THE SOCIOLOGY OF KNOWLEDGE AND THE MINOR PREMISE IN CONSTITUTIONAL DECISIONS

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The great constitutional decisions of the Supreme Court of the United States have been concerned with the "interpretation" of the legal principle stated in the major premise. It is suggested in this paper that recent developments in the sociology of knowledge, together with the author's theory of validation, provide the theoretical basis for shifting the dispositive issue in constitutional decisions to the content of the minor premise, with a considerable gain in clarity and objectivity.

In non-constitutional cases the Court, in fact, often disposes of the case by its formulation of the minor premise, as an example from anti-trust law will show:

In 1936 the Supreme Court decided a case that had been brought by the Department of Justice against sugar companies and their trade association alleging that advance public announcement of prices, and other practices, had the purpose and effect of eliminating price competition between competing sellers and were, therefore, in violation of Section 1 of the Sherman Act, which prohibits conspiracies "in restraint of trade" ([1]). The remedy sought was dissolution of the trade association and permanent injunctions against the companies.

The Supreme Court studied all the facts about the marketing of sugar; found that advance public announcement of prices was a deliberate joint lessening of the price competition, but also found that such advance public announcements have the stabilizing effect that with respect to other commodities is provided by public exchange markets; concluded that buyers, sellers, and the public would be served better by the lesser competition of public prices in a stabilized market than by secret prices in a chaotic market; and, therefore, declined to dissolve the trade association or to enjoin the companies from

making advance public announcement of prices (although it approved an injunction against other practices.)

The advance price announcements part of the Sugar Institute case might be put syllogistically as follow:

Major premise: Deliberate, joint actions that lessen competition are a violation of Section 1 of the Sherman Act.

Minor premise: Advance public announcement of sugar prices, is a deliberate, joint action that lessens competition, but, because of the absence of a public exchange market for sugar, full competition of secret prices produces a chaotic situation and it is better for buyers, sellers, and the public to have the limited price competition of advance public announcement of prices.

Conclusion: Advance public announcement of sugar prices by competing sugar companies is not a violation of Section 1 of the Sherman Act.

Implicit in the conclusion is a modification of the major premise to read: "Deliberate, joint actions that lessen competition *below the level reasonably attainable under all the circumstances of the market in the particular industry involved* are a violation of Section 1 of the Sherman Act". It is suggested that no greater modification of the major premise is involved in constitutional cases. Yet the Supreme Court has labored mightily over the interpretation of constitutional phrases such as "equal protection" and "due process", seemingly under the assumption that the interpretation of the legal principle in the major premise is dispositive of the case.

In the first three decades of this century, majorities in the Supreme Court of the United States "interpreted" the constitutional provisions against depriving persons of liberty or property "without due process of law" as requiring, even under conditions of severe economic depression, that the Court strike down as unconstitutional legislation to relieve farm debtors from mortgage foreclosures, to establish maximum hours, and minimum wages and working conditions for labor, to eliminate chaotic effects of overproduction and to eliminate predatory and destructive competitive practices in distribution. Justices in the majority disowned any claim to a "substantive power"

of review, saying that they were merely performing their duty to lay legislative acts against "the supreme law of the land, emanating from the people" and "if by clear and indubitable demonstration a statute be opposed to the Constitution we have no choice but to say so" (2). It is clear in these opinions, however, that the majority Justices were reading the constitutional provisions in the light of *laissez faire* social and economic theory (3). Justices who dissented from the decisions striking down social and economic experiments typically took the position that members of the majority were embodying in the constitution their own personal economic and moral preferences (4).

The obstruction of social and economic legislation was brought to an end by political pressure on the Supreme Court, (5), and was explained doctrinally as "judicial self-restraint" (6). Justice Douglas recently stated the doctrine as follows: "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions" (7). The question before the Court in the case in which Douglas made that statement was not within any of the enumerated areas, but concerned whether the legislature of the state of Connecticut could make it a crime for licensed physicians to give contraceptive advice to *married persons.* Douglas' opinion, for the Court, held that the constitution creates a zone of privacy around the marital bed which the state of Connecticut is without power to invade.

Actually, long before the 1965 Connecticut contraceptive case, the Supreme Court had again become active in striking down state and federal actions as unconstitutional. The activism of the past two decades has been in the areas of racial justice, voting rights, rights of criminal defendants, and rights of privacy and liberty. With the return to constitutional activism, the problem of the proper standard for interpretation of constitutional language was again raised. It remains unresolved, as can be seen by perusing the Justices' pejorative discussions of each other's standards in the several opinions in the Connecticut contraceptive case (8).

Here are the standards that Supreme Court Justices have adopted from time to time and the objections that have been made by fellow Justices.

STANDARD	OBJECTION
The original intent of the framers.	A constitution is an organic document and must be capaple of meeting current felt necessities.
Fundamental; basic; rooted in the traditions and conscience of our people.	Meaningless words to wrap a judge's personal value preferences in a cloak of immutability.
Dominant opinion.	Would not protect rights of unpopular minorities against passions of the moment in the legislature.
The judge's own considered values (usually coupled with, "after all we can't conduct a Gallup poll.")	The Constitution is supposed to be the voice of the whole people.

