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Trends in Theories About Law: Comprehensiveness in Conceptions of Constitutive Process

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The elements of a comprehensive process of authoritative and controlling decision (including both a constitutive process\(^1\) by which law is

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1. The conception of constitutive process here employed is summarized as follows:

In the terms we find convenient, the "constitutive process" of a community may be described as the decisions which identify and characterize the different authoritative decision-makers, specify and clarify basic community policies, establish appropriate structures of authority, allocate bases of power for sanctioning purposes, authorize procedures for making the different kinds of decisions, and secure the continuous performance of all the different kinds of decision functions (intelligence, promotion, prescription, etc.) necessary to making and administering general community policy.


The different kinds of decision functions, or outcomes of constitutive process, are specified as:

**Intelligence:** Obtaining information about the past, making estimates of the future, planning.

**Promoting:** Urging proposals.
made and applied and an emerging flow of public order decisions for the shaping and sharing of all values) are of course omnipresent in all of mankind's different territorial communities, ancient and modern. Our inherited theories about law differ immensely, however, in the comprehensiveness and precision with which they make reference to these elements. Quite commonly such theories, whether described as "political thought" or "jurisprudence," fail to focus clearly upon the interrelations of authoritative decision and effective power process, and inquiry about such interrelations is made to proceed through imprecise and diverse conceptions of "community," "state," "politics" and "law." Some theories emphasize—to the detriment of deliberate, innovative creation and change—that the genuine "constitution" of any community must consist of the perspectives which community members create in each other about the requirements of decision by their continuous cooperative, or "customary," behavior; other theories seek to confine the reference of "constitution" to deliberately created instruments, to the detriment of inquiry about ongoing customary processes. With respect to both conceptions of constitution, em-

| Prescribing: | Projecting authoritative policies. |
| Invoking: | Confronting concrete situations with provisional characterization in terms of a prescription to concrete circumstances. |
| Applying: | Final characterization and execution of a prescription in a concrete situation. |
| Terminating: | Ending a prescription or arrangement within the scope of a prescription. |
| Appraising: | Comparison between goals and performance. |

Id. at 387.


4. A brief indication of the differences that different theories make for conceptions of constitutive process is offered in Allen, Law in the Making
phasis is often placed more upon features designed to limit decision than upon the decisions which in fact establish and maintain the process.\footnote{5} Although most of the features of a comprehensive constitutive process of authoritative decision are accorded some mention, however indirect or implicit in some theories, few of the great historic theories even attempt a systematic and integrated reference to all the different phases of constitutive process—from participation, through the establishment of perspectives and structures of authority, the allocation of bases of power, and the conduct of strategies, to the securing of demanded outcomes. In particular, the different types of decision outcomes necessary to the effective making and application of law are seldom clearly discriminated, but are rather discussed in vague terms which refer more to organs or structures of authority or to a distribution of bases of power than to decision outcomes.\footnote{6} In many theories distinctions between the intensities with which different constitutive policies, from the most to the least fundamental, are demanded by community members are not noted; in a few theories even the distinction between constitutive and other decisions is obscured.\footnote{7}

Much of this confusion in traditional theories about constitutive process would appear to derive from the fact that such theories are most often designed to serve the purposes not of careful empirical description but rather of preference or advocacy. Historically, the focus of scholarship has been more upon “constitutionalism” as a set of preferred constitutive goals or policies than upon the comprehensive pattern of community practices, consisting of both perspectives and operations, by which any postulated goals are made effective or ineffective.\footnote{8} When the intellectual tasks of description, goal clarification, and decision analysis become prioritized, the roles of community are given a more appropriate focus in theories about constitutive law.\footnote{Ch. 1 (6th ed. 1958). Observe the very limited reference of “constitutional law” in Pritchette, Introduction to Constitutional Law, in 3 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 295 (1968); cf. Friedrich, Man and His Government: An Empirical Theory of Politics 271 (1963). The range of potential references is summarized in Lowenstein, Constitutions and Constitutional Law in the West and East, 30 INDIAN J. POL. SCI. 203 (1969); McILwain, Constitutionalism Ch. 1.}

For an extraordinarily perceptive statement of the role of custom in constitution making, see Tiedeman, The Unwritten Constitution of the United States (1890).


