussion of rule skepticism assumed that there are a variety of rulemakers in our legal system, that they make different kinds of rules, that they are arranged in some kind of hierarchy, so that we can speak of superior and inferior (or subordinate) rulemaking power, and that some agencies make rules, while others merely apply them (or are formally designated as legitimately concerned only with application).

17. Wis. Laws 1911, ch. 485, at 584.
18. In order to conform to the dictates of a legal rule, a person need not necessarily know the precise limits of permissibility. When one speaks of a range of safe action, or of leeways, one refers to a rule that is, in a sense, a composite of discretionary and nondiscretionary elements. The limits may be obscure and discretionary, but there is a nondiscretionary core of action covered by the rule.
19. In some areas of law, relative certainty of expectation is important, and the rules are highly discretionary but relatively certain not to be invoked. Such a situation, of course, is tolerable to potential actors, at least in the short run.
It is a matter of common sense that some agencies, such as Congress, do not enforce or carry out their own rules. The policeman on the beat, on the other hand, does not turn out rules so much as he enforces existing rules. He has, as is well recognized, a great deal of discretion, but his legitimate discretion operates within limits, usually defined by other agencies and by his superior officers. He has no power to add a wholly new crime to the penal code. This distinction between making and applying legal rules is not wholly artificial; it does identify a real difference in function and behavior between legal institutions whose products are rules and legal institutions whose products are concrete instances of control of behavior—that is, applications of rules to specific individuals or cases. But the distinction is blurred by the fact that to some extent many institutions validly, legitimately, and constantly perform both functions. Anglo-American judges both make law and apply preexisting law. Often they make law as they apply it.

Rules and the institutions that create them can also be hierarchically arranged. In general, rulemakers are superior to rule appliers within the legal system. Rulemakers of a city council are lower in rank than those of the state; county boards make rules only insofar as state governments allow them to or order them to. A branch office of the Internal Revenue Service may make up some rules of its own—for example, internal office rules about lunch hours or about choice of vacation time. But the branch office also will carry out many rules received from the district office; the district office will follow the Washington rules; and the Washington rules (“regulations”) are drafted in conformity with a congressional mandate.

Rules themselves can be arranged in a hierarchy. There are rules for making rules, as there are machines from which other machines are made. The Constitution, for example, contains rules which limit the kind of rules subordinate bodies may make. In the evolution of common-law rules, the bigger, broader rules we call principles shape the direction in which sets of common-law rules move. Like constitutional clauses, principles are rules by which other rules are made. And, like constitutional clauses, they are not merely patterns out of which smaller rules can be cut; they are normative standards for evaluating working rules. Principles, in short, are statements which legitimate rules.20

D. The Function of Rules

Legal institutions and their products serve various purposes in society; but their primary purpose is to make government possible and effective.

20. The federal and state constitutions contain more than principles. They also contain jurisdictional rules and rules of substance and procedure. Those rules have been made part of the constitution as a means of granting them higher legitimacy and permanence, but they are not otherwise different from the sort of rules that can be found in the ordinary statute book.
One major function of law is social control. Within this vague, broad mandate, specialized agencies play specialized roles. A complex society must use rules as tools to govern its members. These are of various substantive types, corresponding to the components required by a system of social control. First, rules may be concerned with effectuating general policy; they will attempt to channel conduct by mapping out areas of preferred, allowed, and forbidden behavior in everyday life. Second, rules may impose sanctions on those who deviate from the norm—that is, govern the disposition of trouble cases. Third, rules may invoke or lay down some strategy for dealing with major deviations from the norm—with disorders or emergencies so great that they amount to a crisis in the system. Finally, although all rules (as we have said) have power-allocating aspects, some rules may be jurisdictional in substance; they may set up courts, grant certain kinds of business to certain agencies, and authorize officials to do certain things. Most institutions—perhaps all—generate or operate with rules of all four types. However, there are also institutions whose overall function is to devise or to apply rules of one particular type.

Of course, the four classes of rules are not clearly differentiated from each other. They have a tendency to blend, and distinctions between types of rules are meaningful only insofar as they shed some light on the behavior of legal institutions and on the manner in which those institutions generate, adopt, and modify legal rules.

E. Institutional Behavior

Before proceeding, we will make explicit two simple assumptions about the behavior and nature of legal (and other) institutions. First, we assume that the people who staff legal institutions would normally like to do a good and efficient job; they prefer to satisfy legitimate demands made upon them. If they cannot satisfy the demands, they will seek some legitimate excuse for not doing so.

Second, we assume that institutions have boundaries in our society; jurisdictional limits, however vague, are placed upon the institution's authority. In some respects, institutions are subject to review, appeal, or limits of some kind on some area of their work; this is true of courts, administrators, policemen, and even the President. These boundaries are fixed by law, custom, public opinion, and physical necessity. Their exact location is in any given case likely to be unknown. Bold Presidents, bold courts, and bold incumbents of other institutions are likely to test the location of the boundary of their power. Conservative power-holders are likely to remain within the safe sphere of their traditional jurisdiction, never venturing close to the edge. It may be that the factors which influence institutional limits cannot be reduced to general rules. But it certainly
is clear that all institutions have limits and that some of these limits are easier to define and to see than are others. Some institutions are less adaptable than others. They have less room either to seek new power or to satisfy new demands.

The National Guard, for example, can be called out to stop a small riot or to sandbag a flooding river. It would be powerless, in all probability, to stop a major revolution. In the event of a major revolution, the National Guard would have to be replaced by some other kind of army. As a result, the National Guard might permanently lose its power, even if the revolution were put down. The National Guard, then, as an institution will tend to avoid issues that it cannot cope with and will settle for a more limited—rather than a more expansive—social role, in order to ward off permanent impairment of its power and function.

Courts also have quite definite limits to their authority. The kinds of work that courts can do are prescribed by law (statutes and constitutions) and by tradition. In the light of this fact, we will proceed to examine how the courts have reacted, in their rulemaking, to certain kinds of demands made upon them. We mean to show how a legal institution reacts to pressures upon it and how it adopts rules which make an efficient response to the pressures in terms of its institutional needs. For example, when an institution in the short run has no power to expand its capacity and when the sheer volume of demands made upon it increases, it will react by framing jurisdictional rules such that the number of instances coming before it will remain more or less manageable. Or, more concretely, a court will tend to evolve rules which will limit the number of actual cases to that which it can reasonably handle.

It is important to distinguish clearly, however, between long-run and short-run responses. It is possible to show relationships between social demands and rulemaking output in the short run. It is not possible to predict, however, how institutions will evolve over the long run—to what extent they will break through their boundaries and grow in power at the expense of other institutions. Even if in 1800, let us say, one might have predicted a tremendous absolute growth in the power of central governments, one could not have said what agencies, bearing what names and descending from what other agencies, would be the major legatees of this power. It turns out that the President and his subordinate officials have gained a great deal of the power, but it might conceivably have been the Supreme Court, or Congress, or the Secretary of State (cutting down the President's role to a ceremonial kingship), or even the Vice President (by means of his power as presiding officer of the Senate), all through a chain of events quite unknowable in advance. We reject, then, at least as a long-run consideration, any notion that there is some ideal role of a "court" or
a "legislature" which each of these is uniquely designed to play and which is badly served by other institutions because of their inherent qualities. One may define such a role and recognize empirically that a particular existing institution either now best performs that function or is more easily adaptable to that function than are other institutions. But this is not because of the inherent qualities of any real-life institutions. Certain important kinds of rules cannot be laid down by existing Anglo-American courts. But we should not attribute to the courts fundamental, timeless deficiencies; rather, concrete limits have been imposed upon them, partly by positive law and partly by their traditional legitimate role. As societal values change, so does the law and so do institutions; roles may be permanent, but not their institutional forms. There is no more an enduring function of a court than there is an enduring function of a king.

The remainder of this Article is devoted to enunciating some propositions about the relationship between institutions, their history, their society, and their output of rules. Many more propositions could be enunciated, but those discussed here will be enough, it is hoped, to show the possibilities inherent in future study.

II. Judicial Rules and the Volume of Business

Institutions have normal expectations with regard to their work load. They expect to meet with certain kinds of problems in the course of a day: they expect a certain amount of work, and no more. The number of employees, the equipment available, the organizational structure are all based on these expectations. If radically new problems arise, the institution may find it hard to adapt. Equally, if too many problems of a familiar kind arise, the institution faces a crisis.

An increase in volume is not necessarily trouble. For a department store, more business—up to a point—is a blessing. The store may hire more workers, open new branches, and add on to its buildings; however, if there were a severe labor shortage or floor space could not be added at a given location, then customers might be alienated by unpleasantness, crowds, poor service, and parking troubles.

The American judicial system is in the position of the department store that cannot hire new staff easily or expand its plant. It cannot, in other words, react to increased demand simply by giving additional service. This characteristic is generally true of all American courts, from the United States Supreme Court to the lowest trial court. The court system responds to new demands at a tortoise-like pace. For one thing, control over personnel is not vested in the courts themselves. The labor force is relatively fixed; a court cannot reproduce; it cannot expand out of
"profits." Those who control the statute books and the purse strings have allowed court systems to grow only slowly over the years and have not allowed them to grow at all to meet the total potential demand for adjudication of disputes.

In the long run it is at least theoretically possible to multiply courts to keep up with changing demand. In the short run the difficulties are immense. The process of creating a new federal judgeship is laborious and delicate; it takes formal or informal action by the President, the Senate, the Senators of the proposed judge's state, and (in recent years) a committee of the American Bar Association. Sometimes a nomination is blocked or a new seat left vacant because of political quarrels not easily resolved. Even if all goes well, pressure on the docket is only slowly translated into new jobs.21 State court capacity is generally as difficult to expand as federal court capacity. An increase in the number of judges may require authorization from the legislature, a good deal of political jockeying, new elections, and sometimes even a constitutional change. Moreover, judgeships are typically local in their jurisdiction, and there is no bureaucratic, rational management of the work load and the staff. If the docket in a rural county is virtually empty, what could be more logical than to shift the local judge, at least part-time, to the big city, where there is tremendous congestion in the courtroom? Yet, well into the second half of the twentieth century such responses were the exception rather than the rule; until recently no state was willing to create any central coordinating body to do this.22

Since the number of workers (judges and clerks) is fixed, in the short run at least, courts do not have defenses against sharply rising demands. They cannot expand and contract automatically in response to the ebb and flow of litigation. Nor has there been any significant technological improvement to help the courts handle classic kinds of cases in mass. The legal system has therefore had to evolve devices and strategies to prevent a crisis in numbers.

A. Costs of Litigation.

It is worth dwelling on gross historical changes in the character of court dockets in order to illustrate the means of meeting excessive demands for judicial services. A century ago commercial litigation made up much of the ordinary work of both trial and appellate courts. The tremendous growth

22. See A. Vanderbilt, Minimum Standards of Judicial Administration 32–64 (1949). Over the last century or so American law has in general resisted taking steps to make the role of a judge more like that of a civil servant (an employee and subordinate of the state) than that of an independent, free professional whose career lines and prestige derive from his relation to the bar, rather than to the state. See Friedman, An American Tragedy: The Trial of Jack Ruby, 1966 Wis. L. Rev. 1188.
in population, wealth, and commercial-industrial activities that occurred from 1850 on created such a potential for overburdening the courts that one of the following events had to happen: (1) expansion of the court system; (2) routinization and mass handling of commercial matters in the courts; (3) routinization and mass handling of commercial matters outside the courtroom; (4) use or expansion of a policy in favor of settlements to control the volume of litigation; (5) development of efficient dispute-settling mechanisms external to the judicial system; (6) adoption by courts or the imposition upon courts of substantive rules whose effect would be to discourage litigants from using the courts; or (7) increases in the costs of litigation sufficient to reduce its volume.

The first alternative was never adopted. No radical expansion of the court system occurred. The second was adopted where appropriate (in garnishment and collection actions, for example). The third alternative was in some ways the dominant response of the business world—the rationalization of business practices through the development of standard forms and patterns of doing business. The permissive attitude of the courts toward these devices made good sense ideologically, economically, and institutionally.

The effective use of the fourth alternative is difficult to measure. Its existence is evidenced, however, by the constantly enunciated proposition that the law favors settlement rather than litigation and by the fact that it is an unethical—even criminal—act to stir up lawsuits. It is somewhat paradoxical for an institution to declare so emphatically that public policy favors avoiding its use. There are many reasons other than case-load reasons why noncoerced settlements are preferable to trials. Yet it is also true that if no cases were settled out of court the judicial system as presently constituted could not sustain its share of the dispute-settling business.