Is it not time to conclude that there is no satisfactory standard for determining the value preferences to be embodied in the major premise of constitutional decisions, if both objectivity and organic growth are desired? One alternative is to accept the bad situation as unalterable. Another, suggested herein, is to shift the focus of controversy in constitutional decisions from the major premise to the minor premise.

Until quite recently it would have appeared to be judicial suicide to frame the issue in constitutional decisions in terms of the content of the minor premise, for the simple reason that to accept the proposition that developments in factual social relations provide the correct basis for conflict resolution was to accept some form of determinism, which made meaningless the rational choice of values supposedly involved in legal

decisions. It is now possible to suggest a theoretical basis for shifting to the minor premise without excluding rational choice of values.

The new theoretical possibility rests on two recent books on the sociology of knowledge and on this author's theory of validation. The books are *The Social Construction of Reality,* by Peter L. Berger, of the New School for Social Research, and Thomas Luckmann, University of Frankfurt, published in 1966, and *Reality Construction in Society,* by Burkhart Holzner, University of Pittsburgh, published in 1968. As the titles indicate, the authors have broadened the sociology of knowledge subject matter to include the sociological content of the ordinary person's view of the net of social relations in which he lives, which view he assumes to be reality itself, and on the basis of which he makes day to day decisions. This approach results in awareness of a multiplicity of social realities.

Applying this insight to the conflict situation that is before a court for decision, the dispositive action of the judges is seen to be choosing between competing constructs of social reality — *provided,* the judges are capable of escaping the grip of the social reality projected by the sociological factors in their own life histories, and, *provided,* an objective standard is available for choosing between competing constructs of social reality. Both of these provisos are met by this author's theory of validation.

The validation theory was stated, with respect to new forms of social organization, in his organizing paper for the American Colloquium at the last World Congress in Gardone Riviera. This paper and responding papers were published as Beiheft Neue Folge Number 5 of the *Archives,* under the title, *Validation of New Forms of Social Organization,* edited by Dorsey and Shuman, in 1968. The theory is that neither pure ideas nor objective condtions "in isolation but both in interaction are significant generating and guiding factors in the formative process of social order" ([9]).

In a later article this theory was applied to the problem of developing new standards for the objective selection of social norms. The key propositions are these: "The contribution of

the philosopher is to propose not abstract ideals, but *social* ideals... If a philosopher's proposed social ideal is sufficiently in accord with prevailing ideas so that it can be generally accepted as true, if it is sufficiently in accord with a realistic understanding of current social conditions so that men of practical affairs see in it the possibility of reconciling the demands of newly powerful interests and previously established interests, and if these men rework the philosopher's social ideal to their own understandings and needs, and if as reworked the principle becomes generally accepted by those on all sides of conflicting interests — *then an objective standard of right and wrong* [for the time and place] *has been achieved*" ([10]).

Under this theory, social norms can be identified that are responsive to current conditions and also have objective validity, because they are not the product of the thoughts or the sociological experience of any single individual or any small, unrepresentative group of individuals. If this theory were applied to constitutional decisions, the issue would be what construct of social reality is correct and evidence would be adduced to show what social norms had been validated.

Experience would be needed before rules of admissibility for this kind of evidence could be formulated. But the general nature of such evidence can be indicated. In the constitutional cases discussed above, concerning the constitutionality of social and economic legislation, (if this theory had been applied) evidence would have been adduced to show the concentrations of machinery, buildings, and other forms of capital resulting from the industrial revolution, and to show that by accepting modern industrial organization the people of the United States necessarily rejected norms of individualistic self-sufficiency and accepted norms of collective action through labor unions, corporations, and representative government.

The theory of validation locates the general acceptance of contemporary values in the norms resulting from acceptance of principles to limit and reconcile conflicting demands that are interest-motivated but that are sought to be ideally justified. If the theory of validation is correct, more objectivity in constitutional decisions could be achieved by framing the is-

sue in terms of the correct construct of social reality in the minor premise, instead of in terms of the correct value content of the legal principle in the major premise.

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NOTES

(1) Sugar Institute v. United States, 297 U. S. 553 (1936).

(2) Opinion of the Court (Sutherland) in Adkins v. Children's Hospital, 261 U.S. 525, 544 (1923).

(3) See the full opinion of the Court in ADKINS, *loc. cit.*, and the opinion of the court (Peckham) in *Lochner v. New York*, 198 U.S. 45, 52 et seq. (1905).

(4) See Holmes dissenting in Lochner v. New York, 198 U.S. 45, 74 et seq. (1905); and Holmes dissenting in *Baldwin v. Missouri* 281 U.S. 586, 595 (1930),

(5) JACKSON, Robert H., *The Struggle for Judicial Supremacy*, 124-196, New York, 1941.

(6) Cox, Archibald, *The Warren Court*, 1-23, Cambridge, Mass., 1968.

(7) Opinion of the Court, in *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

(8) *Griswold v. Connecticut*, 381 U.S. 479 (1965). Black, dissenting, says: "A collection of the catchwords and catch phrases invoked by judges who would strike down under the Fourteenth Amendment laws which offend their notions of natural justice would fill many pages [giving many examples from Supreme Court cases]. *Ibid.*, at p. 511, n. 4.

(9) DORSEY & SHUMAN, *op. cit.*, at p. 2.

(10) DORSEY, *et al.*, *Law Reform: A Modern Perspective*, 73-74, St. Louis 1969. (Sesquicentennial volume of St. Louis University).