6. The history of this confusion is beautifully traced in the books by Gwyn and Vile, note 3 supra.

7. Note the very oblique reference to policies in Weare, Modern Constitutions Ch. 3 (1951).

The relevant distinctions are made in MacIver, The Modern State 250 (1926); McILwain, Constitutionalism 13.

8. For a brilliant description of the history of this emphasis upon prefer-
tion, scientific hypothesis, and invention of alternatives are confused in a single set of ambiguous terms, even the one task of goal clarification, so consistently emphasized in "constitutionalism," must suffer. Fortunately, in the most contemporary inquiries some social scientists would appear to be beginning to perceive the importance both of framing a comprehensive and detailed theory of constitutive process, including a more precise discrimination of decision functions, and of distinguishing the descriptive, preferential, and scientific intellectual tasks. 9

Some conception of constitutive process would appear to be coeval with the origins of theorizing about law. The notion of the "nomoi of a state" as "its written constitution" and "a thing sacrosanct, to be touched or altered only with the gravest precaution" has been traced back to the allocations and dispensations by and among the gods. 10 Even before Plato and Aristotle had "made the constitution of authority the central issue in politics," the early Greek liberals had achieved a conception of law in terms of a secular, empirical process in which the members of a community sought, in clarifying and implementing their common interests, to draw upon their past experience for future guidance. 11 The Aristotelian conception of politeia, somewhat more expansive in reference than constitutive process, embodied a substantial segment of community process and was employed for both descriptive and preferential purposes. 12 "The polity is," as Aristotle put it, "an ordering of the polis in respect of its offices and especially in respect of the one supreme over all others. For the supremacy is everywhere in the governing class of the polis, and the governing class is the polity." 13 The emphasis of both Plato and Aristotle was upon degrees of participation in government and the purposes of its establishment, and they distinguished between monarchic, aristocratic, and democratic forms, finding genuine and spurious variants of each. Aristotle made a strong case for rule by law, recommended a "mixed" form of government to achieve this, and offered a preliminary discrimination of governmental departments in terms of "the deliberative, the executive, and the judicial." 14


10. CORNFORD, FROM RELIGION TO PHILOSOPHY A STUDY IN THE ORIGINS OF WESTERN SPECULATION 29 (1957).


12. BARKER, GREEK POLITICAL THEORY: PLATO AND HIS PREDECESSORS 6 (1918); GREENIDGE, A HANDBOOK OF GREEK CONSTITUTIONAL HISTORY (1896).


14. Id. at 92; McILWAIN, CONSTITUTIONALISM Ch. 2. See also BARKER, THE POLITICAL THOUGHT OF PLATO AND ARISTOTLE (DOVER ed. 1959); SABINE, A HISTORY OF POLITICAL THEORY Chs. 3-6 (3D ed. 1961); VILE, supra note 3, Ch. 2.
The Roman conceptions of constitutive process, somewhat less expansive than those of the Greeks, evolved through a long period of time and took many forms, and were commonly designed to subject naked power to authority and to insure that authority did in fact derive from the people.\textsuperscript{15} In his description of the republican constitution Polybius adopted the Greek notion of mixed government, not merely to secure a balancing of social classes or estates, but to recommend a distribution of competence among different organs of government.\textsuperscript{16} The persuasiveness of Cicero's exposition of natural law contributed greatly to the establishment of the notion that constitutional law is a more fundamental law, a more intensely demanded set of community policies, by which the actions of rulers and governors are to be appraised.\textsuperscript{17}

The many subsequent contributions to theories about constitutive process throughout the Middle Ages and in the more recent centuries of the nation-state mostly represent comparable efforts to achieve certain immediate constitutional goals by the rearrangement or modification of some particular feature of the more comprehensive process, whose principal outlines are left largely implicit.\textsuperscript{18} Lord Coke's insistence that even the King in Parliament was subject to the common law gave new sustenance to the notion that some policies, especially those relating to individual rights, were so fundamental that a constitution could put them beyond the reach of temporary majorities.\textsuperscript{19} The most influential individual contribution was perhaps that of Montesquieu in his reformulation of the earlier notions of "mixed government" into an explicit doctrine of the separation of governmental powers among legislative, executive, and judicial branches of government.\textsuperscript{20} The contributions of American theorists to judicial review, areal distribution of powers, explicit provision for constitutional amendment, representation and administration have become the common stock of mankind and have affected constitution-making around the world.\textsuperscript{21} In little of this great inheritance of

\textsuperscript{15} 1 BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE 134 (1901); McILWAIN, CONSTITUTIONALISM Ch. 3; McILWAIN, THE GROWTH OF POLITICAL THOUGHT Ch. 4; SABINE, \textit{supra} note 14, Ch. 9.