The fifth solution, development of extrajudicial mechanisms for settling disputes, is exemplified by the rise of commercial arbitration. The sixth solution, adoption of "hostile" substantive rules, is far more difficult to attest. The seventh, increases in the cost of litigation, is often overlooked, but its institutional impact has been very great. Yet the trend toward judicial substitutes, and the acceptance by the courts of commercial routinization and extrajudicial settlement, is not related to this final factor, the rise in the cost of litigation.

In 1851 the Wisconsin Supreme Court heard a case in which a laborer

sued to collect a wage of 6.25 dollars.\textsuperscript{26} Even then, the case was something of an anomaly; it would be quite unthinkable today, except as a spite case or a test case. In the twentieth century the cost of using the judicial process, especially if an appeal is made, is so high that it acts as a significant barrier against litigation that does not measure its outcome in the thousands of dollars.

The major commercial and industrial interests can afford some recourse to litigation, but they avoid the courts as much as they can. Litigation is expensive in more than dollars spent on lawyers, witness fees, court costs, and the like. It is expensive in business good will and disruptive of ongoing business relationships.\textsuperscript{27} These undesirable effects led to the decline of commercial litigation even for those who were not deterred by the costs of actual litigation. Thus, though the tremendous expansion of business could have led to an appetite for litigation far beyond the capacities of the courts, the rising price of going to court has prevented this from happening.

With the decline of commercial litigation, the slack in the dockets was more than taken up with tort cases. In the late nineteenth century industrial accidents became a major producer of litigation. Cases of injury, death, or permanent disability were often settled, but the absence of a continuing relationship between the parties made for a situation in which a combination of costs of litigation and various, restrictive rules (such as the fellow-servant rule) did not choke off the total volume of litigation as efficiently as had been the case for commercial litigation. Jury freedom and the contingent-fee system neutralized the costs of litigation and the severity of common-law tort rules often enough to guarantee an enormous case load.\textsuperscript{28} The volume and acrimony of accident litigation came to be perceived as a problem by capital and labor alike.

Industrial accident law was unsatisfactory to the courts as well. First, existing law did not ration justice efficiently enough to avoid a problem of volume. Second, that law did not attain (in the view of more and more judges) equitable substantive ends. Therefore, the system imposed upon the courts a task which they could not and did not perform well, and any such task is a threat to an institution which the institution must avoid, delegate, or remove. The eventual solution (slow to develop because of the conflict of interest between business and labor) was a workmen’s compensation system—a relatively stable compromise between the needs of capital and labor and a rough solution as well to the institutional problem.

\textsuperscript{26} Martin v. Martin, 3 Pin. 272 (Wis. 1851).
of the courts. The first of these statutes was enacted in the United States about 1910.\footnote{29. N.Y. Sess. Laws 1910, ch. 674 (declared invalid in Ives v. South Buffalo Ry., 20 N.Y. 271, 94 N.E. 421 (1911)); N.Y. Sess. Laws 1913, ch. 816.} The last state (Mississippi) passed its law in 1948.\footnote{30. Miss. Laws 1948, ch. 354, §§ 1-53.} Workmen’s compensation attempted to solve the problem of volume by delegating adjudication and fact finding to a commission of experts, fully staffed and unhampered by the conventions of court law, and by reducing liability and the amount of recovery to amounts automatically determinable, thus making routinization of the work load possible.\footnote{31. See W. DODD, ADMINISTRATION OF WORKMEN’S COMPENSATION X6-26 (1936).} Litigation remaining in the courts has turned out to be heavier than hoped; nonetheless, it is less absolutely and proportionately than at the turn of the century.

In the twentieth century, cases arising out of automobile accidents came to dominate the civil dockets. Here too the quantity of litigation is imperfectly routinized and imperfectly controlled by high litigation costs, and progress toward a “solution” (institutionally speaking) is slow, perhaps because there is neither real agreement on the proper substitute nor a strong, organized movement toward one goal.\footnote{32. See W. BLUM & H. KALVEN, PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM—AUTO COMPENSATION PLANS (1965); Franklin, Chanin & Mark, Accidents, Money, and the Law: A Study of the Economics of Personal Injury Litigation, 61 COLUM. L. REV. 1 (1961).} On the trial level, dockets are crowded with accident cases, and the delay between docketing and trial can run into years in some large cities.\footnote{33. See A. LEVIN & E. WOOLLEY, DISPATCH AND DELAY (1961); H. ZEISSL, H. KALVEN & B. BUCHOLEZ, DELAY IN THE COURT (1959).} Although the congestion and delay in the courts have been widely criticized, the problem seems manageable in the short run. Of course, many pending cases are settled before they ever come to trial. It is especially apparent in accidental-injury cases, where the litigant rarely has an interest in the “principles” of law involved, that the economic man would rather settle for ten dollars than sue for fifteen dollars, bearing in mind how much it will cost him in time and money to see the matter through the courts. The very fact of congestion is an element of cost—sometimes cruel and unjust. Thus congestion itself encourages settlements and prevents congestion from becoming even worse.

That certain phenomena serve a rationing function in the legal system does not mean that they are ethically “correct,” except in the special, narrow sense that they avoid or postpone radical institutional adjustments. One major drawback of allowing the price of litigation to reduce the volume of business is that it rations resources along class lines as well as along lines of preference. If everybody had equal resources at his disposal, a rise in the price of legal remedies would merely eliminate litigation of marginal value to the litigants. A high price for opera tickets will induce some people who could “afford” the opera to go to ball games and musical com-
edies instead, or to stay home with a book. But in a society with inequality of resources, some people will be unable to go to the opera, no matter how strong their desires. In the legal system, the high price of litigation means that litigation is not a practical method of resolving disputes for the average man.

This state of affairs is not necessarily a major problem for every society. A society may organize its legal system in such a way that different institutions for settling disputes are available for different ethnic groups, occupational groups, or social classes. The medieval common law, for example, was in essence composed of rules and institutions by, for, and of the upper class. The lower classes, indeed, were quite outside the royal common law; its rules did not apply to their affairs, and its institutions were beyond their grasp and their pocketbooks. Not that life below the top was lawless. Quite the contrary. There was an important system of minor local courts, some of them highly informal, which deserved the title of courts of law just as much as the royal courts which usurped the name and the attention.34 But these local institutions did not apply the same system of rules. Just as a single, unitary nation-state is the product of more or less recent times, so is the growth of a single, unitary legal system that is relatively classless in the sense that rules do not explicitly distinguish between litigants on the basis of their income and station in life.

It is true and will perhaps always remain true that most affairs of life are governed by sanctions which operate automatically or without the use of formal institutions of enforcement. But the development of a single, middle-class system of law and legal institutions (rigorously controlled by a cost-rationing device) means that some social goods that are conditioned upon use of the legal process (a divorce, for example) may be beyond the reach of many members of society. Thus the high price of litigation carries its own high price: the denial, in some areas, of justice to the poor. A middle-class democratic society may consider such a situation inherently evil. To avoid this result, many forms of subsidy have been devised—legal aid, public defenders, and small claims courts, among others. Some have successfully broadened access to the legal system; some have not.35 The recent growth of interest in improving and widening these subsidies is a recognition that some minimum of legal care should be available to the whole population, regardless of price.

The problem of defining a minimum is not peculiar to legal services;

34. See, e.g., the materials printed in THE COURT BARON (Maitland & Baildon eds. 1891); SELECT PLEAS IN MANORIAL AND OTHER SEIGNIORIAL COURTS (Maitland ed. 1889).
35. The small claims court finds its heaviest use not by the poor, but in small claims against the poor. For documentation of the heavy use of small claims court by unsecured creditors such as doctors and grocers, see Rapson, The Dane County Small Claims Court, 1961 (unpublished thesis in the University of Wisconsin Library).
all products considered socially important and yet rationed by price (for example, medical care) present similar problems. Free vaccinations—but usually not free psychoanalysis—are provided by the state to those who cannot afford or are unwilling to buy medical care. The movement to provide legal services for the poor man faces the difficult task of deciding what kinds of legal service must be subsidized, and to what degree. There is wide agreement that a poor man arrested for murder needs and should have a good lawyer. Whether a poor man needs or deserves a free divorce, a free civil action against his landlord, or a free claim for damages for invasion of privacy is more difficult to decide and to justify.

The price device has on the whole been useful, however. The price of the law is a factor which, along with the formal and technical structure of the legal system, tends to keep legal and social change relatively even-paced, orderly, and free from caprice. In addition, the cost of litigation has tended to increase the predictability of the consequences that will flow from the acts of private parties.

A legal rule, of course, does not change automatically; it must be challenged, or at least an occasion must be presented at which an authoritative agency has an opportunity to change the rule, even if the rule itself is not directly challenged. Many judge-made and statutory rules, however, are never brought before courts for interpretation or review. It is, in the main, the cost of litigation that shields these rules from change. Otherwise, the inherent uncertainties in the conduct of American trials would expose these rules to challenge. Even where the outcome of a case is quite clear in terms of legal theory, a litigant must reckon with a number of intangibles which affect his actual probabilities of success. The judge and his personality, the jury and its quirks, the possibility that the other party or his witnesses will commit perjury in a persuasive manner, the ineptness of one’s own attorney, accidents and miscalculations at the trial are all risks of litigation. The same uncertainties apply to evidentiary facts which before trial appear quite certain. In a legal system where courts and lawyers were free and available to all it might be worthwhile to sue for relatively trivial sums or (what is more important here) on the basis of causes of action with slim probabilities. Of course, even in such a system, powerful informal sanctions would prevent the overwhelming majority of potential suits. Friends would not sue each other for the small damages occasioned by an accidental nudge in the ribs, even if the nudge amounted to a technical assault. Many defendants might plead guilty to avoid the shame, degradation, and risk of open trial. Businessmen in prof-

itable relationships would not sue each other for small deviations from precise contractual duties. But, clearly, in such a system many actions would be brought that would not be brought under the present system, and hence the number of opportunities of upsetting established rules would be greater.

One may look upon a rule of law as a potential command to certain subjects, a command which may be obeyed, ignored, or disputed. But to challenge the rule is costly, especially if the challenge includes litigation. A simple rule of the road—like the rule requiring drivers to keep to the right on a highway—is formally clear-cut. One does not challenge this rule of the road because the likelihood of overturning it or of modifying its meaning is simply too slight to be worth the effort. Some rules equally clear-cut in form are unclear in operation or effect, because of a judicial gloss added in the course of repeated litigation. This encourages challenges to the validity and scope of the rule. Such a fate, for example, has overtaken the Statute of Frauds.

On the other hand, if litigants, for whatever reason, feel strongly enough about an issue to challenge the averages, then the outcome of the suit does take on an element of uncertainty. But the cause of this uncertainty resides not only in the inherent uncertainty of lawsuits, but in the very fact that somebody bothers to sue. If the plaintiff is an isolated eccentric, he will almost surely lose his suit, and the rule at issue will remain unchanged. But if enough people hammer away at a rule which (in theory) is "well settled," they stand a good chance of unsettling the rule, for we would then have to ask: Why are so many people hammering away at this "settled" rule? Either they or their lawyers sense a possible change in the direction of the law, or the matter is so vital to the litigants that they cannot or will not face "reality." Pioneers in civil rights cases and reapportionment cases—or in any case in which litigants have persistently challenged "settled" rules—show something of this intensity. And in the cases mentioned, there were indeed powerful forces seeking legal change. The costs of access to the legal system support the legal status quo, but they do not shut off all avenues of evolution. These costs act as a conservative force, or, more accurately, a channeling force; they limit access to the courts only to recognized causes of action and to unrecognized causes of action which have many or unusually intense adherents.

In many trial court cases, of course, only facts are at issue, not doctrine. Here too, a litigant must assess his probability of success, in relation to the stakes. A fact, like a rule, is real and certain to the extent it goes unchallenged. Some "facts" are more certain than others in the sense that the evidence supporting them is convincing. But the strength of the evidence is only one influence on the likelihood that a fact will go unchallenged.
Even a "fact" certain beyond any reasonable doubt will be challenged if the stakes are high enough. A man charged with first-degree murder is highly likely to plead not guilty and ask for a jury trial. The stakes are high for him—perhaps even life itself. The costs, pains, and uncertainties of a law suit may be outweighed by the chance—however small—of saving his neck.

A related effect of the costliness of the American legal system is the development of what we might call networks of reciprocal immunities, which help define and stabilize many common, continuing relationships. For example, the formal legal relationships of a landlord and his tenant are spelled out in their lease. Minor infractions of duty on either side may amount to breaches of the lease, but both parties are protected—and given wide freedom of action in fact if not in theory—by the costliness, in money and disruption, of claiming one's "rights." So the tenant can play his radio late at night, keep a dog, and perhaps even move out a month before his lease expires without lawsuit or threat of lawsuit. And the landlord can delay small repairs or shut down the heat while the boiler is fixed without losing a tenant or suffering a lawsuit. This network of reciprocal immunities is beneficial to both parties.