\textsuperscript{16} McILWAIN, THE GROWTH OF POLITICAL THOUGHT 100; PARKINSON, \textit{supra} note 3, at 111; SABINE, \textit{supra} note 14, at 154.

\textsuperscript{17} SABINE, \textit{supra} note 14, at 154.

\textsuperscript{18} 2 HOLDSWORTH, A HISTORY OF ENGLISH LAW 121-23, 195, 196 (1922); id. at 647-50 (1938); McILWAIN, CONSTITUTIONALISM Ch. 4; McILWAIN, THE GROWTH OF POLITICAL THOUGHT Chs. 5-6; SABINE, \textit{supra} note 14, Pts. 2, 3.

\textsuperscript{19} McILWAIN, CONSTITUTIONALISM 14, 87; SABINE, \textit{supra} note 14, at 451-54.

\textsuperscript{20} SABINE, \textit{supra} note 14, at 551-60; VILE, \textit{supra} note 3, Ch. 6.

\textsuperscript{21} MCLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES (1935); MERRIAM, A HISTORY OF AMERICAN POLITICAL THEORIES (1924); SUTHERLAND, CONSTITUTIONALISM IN AMERICA; ORIGIN AND EVOLUTION OF ITS FUNDAMENTAL
“political thought” or theorizing about constitutive process, however, does one find either a systematic and integrated presentation of all the different relevant features of that process or a very precise discrimination, in ways to facilitate policy-oriented inquiry, of the different types of decisions taken in such process.

It could scarcely be expected that theories about law which primarily emphasize derivations of authority from transempirical premises, whether theological or metaphysical, would achieve a comprehensive and systematic description of secular constitutive processes, with a precise delimitation of all the necessary decision functions in the making and application of constitutive and other prescriptions. Even the earliest “religious-metaphysical” theories did, however, exhibit certain aspiring, primitive approaches toward the conception of such a process. Thus, some of these theories made various recommendations in concept and procedure designed for such purposes as harmonizing the conflicting interests in a community into perspectives of common interest, balancing the effective power of different classes and interests, outlining a viable framework of government, making authority an important base of power, establishing uniform procedures for the making of different types of decisions, and making certain necessary distinctions between the prescription of general rules and their application in particular instances. When, furthermore, “natural law” theories, including both these early “religio-

Participation

—legitimacy of rule by gods, agents of gods, kings, tyrants, philosopher-kings, oligarchies and aristocracies;


22. Cornford, supra note 10, Chs. 1, 2; Havelock, supra note 11, at 30.

23. For a survey, see Lowenstein, note 3 supra.

24. See note 3 supra.

25. The items tabulated have been gleaned from many of the sources cited above. One rich source is Vile, note 3 supra.
—distinction of individuals from groups;
—distinction of individuals from successive generations;
—direct democracy;
—participation by techniques in representation;
—universal suffrage;
—equality in participation;
—limitations upon participation by criteria of caste or class or other factors irrelevant to contribution or merit;
—special techniques for participation by minority groups.

Perspectives

—demands that decisions be taken by criteria of authority rather than by naked power;
—demands that the members of a community be permitted to establish their own constitution;
—demands that government be made to serve certain specified ends, such as common interests, justice, liberty, and the good life;
—demands that government be made to protect certain fundamental rights of the individual (natural, inalienable or human rights);
—demands that government be made to serve positive social or welfare functions;
—expectations that some constitutive prescriptions are demanded with higher degrees of intensity than others (as in “bills of rights” or as ius cogens);
—expectations that particular decisions which are not in conformity with constitutive prescriptions will be regarded as without authority.

Arenas

—intermingling of religious and political institutional structures;
—separation of political and religious structures;
—establishment of different branches of government to perform different policy functions;
—separation of executive and parliamentary structures;
—recognition of an independent judicial branch of government;
—invention of structures of bureaucratic administration;
—centralization and decentralization of structures on a geographic basis (regionalism, local self-government).

Bases of Power

—the notion that the sovereign is above the law;
—expectations that the processes of authoritative decision (“the law”) are supreme over all particular participants and that none is free from such processes;
legitimacy myths of a great variety;
— the myth of an original binding agreement;
— distribution and balancing of competences and other power between different classes and groups;
— broad and narrow distributions of the right of franchise;
— distribution and balancing of competences and other power between different structures of government;
— distribution of explicit reciprocal checking competences between the different structures of government (vetoes, judicial review).

**Strategies**

— demands that decisions be taken by authorized, uniform procedures;
— demands that procedures be open, non-coercive, and economic;
— social compact theories;
— techniques for ascertaining, supplementing, and integrating customary expectations;
— written constitutions, with explicit formulations of competences and bills of rights;
— techniques of representation and parliamentary procedure;
— techniques of executive and bureaucratic administration;
— judicial review;
— procedures for individual challenge of decisions allegedly incompatible with authority.

**Outcomes**

— discriminations, in varying degrees of clarity, between the different types of decisions necessary to the making and execution of general community policies;
— distinguishing the prescription of general policies from their application in particular instances;
— distinguishing a "power of judging" from the more general "execution" of laws;
— attempts to distinguish different types of decisions as legislative, executive, and judicial;
— recognition that any particular structure of government may perform many different functions, and that any particular function may be performed by many different structures;
— attempts to confine the performance of particular functions to particular structures.

As impressive as are all these historic contributions to constitutive process, affected at least in part by the invocation and application of "natural law" theories, it must still be remembered that the "natural law" emphasis alone offers no secure intellectual tools for identification and evaluation in context of any particular feature of constitutive process, much less for the performance of all relevant intellectual tasks about the whole of such process.26 The tools of faith, revela-

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tion, cognition of absolutes, natural reason, and syntactic derivation commonly yield but a darkling or ambiguous enlightenment and can be plausibly employed in justification of features of constitutive process which are, as some of the items above suggest, inimical to, rather than expressive of, the values of human dignity. One is tempted to conclude that the important achievements of the "natural law" emphasis have been despite, rather than because of, its intellectual tools.

The distinctive contribution to constitutive process of the historical frame of reference, shaped by its intense identification of all law with empirical community processes, has of course been in its insistence that a community's constitution, even when partially expressed in a formal document, is, like its less basic public order prescriptions, more a product of custom—that is, of expectations created by the cooperative behavior and informal communications of community members—than of deliberate creative action.27 Savigny found a people's constitution, like its other law, of a "fixed character," affected by "the particular faculties and tendencies of an individual people." What binds law, language, manners and constitution "into one whole is the common conviction of the people, the kindred consciousness of an inward necessity, excluding all notion of an accidental and arbitrary origin."28 In his discussion of the state and its relation to public and private law he explains:

If we enquire as to the origin of the state, we must posit that origin in a higher necessity, in a formative power proceeding from within, as has been above generally asserted of law; and this holds good not only of the existence of a state generally but also of the particular shape presented by the state in each people. Thus also the creation of the state is a species of the generation of law and it is certainly the highest degree of that generation.29

When a theory does not clearly distinguish authority and control, and does not identify authoritative decision as an isolable component within community process, it is not surprising that it offers no map of a comprehensive constitutive process or specification of intellectual tools for inquiry about such process. Similarly, a theory which emphasizes "fixed character," "higher necessities," "inner necessities," and "historical rights" and rejects "accidental and arbitrary origins" can obviously be used to obstruct change and hinder constitutive and

27. PLUNKNETT, A CONCISE HISTORY OF THE COMMON LAW 76 (5th ed. 1956);
2 VINOGRADOFF, OUTLINES OF HISTORICAL JURISPRUDENCE Ch. 4 (1922).
For intimations of an English parallel, see Montrose, Book Review, 6 NATURAL L. FORUM 201 (1961).
29. VON SAVIGNY, SYSTEM OF THE MODERN ROMAN LAW 18 (1867).
public order innovations. The most optimistic interpretation of the theory associated with Savigny is perhaps that of Carl Becker: "It opened the door to progress in terms of nationality while refusing admission to revolutionary methods." Becker expands, "who taught the nineteenth century how to justify progressive changes in institutions without countenancing violent revolution and how to think of the differing institutions of many nations as being all in harmony with nature and all equally pleasing in God's sight." Sir Henry Maine did emphasize the development of law by judgments, custom, fictions, equity, legislation, and general jurisprudence and was appropriately contemptuous of the notion that all law emanates from established officials, but he also was fearful that law might be developed too rapidly and does not appear to have advanced any comprehensive and systematic notions of constitutive process. Professor Maitland questioned Austin's view that the principal object of constitutional law was to define the sovereign and found that "[w]e cannot get on without the State, or the Nation, or the Commonwealth, or the Public, or some similar entity . . ." but he was quite pessimistic about the creation of entities appropriate for comparative inquiry, and his own conception of constitutional law was so narrow as to exclude administrative law.