Not all such networks are necessarily mutually advantageous. For example, a relationship may be so one-sided in power or authority that adverse social consequences flow from it, or many people may feel that enforcement of law or rule must be undertaken for social reasons regardless of the wishes of the immediate parties. Thus, the law of landlord and tenant is often said to be unfair to the poor tenant. The reciprocal immunities of landlord and tenant, together with the operation of a vigorously effective real estate market, permit patterns of fairly smooth and equitable transactions for middle-class and upper-class tenants (except perhaps during periods of critical imbalance in housing production). The main reason why the law is unfair to poor tenants is because, being poor, they cannot bring leverage to bear against their landlords. The call for subsidy of tenants' rights is a call for means to break through the wall of immunities—just as the criminal law is a subsidization of sanctions so that (among other things) strangers are not free to steal slightly from each other, protected from punishment or redress by a wall of cost or social relations.37

37. Note that some instances of petty theft, particularly by juveniles or neighbors, or the children of neighbors, will probably be forgiven; and employers ignore the fact that white-collar employees take home pencils, pads, and other inexpensive items of office equipment.
among bearers of the rights. Otherwise they remain below the threshold of that enforcement rate which would seriously disturb social relations among parties.

B. Jurisdictional and Procedural Rules

Up to this point, we have discussed how increases in the price of litigation are related to the specific institutional problem of volume of business. Jurisdictional and procedural rules also control the volume of business in courts. Procedural formality adds to the cost of litigation by making lawyers necessary and by requiring time-consuming effort on the part of litigants. A trial of an issue in court results in the risk of public condemnation as well as the chance of public vindication. Procedural technicality increases the difficulty of winning a lawsuit, adds an element of chance to litigation, and in turn increases the uncertainty of outcome, which is a critical element in cost. Procedural technicality as a cost-producing device characterized English royal law in the medieval period. It is much less tolerated in modern law, which has an ideological commitment to rationality and efficiency.

Jurisdictional rules are widely used to control directly the volume of upper-court business. The United States Supreme Court keeps its workload within bounds through its power over its docket. Since 1925 the case load of the Court has been almost completely discretionary. The Court may turn down cases which it deems too trivial, as well as those it deems too controversial to handle at the moment. The Court's right to refuse to hear controversial cases is the right to prevent substantive institutional crisis; the right to refuse to hear vast numbers of trivial cases is the right to prevent a crisis in volume.

The Supreme Court's freedom to choose its cases is unusual, corresponding to the unusual demands which potentially might be made upon the Court. In some states, statutes define which types of cases appellate courts must hear and which are discretionary. The lower the court, the less in general its leeway. As we have mentioned, courts (high and low) have been relatively inflexible institutions; they have been unable to increase productivity or staff. Limitations on the docket, or discretionary control of the docket, have allowed upper courts to retain their classic style of weighty deliberation and reasoned opinions. Lower courts, lacking the freedom of their appellate brothers and more vulnerable to the pressures of excess business, have had to countenance more and more informal processes, which—whatever other virtues they may have—succeed in limiting the docket to manageable size.

Of course, judicial institutions are not inherently incapable of handling great quantities of "cases." Mass-handling techniques can indeed be used for some kinds of business. If the social interest in rapid, efficient processing is superior to the social interest in carefully individuated justice, it is certainly possible to devise mass-production legal methods. The traffic courts, for example, handle a tremendous flow of business. Their work is mostly quite routine. The "trial" has been reduced to a formula, a vestige. Parking tickets can be paid by mail in many cities. Other lower courts handle garnishments, debt collections, and wage assignments in fantastic numbers. Probate judges in urban centers sign hundreds of routine orders and forms each session; simple hearings on heirships and intermediate accounts are delegated to clerks or assistants.

The procedures used by courts in "trials" of this kind resemble more the procedures of record-handling and processing offices than the procedures of a court handling a murder trial or a large antitrust suit. The traffic ticket is processed on as perfunctory a basis as the recording of a deed in a county recorder's office. That one task is handled by a "court" and the other by an "office" is not often a fact of much functional importance. If one defines a court as an institution which weighs evidence, hears disputes, and renders carefully reasoned judgments, perhaps traffic and probate courts are not courts at all, but the epigones of courts, retaining from a more vital day their titles and customs. If so, then these "courts" represent not so much an adaption of judicial institutions to mass processing of routine matters, but rather an abandonment of the judicial system. The difference depends solely upon one's definition of a court.

Abandonment of the judicial system, or at least of traditional judicial procedures, has indeed been historically one major social response to the pressures of increasing business. Some work has been transferred to private institutions of conciliation; some to different agencies of government. The boards and commissions that handle industrial accident or social security claims, for example, are dealing with matters that at one time were handled, if at all, through litigation initiated by private parties. In most cases of removal of jurisdiction to administrative bodies, the courts retain a right of review—prestigious, but relatively powerless. Of course, a shift in institutional locus is more than a matter of jurisdiction. As industrial accident law shifted from court to commission, the substantive content of the rules changed too. Indeed, that was one point of the transfer. But the new rules were such that the courts would have been hard pressed to administer them without severe distortion of their classic structure.

Courts also have the power to shut off litigation by adopting a *rule of refusal*—that is, a rule refusing to acknowledge as valid a particular cause of action. Frequently, judges defend a particular rule by arguing that to
abandon it would bring on an unmanageable flood of new cases. This argument can be and no doubt often is nothing more than a rationalization disguising some judicial policy choice that remains unarticulated, but it is heard so frequently that it must be at least sometimes honestly put forth. At least sometimes courts must deliberately adopt a rule of refusal precisely because they fear being “overwhelmed.” The unspoken premise is that society will suffer if the courts are overwhelmed. A further premise is that society will be unable to rescue the courts from suffocation. Yet society certainly has the power to create an unlimited number of bypass institutions. What the courts may mean (even if they do not say so) is that a rule of refusal will preserve the institutional integrity of the courts as they now exist.

To a limited degree, such fears are justified. Rules of refusal may be needed to keep the flow of work through courts in a manageable state. Whether society benefits is another question; perhaps it is good, in some instances, to avoid short-run dislocations and institutional imbalance. Conversely, rules of refusal are harmful if the court’s perception of the volume of potential business is wrong, if the claim which has been refused is otherwise justified, and if other institutions are incapable of meeting the demand in the short run. Thus, the Supreme Court might have made a dangerous mistake had it adopted a rule of refusal in the school segregation cases, fearful of the institutional consequences of so grave a decision. The Justices probably believed in their hearts that segregation was morally wrong and constitutionally unsupportable; civil rights groups had failed to get satisfaction in the legislatures; and the Court in fact weathered the crisis. Of course, it is easy to see now that twelve years have passed that the Court survived the crisis stronger than ever. It was not so easy to predict at the time.

*Brown v. Board of Educ.* is an excellent example of the impact of a rule of reception (as opposed to refusal) on litigation. Since the Court in effect opened up a whole new area of law, it invited Negro organizations and individual Negro plaintiffs to use litigation for an attack on this or that aspect of segregation. Such litigation had already been frequent, but the frequency now increased. Federal dockets, particularly in the South, were materially affected by many complicated, controversial cases on
segregation in schools, parks, and other public facilities. It can truthfully be said that the result of the rule of reception was to create an additional demand for court services. We must be careful, however, not to over-emphasize the word "create." Demand is created, not by the courts, but by society. Certainly, a Supreme Court decision which puts in question the validity of certain kinds of criminal convictions will induce numbers of petitions for redress on the strength of the new doctrine, but the basic desire of prisoners for release was not created by the Court's decision. Nor is the Court to be praised or blamed for such important social events as the rise of Negro protest movements or the sexual frankness of the modern novel. Obviously, specific Supreme Court and state court decisions strongly influenced some strategies taken by the Negro protest movement, and others encouraged bold publishers to print increasingly erotic works. Obviously, too, specific court actions play a role in social movements by sharpening public perception of problems and solutions and by directing attention to the subjects of particular litigation. But the underlying drives come to and not from the courts.

In an important—even vital—sense, a court does not control its potential docket, simply because it does not control its society. It is a member-institution in society, but not the guiding one. To do its job a court must walk a tightrope. It must be able to cope with crises or to avoid them, but it must not evade and avoid so ruthlessly as to diminish its reason for survival and lapse into ceremonial triviality (like the English sovereign). Nor must it grapple with crises in such a way as to arouse forces powerful enough to destroy it. The United States Supreme Court is in a particularly delicate position compared to other courts. It has controlled its volume of work to the point that ordinary litigation no longer reaches it. Its normal docket consists of extraordinary cases, and the necessity for striking a balance between too much avoidance and too much boldness is all the more delicate.

III. JUDICIAL RULEMAKING

Courts, as we have stressed, are equipped to handle a normal flow of trouble cases (which for them are routine). They must also be equipped to assimilate and bring about change, at least in a gradual manner. Finally, they must be able to deal with "crises." A "crisis" in the nonquantitative

43. The analysis here is in terms of the institution's own perceptions and its own desires for survival. From a societal standpoint, it might be worthwhile for a particular institution to do certain jobs which are absolutely necessary at a given time, even though this meant that in the long run the institution would decay.
sense is a sudden demand upon the court, different from past demands, which puts the smooth, normal functioning of the court in jeopardy. A crisis is not simply a difficult case in the usual sense—that is, a case which lies within a gray area of law and evokes sharply different responses. Few judicial decisions satisfy both sides. This means that the very nature of the work of a deciding judge is such that some segment of society is necessarily dissatisfied with the outcome of his cases. However, it ought to be true, at least in theory, that a judicial decision should increase net satisfactions in society—a written opinion is an attempt to demonstrate the social utility of the actual decision to interested parties outside the immediate circle of litigants. In a “crisis case,” sharp, widespread impact can be foreseen as the result of decision. In such a case, demands are made on the court, which, however met, might so alienate or disappoint one important segment of society that social support of the court might be endangered. This kind of crisis case is never common, and is particularly rare on the trial court level.

The response of high courts to what they sense as a potential source of crisis has been a frequent subject of study. Most of the study concerns, quite naturally, the United States Supreme Court. The arts by means of which the Supreme Court delays, equivocates, and avoids some extraordinary issues are therefore well known and have been frequently catalogued. The Court has at its disposal an enormous arsenal of tools of defense. It can temporize and compromise. It can split a case down the middle. It can balance results against ideology by deciding a case on grounds so narrow that those grounds evade some burning issue. The Court also can simply refuse to hear certain cases. Others it can accept but delay from term to term. Some matters, if delayed long enough, will vanish or be diverted into another forum. Finally, some issues can be decided in such a way as to limit the notoriety of the result. The Court cannot hide the precise outcome of its cases, but it may issue brief, unsigned, per curiam decisions. Newspapers and trade journals are unlikely to note or notice these low-key opinions.

44. In some societies, and in some institutions in our own society, the role of decision-maker is rather to conciliate both parties than to decide narrowly framed issues on a universalistic basis. Thus, both sides would theoretically be pleased by a decision and no one side could necessarily “lose.”

45. Even high constitutional questions do not evoke much comment on the lower court level. The national headlines came when the United States Supreme Court decided Brown; not one person out of a thousand had ever heard of the lower-court cases which were ultimately consolidated and disposed of in Brown. Supreme Court disposition was final and nationwide in its impact; justifiably its impact was great.

46. The classic three-volume study, C. Warren, The Supreme Court in United States History (1922), is rich in details of the impact of the Court on crisis situations and vice versa. Another example is W. Murphy, Elements of Judicial Strategy (1964). There is a growing recognition of the need for careful impact research—“tracing the consequences of decisional outcomes within legal process upon values and institutions in society.” Jones, Impact Research and Sociology of Law: Some Tentative Proposals, 1966 Wis. L. Rev. 331, 332.

47. See, e.g., A. Bickel, The Least Dangerous Branch 111–98 (1962).

Some legal scholars have bitterly attacked recent examples of what they consider abuse of the per curiam decision. The per curiam, in their view, is an evasion of the Court’s responsibilities, which are assumed to be such that the Court must enunciate principled decisions and lay bare its reasoning processes whenever changes are made in the law or important matters decided. Technically there is no such requirement. The United States Supreme Court is not bound to write opinions of any particular length or degree of explicitness, but the accepted function and the role of the Court in legal and political life are such that the Court is in fact required to enunciate principled decisions in most of its major cases. Nevertheless, the Court has always felt that at times discretion is the better part of valor. The per curiam decisions may be one escape from a baffling dilemma. They can be looked upon as dangerous, but essential.