The basic tenet of the analytical frame of reference—that law emanates from the will of some established "sovereign" or official source—directly affects its notions of constitutive process and of the types of decisions emerging from such process for the shaping of public order. The paradigm of this emphasis is not that of an interaction in social process in which many different participants engage in the continuous creation and recreation of authoritative community policies, but rather that, in the words of C.K. Allen, "of an omnipotent authority standing high above society, and issuing downwards its behests." The principal concern of the emphasis is more for the systematic presentation of the commands or rules emanating from the "sovereign" source than for inquiry about how determinate persons acquire such competence and their effective capabilities for ensuring


32. Id. at 263.

33. Maine, Ancient Law (1920); Maine, Early History of Institutions (1888); Smellic, Sir Henry Maine, in 10 Encyclopaedia of the Social Sciences 49 (1937).

For a balanced appraisal of Maine's contribution, see 2 Vinogradoff, Collected Papers Ch. 8 (1928).

34. Maitland, Selected Essays 529 (Hazeltine, Lapsley, & Winfield eds. 1936).

35. Id. at 112.

36. Allen, supra note 4, at 1. The authoritarian nature of this conception is noted in Friedrich, Constitutions and Constitutionalism, in 3 International Encyclopedia of the Social Sciences 318 (1968).
compliance with their commands. The most extreme and still most influential formulation of this emphasis, built broadly upon the absolutisms of Bodin and Hobbes and upon Bentham's notion of law as command, is that of John Austin.\textsuperscript{37} From Austin's conceptions of the "sovereign" as "a determinate human superior, not in the habit of obedience to a like superior" and receiving "habitual obedience from the bulk of a given society" and of law as the command of this sovereign, it followed that "the mass of customs, understandings and conventions" commonly regarded as "constitutional law" could not, as against the sovereign, be accurately described as "law," but only as "positive morality."\textsuperscript{38} Austin made this conclusion explicit:

I mean by the expression constitutional law, the positive morality, or the compound of positive morality and positive law, which fixes the constitution or structure of the given supreme government. I mean the positive morality, or the compound of positive morality and positive law, which determines the character of the person, or the respective characters of the persons, in whom, for the time being, the sovereignty shall reside: and, supposing the government in question an aristocracy or government of a number, which determines moreover the mode wherein the sovereign powers shall be shared by the constituent members of the sovereign number or body.\textsuperscript{39}

The only saving qualification was that constitutional law might be described as "law" against the members of the sovereign body "considered severally." It is from this grotesque notion that law-making is the relatively exclusive function of an absolute sovereign that we derive our contemporary, widespread illusions that legislation is something "political" and not "legal," and that the principal concern of law is largely with the application of rules.\textsuperscript{40} Austin did give some explicit attention to different types of decisions, noting that the words legislative, executive, judicial, and administrative were employed with imprecise meanings, referring sometimes to structures, sometimes to powers, and sometimes to types of decisions, but he no-

\textsuperscript{37} For a classic presentation of the views of the major figures in this emphasis, see Dunning, A History of Political Theories: From Luther to Montesquieu (1905).

\textsuperscript{38} The definitions from Austin may be found in 1 Austin, Lectures on Jurisprudence 226 (4th ed. Campbell 1873). The latter quoted words, and the basic point, are taken from Dunning, supra note 37, at 225. Cf. Haines, supra note 30, at 71.

\textsuperscript{39} Austin, supra note 38, at 274. It is interesting to compare the views about the nature of a constitution ascribed to Judge Learned Hand by Judge Charles Wyzanski. See Wyzanski, Constitutionalism: Limitation or Affirmation, in Government Under Law 473, 478 (Sutherland ed. 1956).