Criticism of the Court would have more force if the Court used the per curiam decision as a vehicle for dodging most of the issues that came before it. A consistent policy of avoiding crises, through per curiam decisions or otherwise, would bring on a crisis of its own. The Court cannot dodge all difficult issues. First of all, the Justices have taken an oath and assumed serious responsibilities. Moreover, a consistent, constant policy of maximum judicial restraint would be just as disastrous as consistent brashness and “usurpation.” This is the Court’s dilemma. A policy of great (and permanent) restraint robs the Court of the ultimate source of its prestige and drives away those groups which use the Court as an instrument of power. Thus, the one inescapable policy of the Court must be at all times to walk the fine line between activism, which endangers its position, and restraint, which has a similar result.

Nevertheless, any degree of activism contains potentially grave dangers for the Court. Any highly charged issue is likely to be costly. In most of its work, the Court is protected from harm by the general support it enjoys in the country (and as to which it does not essentially differ from other legitimate institutions—the Presidency, the Congress, officers of state). The Court’s legitimacy is not likely to satisfy a man whose death sentence the Court affirms, or a white supremacist whose dearest institutions are destroyed by the “nine sociologists.” Nevertheless, few people are intimately touched by the average Supreme Court decision, and the public, insofar as it can be said to have any opinion at all, holds the Court in enormous esteem. The source of this respect may be the belief that judges are not true politicians and that they decide cases honestly according to some impersonal standard of law. There may be other reasons as well. In any event,

the *legitimacy* of the Court is an outstanding bulwark of protection against harmful criticism.\(^{52}\)

Some students of the Court insist that poorly written opinions, loose rhetoric, flawed logic, inconsistency of decision, and squabbling dissents damage the image of the Court and hence impair its legitimacy.\(^{53}\) This damage, if it exists, must be confined in its immediate impact to a tiny circle of law professors and scholars. Perhaps their influence spreads more widely into society over the course of time. Neither these scholars, nor the Justices of the Court, nor anyone else is sure whether this is so or not. Since the Court itself has no instruments for measuring public reaction, and certainly no mode of predicting impact other than common sense, it must rely on its own judgment as to the best course to follow, and, in appropriate cases, fall back upon a firm body of principle. Strictly as a matter of political expediency, the Court can be dangerously wrong. Most historians would call the *Dred Scott*\(^{54}\) decision a serious error, and perhaps the first income tax case\(^{55}\) as well. On the other hand, *Brown* now looks like a gamble that succeeded—a gamble, in the sense that the Court could not know whether society would let it keep its decision, or at what cost.\(^{56}\)

The questions posed to the Court by *Brown*, *Dred Scott*, and other cases of high policy and moment produce occasions of potential crisis. Crisis can be contained—or delayed—but not always or entirely, as we have noted. Once the Court has decided to meet an issue, and not evade it, is there any further strategy that can limit the risk? This depends in part on whether the crisis is *nonrecurring*—that is, can one be reasonably sure that the issue will not plague the Court in the near future in the same general form.

Two examples of highly publicized actions of the United States Supreme Court may illustrate what is meant here by “nonrecurring.” In the first, *Wilson v. Girard*,\(^{57}\) a serviceman was on duty in Japan, guarding a machine gun. On a nearby firing range Japanese civilians were picking up spent cartridge cases. Girard fired a cartridge case with a grenade launcher; the case struck and killed a Japanese woman. A tremendous furor arose in Japan over the incident, particularly over the question whether Japan or the United States should try Girard for the crime. The United States waived jurisdiction and Girard sought relief in the federal courts. The

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52. The importance of the concept of legitimacy in political theory is due largely to the writings of Max Weber. See R. Bendix, *Max Weber: An Intellectual Portrait* (1960). In this Article action is *legitimate* if it is rightly taken by some particular actor. Legitimacy, in other words, relates to actions which are proper to a particular role, rather than proper in a universalistic sense.


55. *Pollock v. Farmer's Loan & Trust Co.*, 157 U.S. 429 (1895); see *Swisher*, *op. cit. supra* note 54, at 451.


Supreme Court denied relief in a short per curiam opinion. The Japanese tried and convicted Girard. However, his sentence was relatively light and the issue soon receded into history.

Perhaps the furor over Girard was a symptom of deep trouble between the two nations, but if so it was only a symptom. The status-of-forces agreement had worked smoothly before the Girard case; it worked smoothly afterwards. Girard was an “incident,” as isolated as a case of murder over love. It demanded not closely reasoned articulation but clean, swift, and certain resolution by all relevant agencies. Irresolution could have turned an incident into crisis—as happened in the case of Caryl Chessman. The Court’s refusal to intervene was sound statesmanship, perhaps aided by knowledge that the issue rose and fell with Girard.

The celebrated Steel Seizure case is another example of a nonrecurring crisis, although here, in contrast to Girard, the Justices were sharply divided over what was to be done and filed long and contentious opinions. Here too a swift, clean-cut decision was necessary. Delay would have meant avoiding the issue completely. Here too it was understood that all parties would acquiesce in the Court’s decision. Here too the precise event was not likely to recur. It is true that the Justices (and many commentators on the case) felt that a fundamental issue was at stake. The extent of the President’s emergency powers, the power of the President to seize control of an industry in peacetime—there are many ways to formulate this issue. But in one sense it could be argued that the case presented no fundamental issue at all since the Steel Seizure case could not recur. A President might in the future seize the steel industry, and, if so, certainly the earlier case would be cited as a precedent. But in fact no two situations in which a President feels compelled to seize a major industry and which are separated by any appreciable span of time could be similar enough for the Court to feel truly bound by its prior decision. The President seizes a major industry only under extraordinary circumstances or if he is an extraordinary President. In either event his act would be uniquely time bound and of vast political importance—two factors which dilute the importance of precedent almost to the vanishing point.

Thus, paradoxically, these most crisis-like crises are not crisis producing for the Court as an institution. Though the underlying issues are highly

61. See, e.g., Kauper, The Steel Seizure Case: Congress, the President and the Supreme Court, 51 Mich. L. Rev. 141, 142-44 (1952).
63. Except insofar as the assumption of inherent powers by the President implies a diminution of the powers of the Court.
controversial, they can be efficiently decided by the Court since society welcomes a once-and-for-all resolution by a legitimate, impartial tribunal. When the precise event or the person at issue is the source of the crisis, then the crisis is nonrecurring in the sense used here, and it poses (in our society) few or no long-term difficulties for the Court.64

Institutionally more serious is a crisis which is made up of recurrent cases and which does not vanish with a single resolution, but which heralds a new situation for the courts. Either a new social problem emerges out of the social background (as in the segregation cases) or a demand on the courts is met by a judicial response which in turn creates additional demand for fresh definitions of the rights and duties of the parties and the forces that they represent (as in the obscenity cases).

A rational court will attempt to reduce such a situation to institutionally manageable proportions. In the face of recurrent events, the court is therefore likely to develop a rule that can be delegated to other authorities for administration. From the standpoint of the court, this is an important element of a solution to the problem. Of course, the solution must be substantively “correct” as well; it must be in accordance with principle as the Court defines principle. But the form of resolution of such problems (as distinct from substance) is likely to be dictated by institutional needs. The kind of rule which emerges from a recurrent crisis of substance will be a rule which serves the formal requirements of the system and answers the substantive social demands.

What sort of solution will meet this requirement? From the formal standpoint, it is likely to be a rule which perhaps can end the constant probing by litigants for definition and the constant search for the boundaries of the rule. Such a rule will be as objective, as quantitative as possible. An objective, quantitative rule minimizes the risk of further litigation and maximizes the extent to which other private or public agencies can apply the rule, thus taking pressure for decision away from the courts. Such a rule, in form, will be either a rule of refusal or a rule expressed or expressible in quantitative form. A rule of refusal is not usually a rule which accepts and satisfies a fresh demand for social reform, but on occasion it can serve this function. For example, a court might conceivably rule that no power existed in any branch of government to censor any book on the grounds of obscenity. This would be a rule which refused to litigate the question of obscenity at all, not for jurisdictional reasons, but by obliteration.

64. The qualification “in our society” is necessary. The Steel Seizure case would have been much more dangerous to the Court as an institution had it not been reasonably sure that President Truman would obey a decision against him. In a dictatorship or in a society traveling down the road to a police state, defiance of the chief magistrate might in fact lead to destruction of the courts. This has happened, for example, in South Africa and might have happened in recent months in Rhodesia, except that the Rhodesian court sidestepped the most potentially embarrassing issue. N.Y. Times, Sept. 10, 1966, at 10, col. 4.
ing the concept of obscenity as a basis for judicial exercise of discretion. Notice that such a rule is hard-and-fast and therefore expressible in quantitative terms—rules of refusal are rules whose quantitative term is zero. In essence, then, crisis situations will tend to generate in a court a movement of doctrine toward quantitative expression.65

The reapportionment cases provide a neat illustration of this movement of doctrine—atypical only in the swiftness and smoothness of development. The general social background is well known. Many legislative bodies, sometimes in disregard of state constitutions, had refused to reapportion themselves in accordance with actual population distributions. Relatively speaking, cities and suburban areas were underrepresented in state legislatures. Rural areas, some of which had declined absolutely in population as well as relatively since the last reapportionment, had far more representatives than they merited on a straight population basis. In many states, apportionment in the upper house departed from a population basis even more radically than in the lower house.66

In most states it was useless to ask the legislature to reform itself. Representatives were unwilling to vote themselves out of their jobs. Judicial review was a possible avenue to relief. Colegrove v. Green67 brought into question the apportionment of congressional districts in Illinois. The Court, however, sidestepped the issue and adopted a rule of refusal. Mr. Justice Frankfurter thought that the question was "of a peculiarly political nature and therefore not meet for judicial determination."68 The doctrine he invoked (the "political question" doctrine) satisfied all the formal requirements of a rule sufficient to lay the apportionment issue at rest. It was quantitative and clear, in the sense that all rules of refusal are quantitative and clear. Moreover, the doctrine had served the Court well on other occasions when, in its judgment, tactics of evasion were necessary to preserve

65. It must be remembered that institutional values are also served by maintaining a flow of important business. Thus the Court will find its optimum policy to be one of accepting some difficult cases—providing it is able to "solve" many or most of these—in the sense that "solve" is used here.

66. For example, the California constitution provided that no county was entitled to more than one state senate seat and that no state senatorial district could consist of more than three counties. CAL. CONST. art. 4, § 6. This gave the six million residents of Los Angeles County the same voice in the state senate as a group of three counties with a total population of fourteen thousand. This apportionment was held unconstitutional in Silver v. Jordan, 241 F. Supp. 576 (S.D. Cal. 1964), aff'd per curiam, 381 U.S. 415 (1965).


68. Id. at 552. "'[T]he subject has been committed to the exclusive control of Congress . . . . The one stark fact that emerges from a study of the history of Congressional apportionment is its embroilment in politics, in the sense of party contests and party interests . . . . Courts ought not to enter this political thicket." Id. at 554, 556.
the structure of government from interinstitutional conflict or to safeguard
the integrity of the Court.69

But Colegrove was only a formal, not a substantive, solution to the
problem of malapportionment. Some of its defects were apparent upon its
face: a bare majority of the Justices deciding the case concurred in the
result; two Justices did not sit; and only three Justices joined in the ma-
ajority opinion.70 The division of the Court reflected the ultimate, social in-
stability of Colegrove: it did not quiet the movement to seek judicial relief
from unfair methods of apportionment. New Justices and slight variations
in the facts of new cases were enough to encourage the bringing of new
lawsuits. In Gomillion v. Lightfoot71 the Court overturned a racially moti-
gerrymander of the city boundaries of Tuskegee, Alabama. This was
a further sign of the weakness in Colegrove, even though the racial aspect
of Gomillion made it distinguishable and even though it was a unani-
rous decision whose opinion, denying the relevance of Colegrove, was
written by Mr. Justice Frankfurter himself. The case gave fresh encour-
gement to potential litigants. A rule of refusal which seems to have changed
from a “no” to a “maybe” is weak. A “maybe” (unlike a “no”) is not quan-
titative; hence, a weakening rule of refusal loses even its formal claim to
govern.

In Baker v. Carr72 a six-man majority abandoned the rule of refusal.
The case concerned the apportionment of the General Assembly of Ten-
nessee; the precise holding was that “the complaint’s allegations of a denial
of equal protection present a justiciable constitutional cause of action upon
which appellants are entitled to a trial and a decision.”73 Only the threshold
question was decided. The Court, true to its own traditions and anxious to
make only an incremental decision, held merely that the political-question
d doctrine no longer precluded testing legislative reapportionment against
constitutional standards. But the Court deliberately refused to say anything
specific about those standards.

The decision and its successors provoked much comment, scholarly
and otherwise; much of it was highly critical.74 But from the standpoint

69. See, e.g., Luther v. Borden, 17 U.S. (7 How.) 1 (1849) (arising out of Dorr’s rebellion in
Rhode Island).
70. Mr. Justice Rutledge concurred in the result only. He conceded an abstract right to inter-
vene in apportionment cases, but felt that the Court should exercise jurisdiction “only in the most
compelling circumstances.” 328 U.S. at 565. Justices Black, Douglas, and Murphy dissented. Id. at
566. Mr. Justice Jackson did not participate, and Mr. Chief Justice Stone died before the decision was
reached.
72. 369 U.S. 186 (1962).
73. Id. at 337.
74. For these cases, see notes 77–79 infra and accompanying text. For examples of measured,
thoughtful criticism, see Dixon, Reapportionment in the Supreme Court and Congress: Constitu-
tional Struggle for Fair Representation, 63 Mich. L. Rev. 209 (1964); Kauper, Some Comments on
of the Court's institutional needs, there was logic in the course of doctrinal development. To begin with, the halting, tentative reach of *Baker v. Carr* was the expression of an attitude of restraint. The political-question doctrine had been a form of jurisdictional restraint. Substantive restraint underlay the limited scope of *Baker v. Carr*. By deciding only what was absolutely necessary to the case, the Court deferred all other major decisions. The case merely asserted that the judiciary possessed a reservoir of power. It was conceivable (if unlikely) that the problem would then vanish from the judicial forum. For example, legislatures might have voluntarily apportioned themselves to please potentially interested parties and to avoid fresh litigation. Moreover, the narrowness of the decision in *Baker v. Carr* prepared the political public for further steps which, however bold, could not have been as sudden as they would have been if the Court had gone the whole way in *Baker v. Carr*. An occasion for discourse had been opened up; conceivably some sort of dim consensus might have emerged.

But, when all is said and done, a limited, discretionary, nonquantitative rule (like the rule in *Baker v. Carr*) is formally unstable; it lacks the clarity and simplicity of a rule of delegation, and its survival depends upon triviality or consensus. Yet the decision was not trivial by any stretch of the imagination; nor did it lend itself to consensus. The Court had not solved the problem of the constitutional limits of malapportionment in a *formal* sense. Quite the contrary, it had overturned a rule of refusal, enunciated a rule of acceptance, and declined (for the moment) to issue a quantitative guide. If *Baker v. Carr* was a step toward a solution to the apportionment problem in the substantive sense, it was a step away from solution in the formal sense. It had merely opened a door. It had given encouragement and permission to others to inquire about limits, to litigate, to debate. Within a year after *Baker v. Carr* seventy-five lawsuits were filed in state and federal courts; the legality of virtually every legislature was under a cloud. Some legislatures remained deadlocked on reapportionment. Others tried to make minimal changes—changes unacceptable to groups which now sensed a powerful ally in the courts. Thus, the hoped-for stable delegation to the legislatures did not take place, and the Court was forced to meet the essential question head on. It was, in other words, asked to frame the solution itself and then to hand it on to subordinate institutions.

A crisis always looks more intense to those directly involved. The Supreme Court now faced a situation of ceaseless, fractious, and annoying litigation; of warfare between state legislatures and the federal judiciary, and between rural, urban, and suburban interests, all battling on through the years in disruptive litigation. Here, then, was a second "problem" of *Baker v. Carr*.

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75. R. Hanson, *The Political Thicket* 57 (1966).
Substantively there was little doubt that the Court would not go back to its discarded rule of refusal. It would continue to uphold its own preferred solution, embodying an attitude toward reapportionment that would favor cities and suburbs as opposed to rural areas (or that could be so viewed) and would lean toward a theory of suffrage that would weigh as equally as possible the votes of all citizens. Formally, the Court would seek a hard-and-fast, quantitative rule that would not call for the exercise of discretion on the level of the Supreme Court and that would allow efficient and permanent delegation of the responsibility for application.

In fairly rapid order the Supreme Court proceeded to reach a solution to the reapportionment problem that met these minimum formal requirements for equilibrium. In *Gray v. Sanders* the Court invalidated the “county-unit” system used in Georgia as a basis for counting votes in Democratic primary elections. Though there were hints of the coming doctrine of “one man, one vote,” the opinion was still guarded and tentative. *Westberry v. Sanders*, a Georgia case concerning congressional elections, broadened the hints. Finally, in June 1964 the logical end point was reached in six cases headed by *Reynolds v. Sims* and all handed down on the same day.

In essence, these cases enunciated a rule that both houses of a bicameral legislature must be apportioned substantially on a population basis. Anything short of this offends the Constitution. In each of the cases Mr. Justice Harlan registered a bitter dissent. He accused the Court of ignoring history, precedent, logic, good sense, and the proper limits of judicial restraint; the rule laid down by the majority, moreover, was vague and utterly unworkable. Yet, though the majority did speak of case-by-case resolution and did disclaim the need for mathematical precision in fixing boundaries and in determining permissible deviations from absolute equality, the rule laid down by the Court was as logical, as quantitative, and hence as workable as the situation permitted. A more discretionary rule would have invited constant litigation; it would have lacked even the bare formal prerequisites of a stable solution. The actual formulation—“one man, one vote”—met these formal prerequisites. It contained in itself, by virtue of its relatively clear-cut contours, at least the possibility of a stable

76. Within a month after *Baker v. Carr*, and on the strength of it, the Court remanded a Michigan case for further proceedings. Scholle v. Hare, 369 U.S. 429 (1962). Shortly thereafter, similar action was taken. WMCA, Inc. v. Simon, 370 U.S. 190 (1962). In *Simon* Mr. Justice Harlan demanded that the Court come to grips with the substantive issue, or at least indicate guidelines for the lower courts. *Baker v. Carr*, he pointed out, “did neither.” Id. at 194 (dissenting opinion).


78. 376 U.S. 1 (1964).


80. 377 U.S. at 589.
solution—a relatively permanent and operational delegation of authority to the lower courts and, hopefully, to the state legislatures.81

Of course, a hard-and-fast rule is only an attempt to provide a solution; it was yet possible for the Court to be submerged in a storm of protest. To serve as a stable solution, the new rule must be generally accepted, or the costs of challenge, measured against the likelihood of change, must successfully deter challenges. If the new rule is unacceptable, it will be followed by more and more challenges, and the Court may either have to retreat from its rule or (even more serious) suffer losses in power or prestige. There is often, then, a period of anxious waiting. In the case of the reapportionment rule, there now seems little doubt that the rule will prevail. Despite angry cries, a proposed constitutional amendment,82 much fulminating in the press, and waspish carping in the law reviews,83 the decision seems firmly, even serenely, entrenched.

The Court has not always been so prescient or so lucky. Some of its hard-and-fast rules have merely embroiled it in controversy, sometimes of so strident a nature as to injure the Court, at least temporarily. The Dred Scott case is historically the most notable example; it ran counter to forces much too deep to be contained. In form Dred Scott satisfied the requirements for stable delegation—it embodied a hard-and-fast rule designed to end, once and for all, a worrisome issue that plagued the courts and the country. In this, of course, it failed. But even Dred Scott was sufficiently wrapped in a mantle of stylistic legitimacy (and sufficiently acceptable to one great bloc of opinion) to muffle its long-run impact. Today the Court’s status is probably such that no one decision it has made, or is likely to make, can fundamentally impair its position. The current Court seems more aware of this fact than most, and it seems therefore inclined to take numerous gambles.

When a rule can be stated in “yes-no” terms, it satisfies the conditions of quantitative certainty, and it is formally capable of stable delegation. Not all rules, however, are susceptible of statement in such terms. The political-question doctrine was a rule of refusal, capable of statement as a simple “no”; once it was abandoned, no simple “yes” rule was possible. It was necessary, then, for the Court to work its way toward a rule capable

81. Martin Shapiro states that “with the benefit of hindsight it now seems clear that in the reapportionment cases a majority of the Justices at the time of Baker v. Carr actually jumped directly to the one man—one vote decision which they then implemented by successive decisions.” Shapiro, Stability and Change in Judicial Decision-Making: Incrementalism or Stare Decisis?, 2 LAW IN TRANSITION Q. 134, 146 (1965). The speed of the trip from Baker v. Carr to “one man, one vote” is some evidence for this proposition. But, even if true, this would merely indicate that the consciously rational Court would deliberately choose to simulate a process which occurs without premeditation in other instances. Professor Shapiro notes that the Court “could have stopped short of full implementation in the later decisions if the adverse feed-back from Baker had been strong enough.” Ibid.


of quantitative statement in a more literal sense. As we have seen, the Court did so. But it is not always easy for appellate courts to work out quantitative rules, even when, sociologically speaking, circumstances impel the Court toward such rules and when societal patterns or the Court's great reservoir of prestige would allow any solution to be stable.

On the trial court level particular concrete decisions are often expressed in quantitative terms. Juries return verdicts in dollar amounts, figured to the penny. A verdict that the plaintiff in a tort action should recover a "reasonable" amount of damages would be insufferable; such an award could not be efficiently executed and would require one more (and unnecessary) delegation. Not all lower-court decisions are dollar decisions, but they are all extremely precise. A finding that B has title to a tract of land rather than C or that the court has no jurisdiction to hear D's claim is quantitative in the same sense as a rule of refusal, and has the same general impact—that is, it can be precisely carried out without further delegation of discretion.

Indeed, the ultimate application of a rule to a fact situation must be concrete or precise, or it is not an application at all. Similarly, appellate decisions take a simple "yes-no" form; they reverse or affirm. But in formulating general rules to govern whole classes of cases, courts do not find it easy to lay down obviously precise, quantitative rules. In Anglo-American law it would be completely unthinkable that a court could decree or even evolve a workmen's compensation system or a social security law. Those programs rest on statutes with elaborate quantitative tables, schedules of rates, dollars, and ages. They require a taxing system and a large administrative staff. They presuppose some means of gathering information, of evaluating it, and of devising technical instruments for carrying policy into effect. All this is beyond the customary power, as well as the customary role, of the courts. Laws of this form in our legal system are promulgated only by legislative bodies.

Nevertheless, courts do sometimes lay down rules which cost a great deal of public money to implement and which either invoke or imply a large administrative staff. Those rules may be embodied in decisions which, if adopted as legislative policy, would likely have been preceded by considerable study and accompanied by careful plans for implementation. Brown required complete reorganization of southern school systems. In 1964, for example, the Court ordered a Virginia county to reopen a public school system.\(^{84}\)

\(^{84}\) See Griffin v. County School Bd., 377 U.S. 218 (1964). The courts have virtually run bankrupt railroads through the device of equity receivership, see, e.g., Sage v. Memphis & L.R.R.R., 125 U.S. 361 (1888), and have made and broken industrial strikes, see, e.g., In re Debs, 158 U.S. 564 (1895); F. Frankfurter & N. Greene, The Labor Injunction (1930).
There is, nonetheless, an important distinction between these activities and programs on the scale of workmen’s compensation and social security. Lack of staff and inability to levy taxes are symptoms, not the underlying reality. The courts do not innovate certain kinds of new programs because they lack power—in the sense of legitimate authority—to do so. The legitimate authority of the courts is defined by positive law (the federal and state constitutions and statutes on jurisdiction) and by a powerful tradition which describes the proper role of judicial agencies and the proper mode of behavior of judges. There is nothing inherent in a “court” to prevent it from devising new programs and, specifically, from promulgating rules in precise, quantitative terms. There is nothing inherent in a “legislature” that prevents it from deciding concrete cases. Historically, the institutional ancestors of American courts and legislatures performed many tasks which, to the modern eye, seem curious reversals of their roles. Legislatures long exercised appellate jurisdiction; the name of the highest English court (the House of Lords) preserves the memory of this period. In the United States, too, appellate decision-making in state legislative bodies persisted well into the nineteenth century, and county courts in the American colonies were important administrative agencies—levying taxes and overseeing construction of roads, for example. The name of the Massachusetts General Court (a legislative body) harks back to a time when governmental functions were performed by a single authoritative body, untroubled by notions of the separation of powers.