\textsuperscript{40} Observe the difficulties in connection with the concept of "constitutional law" encountered in Dicey, Introduction to the Study of the Law of the Constitution 22 (9th ed. Wade 1939) and Patterson, Jurisprudence: Men and Ideas of the Law 166 (1953).
where attempts to clarify the confusion or to achieve a homogeneous categorization for reference to structures, competences, and functions.\textsuperscript{41} He was much too obsessed with the futile task of distinguishing between supreme and subordinate powers.\textsuperscript{42} It has been frequently noted—with only modest apparent effect on professional perspectives—that Austin's complex theory is a complete misdescription of English attitudes and practices of his time and is a most inadequate tool for comparative inquiry through time and across geographic boundaries.\textsuperscript{43}

The theory propounded by Kelsen for describing constitutive process is even further abstracted from the empirical events of decision, and its causes and consequences, than that of Austin. Kelsen gives much attention to "the State" and to constitutions, including many details, and finds that a constitution in a "material sense" is "an essential element of every legal order."\textsuperscript{44} In his "pure" theory, however, "the State" is dissolved as "the personification of the national legal order" or the "hypostatization of certain moral political postulates" and made "identical" with "the law" or "national legal order,"\textsuperscript{45} while "the constitution in the material sense," as contrasted with a formal "solemn document," is made to refer merely to "those rules which regulate the creation of the general legal norms, in particular the creation of statutes."\textsuperscript{46} The basic "grundnorm," or "first constitution," which Kelsen stipulates for appraisal of the "validity" of the whole hierarchy of subordinate norms, is never explicitly related to either the effective power processes which establish it or to the community expectations which give it authority; it is merely "presupposed":\textsuperscript{47} "It is postulated that one ought to behave as the individual, or the individuals, who laid down the first constitution have ordained."\textsuperscript{48} The relevant identities and activities of decision-makers are restricted to those established by authoritative norms; "the individual who creates the legal norm is an organ of the legal community because and insofar as his function is determined by a legal norm of the order constituting the legal community."\textsuperscript{49} The norms projected by the constitution are not the perspectives—demands, identifications, and expectations—of identifiable community members, but rather mere ought-form statements, ambiguous both as to the author of the preferences and as to content.\textsuperscript{50} The account given of struc-

\textsuperscript{41} AUSTIN, supra note 38, at 255.
\textsuperscript{42} Id. at 258.
\textsuperscript{43} 1 BRYCE, supra note 15, at 537, 614; MAINE, EARLY HISTORY OF INSTITUTIONS 342 (1888); MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 526 (1908); VINOGRADOFF, COMMON SENSE IN LAW 28 (2d Rev. ed. 1946); Wade, Introduction to DICEY, supra note 40, at xxxv.
\textsuperscript{44} KELSEN, GENERAL THEORY OF LAW AND STATE 125 (1945).
\textsuperscript{45} Id. at xvi.
\textsuperscript{46} Id. at 125, 267.
\textsuperscript{47} Id. at 110, 115.
\textsuperscript{48} Id. at 115.
\textsuperscript{49} Id. at 92.
\textsuperscript{50} Id. supra note 44, at 132.
tures of authority is in the conventional terms of legislative, executive, judicial, and administrative, although it is emphasized that the "separation of powers" does not accord with the facts and that the same structure may perform more than one decision function. The only base of power regarded as relevant is authority, to the complete exclusion of all factors affecting control; concern with control is exhausted by assuming the efficacy of the total system. The procedures recommended by Kelsen for determining the "validity" of an alleged norm bear a compelling resemblance to mere philosophical syntactics. For the "usual trichotomy" of decision functions Kelsen would substitute a dichotomy of "law-creating" and "law-applying," and he suggests that even the difference between these two functions is "merely relative." Thus, he states that with certain exceptions "every act is . . . at the same time a law-creating and a law-applying act." "The creation of a legal norm is—normally—an application," it is explained, "of the higher norm, regulating its creation, and the application of a higher norm is—normally—the creation of a lower norm determined by the higher norm." In a side comment upon J.C. Gray's assertion that "the real rulers of political society are undiscoverable" Kelsen remarks, in perhaps fitting summary of the constraints which he imposes upon inquiry, that while "what individuals influence those who create valid norms of the legal order constituting the State may be unknown and undiscoverable," this "is also without juristic interest."