The legitimacy of an institution is not unchanging, and, with respect to the courts, does not rest on a single ideal core of meaning. Legitimacy is culturally defined; its effect on the power and style of courts is specific to a given time and place. In the recent history of the common-law system, it was conventionally stated that judges could not legitimately “make law.” Some legal theorists carried this proposition very far; the law, in their view, was a gapless system whose principles contained an answer for any question of law, however new such a question appeared. These classical jurists were expressing one theory of judicial legitimacy. Even today (and for much the same reasons) legal scholarship, echoing the popular mind, often adheres to subtle variants of the classical theory. The rulemaking of courts has to be principled, or neutral, or restrained. Judicial rulemaking has an obligation to be reasoned and persuasive; when judges make law, they may make it only in small bits and pieces, and they must explain how they are


86. See, e.g., P. McClen, The County Court in North Carolina Before 1750 (1954).

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making it and why. Rules made by judges must be somehow legitimated. They differ in this regard from rules of statutory law, which are enacted naked and unashamed by representatives elected for this very purpose. 88

In the main, courts still deny their power to make new law. This denial is itself no small limitation on their power. It helps ensure that judge-made law results in only small, incremental changes in the existing fabric of doctrine. A great leap forward is rare. Even constitutional law—where a major change can be legitimated through appeal to the higher mandate of the Constitution—shuns sudden advances. The reapportionment cases, for instance, exemplify a cautious, step-by-step movement. In general, judge-made law inches forward in a glacial kind of creep. When a court overrules a past decision, it often claims to be redressing an error rather than changing the law. Cases make small changes in law and call them no change; big changes are called small changes. Dean Edward Levi has well described how case law moves from instance to instance through the use of reasoning by analogy. 89 By an accepted and usual technique, common-law courts make changes within broad "principles" and ultimately change the principles themselves.

In the twentieth century, partly because of the effect of legal realism upon the style of judicial opinions, judicial creativity is somewhat less verbally restrained than it was in the late nineteenth century. Legal realism has meant a reexamination of the methodology and purpose of judicial decision-making, and this in turn invites a reexamination of the bases of the legitimacy of judicial institutions. In modern theory, the courts have the right and the duty to "consign to oblivion what has proved over the years to be chaff." 90 New theories legitimate particular kinds of bold creativity—the duty of courts to expound the Bill of Rights to protect the individual against government or the duty of courts to keep law in touch with what is deemed to be the temper of the times. Yet changes in judicial behavior, all in all, are not deep; they are style rather than substance. Change in the law, through the medium of courts, remains incremental and gradual, rather than sudden or revolutionary. There is still a commitment to the common-law approach, to evolutionary movement, and to constant recourse to grand principles of law, established precedent, or con-

89. See E. Levi, An Introduction to Legal Reasoning (1962); K. Llewellyn, The Common Law Tradition: Deciding Appeals (1960). Since this Article makes the argument that incremental, cautious rulemaking is part of the style of judicial institutions because the limits of their legitimacy make a bolder style dangerous, it might be argued that, from the institutional standpoint, this style of work produces the most rational results, even if these results are not the most "rational" from an omniscient viewpoint or the viewpoint of the whole society. This question is taken up in the important and perceptive article by Martin Shapiro, Stability and Change in Judicial Decision-Making: Incrementalism or Stare Decisis?, 2 Law in Transition Q. 134 (1965).
stitutional phrases as the major premises of judicial reasoning. Legal realism has not freed the courts from an obligation to society, only from an obligation to a certain style of legal logic; the pull of social responsibility, coupled with an awareness of the limits of judicial knowledge and the limits of judicial capacity to effect social change, may lead to greater, not lesser, caution in action and to greater, not lesser, accountability in principle and reasoning.

But past and present disabilities on the kind of rules that can be legitimately enunciated are an embarrassment to courts when problem situations call for rules of stable delegation, since these, as we have seen, will tend to be quantitative rules. The evolutionary, incremental character of judicial behavior in rulemaking implies (on the contrary) slow, inductive movement along a continuum, and clandestine changes in law—qualitative rules, rules expressed in terms of reasonableness, rules empty of content except as courts fill them with content, rules capable of expansion by small degrees, discretionary rules concealing the reality of change. Thus, the history of judicial systems harbors a considerable dilemma: How can the legitimate limits of judicial rulemaking be reconciled with the institutional need for quantitative rules?

One solution, frequently adopted, is to enunciate rules of a flat “yes-no” nature—rules of refusal, for example. But such rules are not always appropriate. Still another technique is to ratify or absorb into judge-made law quantitative measures whose legitimacy derives from other branches of the legal system or from elsewhere in society. One example of this technique can be seen in the course of the evolution of the Rule Against Perpetuities. The rule, in essence, puts a limit on the length of time property can be “tied up” in a family or held in a family trust. Originally phrased in terms of “reasonableness,” the rule could not in the long run remain in that form, just as the rule in Baker v. Carr had to move in the direction of more certainty. In sharp contrast to the swiftness of Baker v. Carr, the evolution of the Rule Against Perpetuities from a rule of reason to a stable quantitative rule took more than a century. The process was much the same, however. A rule of “reasonableness” in perpetuities law would have precluded any stable delegation to conveyancers, lower courts, and the general public. Rational calculations in the dynastic planning of estates would have been much more difficult without a hard-and-fast rule to ensure safe predictability. Perhaps the simplest solution might have been a flat quantitative limit on the duration of trusts containing contingent interests—perhaps fifty or one hundred years; or fifty years following the duration

91. The latter is of course more important in modern law. The classic formulation of the rule, originally published in 1886, is J. Gray, THE RULE AGAINST PERPETUITIES (4th ed. 1942).
92. See id. at 161–63.
of a life estate. A legislature might choose such a method, but it is not the style of a court. Hence the evolutionary character of the rule. The original formulation was characteristically vague; the final formulation, “lives in being plus twenty-one years,” for all its irrationalities, is in theory capable of “mathematical” accuracy in application. The twenty-one-year period is not measured by anybody’s minority, although the choice was not entirely accidental. It has some rational relationship to the period of minority, but it was powerfully influenced by the fact that twenty-one years was an available number with preexisting legal significance, so that it could be adopted and embodied within a rule of law without transgressing the bounds of judicial legitimacy. The history of the Rule Against Perpetuities, then, illustrates not only the tendency of courts to evolve rules that are mathematical in the broadest sense, but also one technique for solving the dilemma of how to achieve quantitative results without the legitimate means available to a legislative body.

Some areas of litigation may cry out for mathematical solution, but no such solution appears. Usually these are areas in which value choices are confused and in which the deciding institutions cannot agree about substantive goals. But it may simply be difficult to frame a formally stable rule. Problems of the permissible scope of state taxation of interstate commerce, which raise some of the trickiest questions of constitutional law, fall into this category. What kinds and amounts of tax may State X levy on businesses that operate in State X and also in other states? The Supreme Court has come out now with one doctrine, now with another; some doctrines emphasize the revenue needs of the states, some the immunity of national business from local interference. But the rules enunciated so far suffer from a basic formal vice; they are not rules that permit easy resolution of the question whether a particular tax levied by State X violates even the
current doctrines. They therefore do not permit a stable delegation to lower courts.

As we have noted, a flexible rule is tolerable if it fits in with some sort of consensus among those affected, so that there is no constant, ceaseless testing of the boundaries of doctrine through litigation. It may be tolerable, too, if any proposed solutions seem worse to affected groups than current uncertainty. Whether business can and does adjust to the system is unknown. Clearly, this field of law breeds litigation. The states have a rapacious appetite for tax money, and interstate business is fat and profitable. There is a tendency, then, for states to try to push their revenue laws to the limit of constitutionality, and interstate corporations continue to resist application of such laws if they see a reasonable chance of success. So the number of cases (though numerically not great) persists before the United States Supreme Court, and, until a stable solution is found, neither the constituents (state governments and large interstate corporations), nor the scholarly audience, nor the Court itself are likely to be wholly pleased with the state of the doctrine.

Substantively, the most efficient solution would be some sort of apportionment formula dividing the income of a company into taxable and nontaxable segments. Congress could easily enact a workable statute, if such a law were politically feasible. In the absence of a statute, the Court is forced to invent its own formulas; and the most likely way, once substantive agreement is attained, is for the Court to adopt and legitimate some specific state formula or set of formulas, or (less likely) a formula suggested by some other authority. There are indications in the case law that a solution of this general form has tempted the Court.97 The pressures for adopting such a solution are precisely the same as in the Rule Against Perpetuities, and the technique that could be used is comparable.

For courts the most embarrassing area of conflict is one lacking the possibility of quantitative rulemaking, stable delegation, agreement upon policy, or any signs of a nonjudicial solution. In such areas of law the courts are continually plagued by pressure from litigation for constant redefinition and refinement. In these areas, public awareness of the problem is high, but no consensus is visible, and no solution to the substantive problem seems feasible. In such an area, the law will show a considerable degree of uncertainty and flux, prediction will be difficult, and “trends” will be ambiguous. Indeed, the very term “trend” implies a high degree of policy agreement on the part of the courts. A trend means substantive movement in one policy line toward some absolute limit. As we have seen, courts prefer making changes by degrees when they can.

Many areas of law have characteristics which rule out any current for-

mal solution. How far the Constitution permits suppression or control of "obscene" literature and art is one such question. For decades no great conflict between censorship of literature and freedom of expression appeared in the law; a rough working consensus of values in the community kept these two problem areas separate. In the nineteenth century the limits of permissible expression were generally understood not to include graphic descriptions of sexual activity. The first amendment and its state counterparts were not taken to bar the banning of obscene books. The legal limitations on expression seem to have been accepted by respectable artists as congruent with the dictates of good taste—even by artists who were otherwise in full rebellion against their society. This consensus has now broken down. The law is now in a period of constant testing of boundaries. The courts are the forum for dispute between those who wish to push literature further toward graphic sexuality (out of conviction or, in the case of some publishers, for gain) and those who see grave social dangers in unbridled literary sexuality. There is no obvious solution. Rules that might satisfy the formal requirements of stability are unacceptable—that is, either a rule allowing all censorship or all censorship of such-and-such a type, or a rule so formulated as to bar once and for all any control by the state over the limits of sexual frankness in literature and art. The Supreme Court has moved far in the direction of complete freedom of expression, but it has thus far insisted on retaining the concept of obscenity as a category of expression not protected by the first amendment. And from time to time it has gone "backwards"—for example, in the recent case of Ginzburg v. United States. But no objective test of obscenity appeals to the Court, and perhaps such a test could never be devised. Since there is no stopping point, no consensus, and no possibility of stable delegation, the issue will remain at least temporarily where it now is: a subject of great uncertainty and backing and filling in the courts. The Supreme Court of the United States—and the high courts of the states—will continue to act as "high courts of obscenity," reading particular books, seeing particular movies, and making up their minds about them one at a time.

Ultimately, if the Court cannot solve the problem and if the problem does not vanish of its own accord (through a radical change in popular


tastes or levels of toleration), some extrajudicial solution will have to be reached. This is so because the very definition of a problem implies a social impulse toward solving it. No “issue” or “problem” lasts more than two or three generations. There are, to be sure, eternal issues or problems, but these are not problems in the sense used here; rather they are formulations of human dilemmas on so high a level of abstraction that they cannot ever really be resolved. Problems such as poverty, crime, or the ugliness of cities can exist through all time, but such specific issues as whether slavery shall exist in Missouri Territory, whether fair-housing ordinances can constitutionally be enacted, whether fetishistic literature can be sold in drug stores, and whether hospitals shall be immune from tort actions must be resolved; they cannot drag on forever. If an issue is sharply enough defined to be perceived as a “problem” by the public or some significant segment of the public, there is a strong movement toward resolution, by definition. Society has a whole battery of institutions and mechanisms for resolving current problems. Otherwise society could not survive. If the first agency to which the issue is referred cannot resolve it, those raising the issue will seek a more authoritative agency (or a more efficient one). If worst comes to worst, the issue will not find its agency, and society might even be destroyed by the ensuing struggle. The slavery issue in American history came close to doing exactly that. Within any given society, however, such radical instances will be uncommon.

IV. LEGISLATIVE RULEMAKING

The American legislature functions as a rulemaking body in a purer sense than the courts, which (on the trial level particularly) are much more concerned with concrete applications of rules. One major function of the legislature, indeed, is to lay down statutory rules. Very little of the total legislative effort currently consists of applying rules to specific concrete instances. Congress (though not most of the states) still passes private laws—that is, laws which apply only to single cases—but even these are usually dispensations from rules rather than reasoned decision-making accompanied by a statement of underlying principles.102 In general statutes, rules are laid down directly, usually without any statement of reasons. Political theory allows representatives of the people to make law openly; it does not require any further legitimation.103 Therefore, many of the restraints which hamper the rulemaking of courts do not apply to the legislature. Quantitative rules can be decreed without subterfuge.

In another sense, however, the legislature faces institutional problems

as serious as those of the courts, and in some ways more serious. Congress is (we are told) almost “obsolete,” in that the functions and problems of modern government are far too complex to be managed by a large body of nonprofessionals whose membership fluctuates according to the whims of the voters.\textsuperscript{104} Faced with vast economic and social pressures, state and federal legislatures have responded to a tremendous rush of potential affairs by delegating much of their historic business to other institutions—the President, administrative bodies of all sorts, and even to the courts.

Delegation has taken place in many ways. One mode of implicit delegation is to legislate by framing very broad rules. Such rules do not govern by themselves, but must be implemented by the courts or by some subsidiary agency. The original Sherman Act\textsuperscript{105} was very much of this nature. The operating paragraphs outlawed “contracts . . . in restraint of trade” and “monopoly,” but made no attempt to define the terms. No specialized agency was created under the Sherman Act to quantitate “restraint of trade” and “monopoly” and to enforce the prohibitions against these practices. Effective power to mold antitrust law and policy passed to the Department of Justice, as the general arm of the federal government in initiating criminal proceedings, and to the courts, as interpreters of statutes. Even today, statutory antitrust rules are not very specific. But legislatures, unlike courts, readily make stable delegations through rules which are not in any sense quantitative. In antitrust law, administrative agencies—and, secondarily, the courts—flesh out policy and put detail into the operating rules. The statutes remain much the same, but policy fluctuates between permissiveness and trust busting, depending upon the temper of the Justice Department and the attitude of the federal judiciary.\textsuperscript{106} The judiciary’s role is not unimportant; it ratifies governmental action or limits its scope.

Thus the legislature by adopting delegation rules in this not atypical area has attempted to solve two distinct sets of potential problems—problems of volume and problems of substance. Wearisome, complex, and infinitely varied problems could arise to plague the legislature with regard to antitrust policy—problems that would have made the legislature into an arena of endless dispute between opponents and proponents of a vigorous antitrust policy. A broad rule, delegated to agency and court, avoids these problems. Moreover, the rule “solved” the substantive problem caused by the inability of Congress to agree upon an acceptable antitrust policy because of a sharp clash of interests and ideologies.\textsuperscript{107} At the time of the

\textsuperscript{104} See, e.g., Huntington, Congressional Responses to the Twentieth Century, in The American Assembly, the Congress and America’s Future 5–6 (1965).


Sherman Act, there was general agreement in the country that something had to be done about "the trusts," but there was no agreement about the extent to which the trusts had to be crushed, and big business was bitterly opposed to any law that would be too vigorously enforced. The Sherman Act, by delegating final authority to agencies outside Congress, satisfied the urge of the public for action without completely antagonizing the forces resisting action. The Sherman Act both compromised and temporized. It compromised in its vagueness and resort to delegation and temporized in that the law, lacking specificity and precise machinery for enforcement, shifted the burden to the general Government in time as well as in space. In the long view of history, this delegation policy was successful in achieving the goal of sparing Congress the embarrassment of endless wrangling over the trusts. By now, the issue no longer agitates the general public. Politically speaking, then, the trust problem has been solved, even if economists and lawyers (with much justice) find fault with the workings of the laws. The Sherman Act thus demonstrates how the formal and jurisdictional character of legislative rulemaking is molded by the specific nature of the demands on the legislature as an institution.

A. The Volume of Business

Delegation is a primary legislative response to the solution of nonroutine problems. "Routine" has a special meaning for legislatures, as it does for courts; the normal or routine work loads of legislatures consist of matters which would not be routine for any other institution or from the standpoint of the general society. Nonetheless, legislatures have certain standard and (ordinarily) not very troublesome functions—amending existing laws, correcting deficiencies in the interstices of the legal system, levying ordinary taxes, recognizing change by enlarging the scope of programs, and countless others. But there are times when legislatures are overwhelmed with sudden, unparalleled change either in the quantity or the nature of demands made upon them.

This takes place (both as to volume and substance), for example, at the outbreak of a major war. In wartime, then, the legislature faces loss of function through sheer inefficiency unless it delegates great chunks of authority to other bodies. Naturally it chooses to delegate, although sometimes in a grumbling way. Wartime cessions of power in recent decades have accrued to the executive branch of government, since legislatures and courts cannot quickly expand—their formal structures are relatively rigid and their legitimate roles are tightly defined. In contrast, the executive branch can expand and contract quickly and efficiently; it is not bound so tightly by traditional definitions of scope. New wartime agencies, therefore, are executive agencies, and their mandates under conditions of crisis
are typically quite broad. The Selective Service Act, for example—although highly decentralized and subject to great local variation—is in form a delegation to the President and his subordinates of great power to decide who goes to war.\textsuperscript{108} In other words, Congress gave this power away to the President, who in turn shifted much of it downward to lower operating units. Similar broad delegation rules appear in other wartime statutes\textsuperscript{109} and in statutes which arise in times of great economic crisis or rapid social change.\textsuperscript{110}

In delegating its authority a legislature, unlike an appellate court, can decree a formally stable quantitative rule—for example, workmen’s compensation. But the legislature may also resort to wholesale delegation, as long as on some intermediate level there is the capability of framing hard-and-fast rules, or, less commonly, ultimate operating discretion at the level of application. Administration of the draft laws by local boards is of this latter type and provided a stable solution to the problem of administering the draft until recently, when general dissatisfaction with the administration and with the war in Vietnam and the rise of a new student activist movement upset the consensus which shielded the draft laws from dispute.\textsuperscript{111} Much of the dissatisfaction with the law focuses on the high degree of local discretion, and some of the plans for reform seek to eliminate this discretion and to replace it with a device that proceeds by objective, though random, means.

Broad delegation of work to the courts is not a frequent response to legislative problems of volume, at least not in this day of the administrative agency.\textsuperscript{112} By now, division of functions between legislatures and courts is traditional, even routine. It is understood that the courts interpret, flesh out, refine, and define the meaning of statutes that may give rise to litigation. Because the legislature is aware of this power of the courts, statutes are sometimes worded with extreme circumspection to make it difficult for courts to miss the legislative meaning.\textsuperscript{113} On the other hand, language

\begin{itemize}
  \item \textsuperscript{108} The original Selective Service Act, passed a year before the entry of the United States into World War II, provided: “The selection of men for training and service [under the Act] . . . shall be made in an impartial manner, under such rules and regulations as the President may prescribe, from the men who are liable for such training and service . . . .” Selective Service Act § 4(a), 54 Stat. 887 (1940). Under this act, the President was “authorized from time to time, whether or not a state of war exists, to . . . induct . . . such number of men as in his judgment is required . . . for the national interest . . .” but no more than 900,000 men. Selective Service Act § 3(a), 54 Stat. 885 (1940).
  \item \textsuperscript{109} “The President is hereby authorized to prohibit or curtail the exportation of any articles, technical data, materials or supplies, except under such rules and regulations as he shall prescribe.” Act of June 30, 1942, ch. 461, § 6(a), 56 Stat. 463.
  \item \textsuperscript{110} See, e.g., the Agricultural Adjustment Act, 48 Stat. 31 (1933), declared unconstitutional in United States v. Butler, 297 U.S. 1 (1936).
  \item \textsuperscript{111} For some of the background, see Finman & Macaulay, Freedom To Dissent: The Vietnam Protests and the Words of Public Officials, 1966 Wis. L. Rev. 632.
  \item \textsuperscript{112} Historically considered, the very creation of separate courts can be looked upon as a delegation to solve crises of volume. See text accompanying notes \textsuperscript{114–23 infra}.
  \item \textsuperscript{113} See Friedman, Law, Rules, and the Interpretation of Written Documents, 59 NW. U. L. REV. 751 (1965).
\end{itemize}
may also be left vague as a deliberate device of delegation (for example, the Sherman Act). This device, however, pertains more to substantive pressures than to volume pressures.

Most of the examples of delegation rules have been drawn from the federal system, but the principles discussed are equally applicable to state or local legislatures. Peculiar to the states is delegation to constituent municipal governments—"home rule," for example—which relieves state legislatures of some of the rush of business occasioned by the growth of towns and cities. In the nineteenth century state legislatures spent much of their time granting charters to cities and towns, amending the charters, and tinkering with special laws for particular cities. Since even a willing legislature could not run its own cities and do it well, home rule was one practical solution to the problem.

Even before the era of home rule, much of the crushing burden of charter work was avoided by passing general laws which applied to all cities of a certain type. This reminds us that generalization is one of the simplest, most common, and most efficient responses of an institution to problems of volume. General laws are equivalent to the general rules of law laid down by courts. The history of legislation in the United States shows a constant movement toward increased generality in lawmaking. In the nineteenth century, American state legislatures enacted great quantities of private and local laws; in fact, these constituted the bulk of the legislative output. In some states even divorces were granted by the legislature. Private laws also authorized changes of name and corrected defects in the titles of particular tracts of land. From about the middle of the century on, state constitutions began specifically to outlaw some of these practices—for example, the legislative divorce—and even to forbid flatly the passage of any private or local laws. This movement was con-
connected with a general reform of state legislative bodies, which had fallen into some disrepute because of their supposed inefficiency and corruption. Since legislatures were unwilling to reform themselves, the solution was imposed upon them constitutionally. But whatever other reasons dictated tighter control of the work load of legislatures, the increasing press of business made some change inevitable. When legislatures granted divorces, few marriages were dissolved. If legislatures today had the sole power to grant divorces, they would have to adopt some radical routinizing process (analogous to the way the legal system handles overtime parking) or else give up all work other than divorce.

In its day, the special corporate charter was a particularly important type of private act. These grants of incorporation ran to specific individuals and were tailor-made, at least in theory, to the needs of the particular corporation and the requirements of the state’s economic policies. In practice, the issuance of charters became perfunctory, though never entirely standardized. Even in an almost routine form, granting and amending corporate charters became an enormous drain on legislative energy. Economic development generated a tremendous demand by entrepreneurs for access to the corporate form. Since the legislatures had neither the will nor the means to resist these demands, the demand for charters and amendments to charters would have become so great that legislatures could not have transacted their other business if some means of control had not been devised. The legislatures resorted to general laws—skeletal charters which could be used, like business forms, by anyone who complied with objective, straightforward legal requirements. This change in the law was analogous to the adoption of an objective, quantitative rule by a court system threatened with crisis in volume. In one sense, the adoption of general corporate laws can be looked upon as the triumph of unbridled capital and an abdication of meaningful public control. It may be just as accurate to see in these general laws not so much the triumph of capital as the solution of a legislative crisis in volume brought about by the onrush of enterprise.

General laws are delegative; when they are objective and precise, they are final delegations to the members of the public or to the branch of government authorized to do or let do the precise, objective acts mentioned in the statute. And these delegations will be stable if they are acquiesced in

122. See, e.g., F. Green, Constitutional Development in the South Atlantic States 1776–1860, at 284–86 (1930) (Maryland).

123. Georgia’s legislature granted eight divorces in 1823 and Louisiana’s legislature granted three in 1817.


or if the degree of dissatisfaction is lower than the costs of attempting a change. Even if the laws are vaguely phrased, they are delegative; but in the case of vague laws, power has been granted to some subordinate agency, which in turn will draft objective, nondiscretionary rules, delegate authority further downward, or attempt to govern some area of life without fully articulated formal rules. Sometimes a legislature feels it cannot, sometimes that it ought not to, be explicit. The same is true of subordinate agencies. The conditions under which any of these various alternatives takes place are obscure and deserve more study.

Although the dominant response of legislatures to a crisis in volume is delegation, a legislature may also adopt a rule of refusal. A rule of refusal, in the purest sense, is difficult for a legislature to adopt on its own. One legislature cannot decree a refusal to pass laws of a given type; any such rule would not bind the next legislature, and the doctrine of precedent usually does not govern elected assemblies. However, rules of refusal may be imposed upon legislatures—for example, a constitutional prohibition against legislative divorce. Implicit in many delegation rules, however, are rules of refusal, though of a rather weak sort. When a general statute delegates power in a given subject matter to an administrative body, it is understood that the agency may make further rules, and the legislature, it is hoped, will be able to refrain. Persons with specific interests in the subject matter are thus encouraged to seek redress or accommodation from the administrative agency, at least in the first instance. Railroads desiring changes in regulations are to approach the Interstate Commerce Commission first and are to approach Congress only if the Commission is unyielding. This order of approach is not highly formal (as is its judicial cousin, the doctrine of “exhaustion of remedies”), but it is a practical way of doing business. If railroad companies and other articulate economic and social interest groups are consistently displeased with the work of their agency on matters important enough to make recourse to Congress worthwhile, then the delegation to the agency has not been stable, and the problem of volume has not been solved. On small matters, a Congressman may informally intercede, but if the dissatisfaction is persistent and major, Congress may amend its law or change the method of delegation.

B. The Substantive Law

From this discussion it is evident that problems of substance and volume tend to overlap in the work of the legislature. It may be worthwhile, then,
to look again at some examples of legislation previously mentioned, this
time from the standpoint of problems of substance.

Generalization and rules of refusal have often been responses to crises
of public confidence in the legislature. American legislatures are elected
bodies, theoretically responsive to the public. But the character, efficiency,
honesty, and representative nature of legislative bodies have frequently
been subject to doubt. Doubt of this kind threatens the roots of legislative
power, and may result in additional controls or restraints upon the work
of these bodies. There was widespread fear in the nineteenth century not
only that legislatures could not handle the volume of demands for private
laws but that these demands tempted legislatures to pursue private, selfish,
and sometimes corrupting ends. Since the legislature was incapable of self-
reform (as it was later incapable of reapportionment) changes came from
outside.\textsuperscript{127} A short-run loss of power, however, may have led to a long-run
gain in public confidence.

Delegation rules may also be attempts—this time from within the legis-
lature—to avert or respond to a crisis of confidence. There are justifiable
doubts that a major war can be run by politicians. Similar doubts arise
during a prolonged or severe economic crisis; moreover, doubts about the
capacity of the legislature to govern the economy encourage the passage of
legislation which creates specialized regulatory agencies and gives them
broad powers.

Opposing interest groups clash in the legislature and in the channels
of access to the legislature more often and more nakedly than in court.
In court, disputes are softened by formalities of procedure and the osten-
sible duty to decide cases solely through objective principles of law. The
concept of the “public interest” does serve as some sort of comparable in-
sulation for legislators, at least in debate on the floor. Off the floor, direct,
strident appeals by parties in interest are frequent and are by no means
universally condemned as illegitimate. A citizen may properly threaten to
vote against his Congressman if he votes “wrong” on a bill, but threats to
punish an elected judge for his decisions are questionable\textsuperscript{128} and pressures
in advance of decision are downright illegal. A legislature can avoid and
delay many issues, but, like a court, a legislature can delay and avoid only
so many without losing its reason for being.

Occasions of sharply divided loyalties and the legislative desire to avoid
issues give rise to characteristic forms of legal rules. The Sherman Act is
a good example. It is delegative and its contours are so vague that enforce-
ment rests in the initiative of other institutions. The act solved the particu-
lar crisis which called it forth by neatly balancing the demand for extreme

\textsuperscript{127} See text accompanying notes 121–22 supra.

\textsuperscript{128} Ladinsky & Silver, Popular Democracy and Judicial Independence: Electorate and Elite
Reactions to Two Wisconsin Supreme Court Elections, 1967 (unpublished manuscript).
action and the demand for no action with action that was equivocal and incomplete. Broad discretionary statutes often perform this function. Many administrative statutes contain formulas of equal vagueness. There may be general agreement that regulation of some industry or activity is necessary. But the goals and purposes of regulation, and the criteria by which the regulation is to be carried out, cannot be so easily established. Hence, delegation to a subordinate agency is a form of avoidance of the ultimate issue. And the delegation formula is apt to contain standards of maddening vagueness.

A crippled mandate of this kind is unstable, just as a vague judicial rule may be unstable. The agency will wish to achieve some more permanent equilibrium. The simplest way is to draft rules or to apply standards in such a way as to satisfy the affected parties. These rules may be quantitative or once more discretionary. Quantitative rules will be satisfactory if they are acquiesced in for substantive reasons, if the work of the agency is trusted and approved, or if the gains of obedience outweigh the costs of inducing change. Nonquantitative rules involve a further delegation of discretion, perhaps down to the level of line officials who work closely with particular regulated companies or groups of companies. These officials too may work out concrete formal or informal procedures to enable an accommodation to be reached—or some less proper method, perhaps even bribery or payoffs. Since the agency has an interest in smooth operation, it will seek to find the best way to accomplish that goal by using some form of cooperation or perhaps outright capitulation to the desires of those ostensibly regulated. The delicacy of the process is due to the fact that the typical administrative body has many constituencies and publics to take into account.

In making rules legislatures have much greater freedom than courts to frame adequate sanctions and devise techniques of enforcement; they may use this freedom to avoid resolving difficult issues. Occasionally legislatures pass truncated, hortatory statutes which do not possess strong enforcement provisions. These may be compromises expressing a strong policy that favors the measure's proponents, while at the same time containing weak and halfhearted sanctions that favor the opponents. The extreme case would be a mere resolution which expresses a wish or a pious hope without committing governmental resources and initiating a program. More often, we hear of laws which are "without teeth"; their enforcement provisions are inadequate or niggardly, or little money is appropriated to do the work. Such a law is an uneasy compromise. Fair housing laws and ordinances provide excellent examples. The price of passage is nonenforcement or

130. Most of these have elaborate safeguards against "harsh" enforcement. See Lockard, The Politics of Antidiscrimination Legislation, 3 Harv. J. Leg. 3, 18 (1965); Pearl & Terner, Fair Housing
enforcement by "persuasion" or "education." The recent rent supplement law was passed by Congress only after a bitter legislative conflict; the "victory" was followed by a feeble, halfhearted appropriation.\(^{181}\) Indeed, where there is a conflict between an official morality and a working morality, the former is apt to find formal expression in the rule books, the latter to work insidiously on the provisions for sanctions or in the low level of actual enforcement.

V. AN EPILOGUE ON DIVISION OF LABOR AND ON FICTIONS

This Article has stressed the formal aspects of rules of law and the influence of institutional needs on the development of those rules. Two further points may be made here. The first, a fairly obvious one, relates to the manner in which social pressures result in functional division of labor in a developing legal system. The second, slightly less obvious, relates to the use of legal fictions by institutions.

A legal system needs fewer institutions and simpler rules in its early stages of development. Colonial American towns, small and homogeneous, did not need the vast, complicated legal system of twentieth-century America nor the vast, complicated English legal system of their time.\(^{132}\) In the early days of Massachusetts Bay formal power was in the hands of "magistrates" (many of them clergymen) who made rules, applied them, decided disputes, and, in general, simply governed. Later the legal system developed some rudimentary separation of powers, and some important legal rules were codified and reduced to knowable form.\(^{133}\) Absolute rule by magistrates applying a mixture of uncodified biblical and English legal principles could not be sustained beyond a narrow compass of time and space; bureaucratic organization and governmental division of labor become necessary once an organization or society reaches the point where rule through personal surveillance is not feasible. As the colonies grew, impersonal rule replaced personal rule, or, to put it another way, a one-level system (where laws were both made and applied by discretion-bearing rulers) was replaced with a system on two or more levels, thus separating some aspects of lawmaking from law application. Such a multi-level system demands separation of powers, specialization, and the reduction of at least some of its rules to written or knowable form.

Of course, theories about the nature of government had a great impact

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on the way in which power was delegated and on the content of the rules that were reduced to written form. These theories specified what kinds of exercise of power, what rules, and what institutions were legitimate, and delegation proceeds in such a way as to take legitimate form. Throughout the history of our legal system, the pressures on the system (quantitative and qualitative) have demanded responses whose form is determined by current concepts of legitimacy. In Massachusetts Bay, population growth was also accompanied by a crisis in the legitimacy of the magistrates. Quite apart from the technical feasibility of personal rule by the magistrates, the citizens were not willing to acquiesce in that kind of rule.

In a state with a settled population and a complex legal system, population growth does not necessarily mean any structural change in the system. But if new population suddenly confronts old institutions with radically different problems, the old institutions cannot assume new tasks unless these tasks are or can be argued to be within their legitimate spheres. Often a new task is not quite within the legitimate sphere of any one existing institution, but is close to the sphere of, or analogous to the task performed by, many institutions. Jurisdictions overlap slightly; institutions have roles which authorize or require them to check each other's work; operating boundaries of institutions are imperfectly marked.

We may assume that institutions, generally speaking, are composed of members who wish to preserve or to increase their own position and power, hence that of the institution itself. Consequently, in a complex legal system, institutions compete with one another for jurisdiction over new tasks arising from changing social conditions. In a society as delicately balanced and as committed to orderly process as our own, institutions are not allowed to seize power from each other through violent means, and they can extend their jurisdiction only incrementally. For example, the pressure of events has resulted over the years in a tremendous growth of the federal executive power, as compared to congressional power. Yet that growth has been accomplished, in the main, in slow stages; further, most of it has been ratified by Congress in one way or another. The acquiescence of Congress, we have seen, is a matter of virtual necessity. Powerless itself to govern, Congress can only retain power by demonstrating that it is responsible and that it knows how, when, and to whom to yield authority. The courts, too, sense (usually accurately) when they must give way and when they may inch forward.

Since the role of institutions is defined for them by positive law and by strong tradition, when they move forward they may do so like an army advancing under cover of darkness. Incremental growth is the major theme

135. See ibid.
of Anglo-American legal history. New accretions of power must be brought under the umbrella of a former legitimacy. Forward movement has been halting and stepwise. Acts of bold judicial creativity, for example, have been uncommon and, when they occur, have been legitimated by appeals to the Constitution, to precedent, or to the genius of the common law.

One characteristic mode of advance by courts has been through the use of legal fictions. Although some have argued otherwise, there is nothing inherently “primitive” in the use of fictions, in the broad sense of deliberate suppression of a known truth for reasons of policy or jurisdiction. Blatant fictions may be unsuited to the rational temper of modern judicial thought, but the objection runs merely to style. That all children born to a married couple are the legitimate children of both parents is a fiction if the phrasing suggests that all such children are the biological product of the husband. But the rule with the same effect can be phrased as a conclusive presumption based on an explicit policy of family law. If so phrased, the rule would be stylistically acceptable to modern jurists. It may not make much difference which style one prefers. Fictions are no longer as necessary to the legal order as they once were, in part perhaps because the legitimacy of legal innovation is less open to dispute. “Fictional” reasoning—indeed legalistic reasoning in general—is a device to facilitate incremental changes in law.

Fictions also conceal attempts by legal institutions to extend their own jurisdiction. A good example is the fiction whereby the common-law English courts in the late middle ages extended their power to include jurisdiction over “transactions entered into or acts done abroad.” Liti- gants who brought suit based on such transactions alleged that the foreign place was really in England—“to wit, in the parish of St. Mary le Bow in the Ward of Cheap.” The courts treated this allegation as nontraversable—that is, they refused to admit any evidence that France was not located in London. The assumption of this jurisdiction by common-law courts ultimately prevailed, perhaps because potential rivals were weak or inappropriate or because no better means of providing for actions of this kind were available. While the style of fictions may be “primitive,” competition among institutions for incremental accretions of their power is not “primitive,” but a permanent characteristic of the legal system. The decline of fictions—and the decline of legalism in general—can probably be explained by the growth of two fresh principles of legitimacy to justify legal

136. For Sir Henry Maine, fictions were the earliest of the three “agencies by which Law is brought into harmony with society.” H. MAINE, ANCIENT LAW (4th Am. ed. Pollock 1864). Equity and legislation were the later two. See Kiraly, Law Reform by Legal Fictions, Equity and Legislation in English Legal History, 10 AM. J. LEGAL HIST. 3 (1966).


138. 5 W. HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1945).
change: scientific logic as a touchstone of truth and the concept of the
general welfare as the object of the legal system and its constituent parts.\(^{139}\)

Three aspects of fictions thus may be noted: first, they commonly involve an extension of power on the part of a legal institution; second, the extension of power proceeds under color of legitimacy; and third, by style and necessity the extension of power is incremental. Moreover, institutions which suffered diminution of power might, conceivably, persist or counter with some movement of their own. A fiction is of lasting importance only when it succeeds—that is, when the extension of power is acquiesced in by society at large and by the institutions which might have thwarted it.

Fictions, then, appear in a legal system at a point where the system (either the system as a whole or some institutional segment) cannot openly legitimate change; jurisdiction, fixed by positive law or tradition, conflicts with a need and desire for change. Such a situation is possible in all legal systems regardless of complexity. That the fourteenth amendment forbids segregation in public swimming pools is perhaps as much a fiction as the notion that contracts concluded in France are to be treated as concluded in London—no more and no less. In both cases, however, only in a narrow sense did extension of jurisdiction follow a fiction. In a larger sense, change proceeded in accordance with social necessity—with a time-bound truth, whose profundity was satisfying and, in the short run, stable. The style of legal systems reflects social forces and institutional necessities as much as the substance and form of its rules.

\(^{139}\) Note that in the nineteenth century Langdell attempted to use scientific logic as a model for reviving and purifying legal “science,” but ultimately failed because the substance of his legal “science” was the common-law canon of propositions and its legitimacy had been undermined by the development of the two principles mentioned in the text. See C. Langdell, Cases on Contracts (1871). There were striking parallels in other countries to Langdell’s work; for example, in German nineteenth century thought. Max Weber asserted that logical formalism was the jurisprudential reflex of the modern capitalist order, although he found the two in other ways somewhat incompatible. See Max Weber on Law in Economy and Society 303–21 (Rheinstein ed. 1954).