The facts of constitutive process appear but dimly through Hart's tight "framework" of appropriate linguistic usage. The indispensable "foundations of a legal system" which Hart finds in his "secondary rules" leave many features of constitutive process highly implicit. Thus, he indicates that "secondary rules" are "all concerned with the primary rules" and "specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined," but he does not follow through with the identification and specification of the different types of decisions that these words would appear to anticipate. Instead, he breaks "secondary rules" into three different types of "rules": rules of recognition, change, and adjudication. A rule of recognition identifies a primary rule and apparently establishes its

51. Id. at 269.
52. Id. at 42.
53. Id. at 132, 256.
54. Id. at 133.
55. Id.
56. Id. at 152.
58. Id. at 95.
A rule of change "empowers an individual or body of persons to introduce new primary rules for the conduct of the life of the group, or of some class within it, and to eliminate old rules." A rule of adjudication, also "intended to remedy the inefficiency" of a regime of "diffused social pressures," empowers "individuals to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken." In contrast with Kelsen, who depends upon postulation only to establish his grundnorm, Hart insists that the "existence" of a rule of recognition is "a matter of fact:" it must be "actually accepted and employed in the general operation of the system," and if questioned, it may be "established by reference to actual practice—to the way in which courts identify what is to count as law, and to the general acceptance of or acquiescence in these identifications." Hart provides little information, however, as to how these rules of recognition, change and adjudication are identified, established, and altered or how they are affected by factors of effective control in particular social contexts. The most he offers are fleeting references, such as that the "criteria" provided by a rule of recognition "for identifying primary rules of obligation" may take many forms: "these include reference to an authoritative text; to legislative enactment; to customary practice; to general declarations of specified persons, or to past judicial decisions in particular cases." The important lesson from Hart's exercises would appear to be that, in promoting understanding of constitutive process, linguistic analysis, "the concept of a rule," and a focus primarily upon rules are not adequate substitutes for comprehensive social science techniques, an empirical conception of authority in terms of community expectation, and a focus primarily upon decision process.

The concern of the sociological frame for the conditions and consequences of particular legal institutions and conceptions has, somewhat surprisingly, not manifested itself in great innovations in theory or in recommendations about constitutive process. The major writers associated with this frame have wavered between a diffuse, mystical emphasis—deriving from the historical frame—upon the intimate interrelations of all law and social process, and an unquestioning deference to the more conventional typology of official institutions popularized by the analytical frame. Thus, Ehrlich, realistically insisting that law is created not merely by decrees from officials but also by the informal communication of community members in cooperative activity, describes the "enormous importance of the state for the law"

59. Id. at 92.
60. Id. at 93.
61. Id. at 94.
62. Id. at 107.
63. Id. at 105.
64. Id. at 92, 97. A more detailed appraisal from comparable perspectives is offered by Rogoff, International Law in Legal Theory: The New Positivism, 1970 U. Tol. L. Rev. 1.
65. ALLEN, supra note 4, at 28.
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as "based upon the fact that society avails itself of the state as its organ in order to give effectual support to the law that arises in society."\textsuperscript{66} He adds:

Social forces are elemental forces, against which the will of man cannot prevail, not for any length of time at least. The whole question of the constitution of the state, as Montesquieu understood it in his day, and as it has been mooted again and again since then, concerns the technical task of fashioning the state so that it may carry out the will of society with as little resistance and friction as possible.\textsuperscript{67}

Yet Ehrlich offers no comprehensive conspectus either of authoritative decision, much less of constitutive decision, or of the particular factors that may affect decision. The exact interrelations, and even the empirical references, of "living law" and "state law" are left obscure. Although much of what Ehrlich writes could be made relevant to realistic description of various authority functions, and anecdotal references are made to "application of law" and "finding of law" and a tertium quid labeled "projection,"\textsuperscript{68} Ehrlich himself never suggests a systematic categorization of different types of decisions for purposes of inquiry. The functions with which he is concerned are those of "juristic science" and not of authoritative decision. Despite his emphasis upon the spontaneous creation of law in "popular consciousness," Ehrlich, in the final analysis, offers little guidance in terms of procedures for exploring that consciousness and consistently engages in minimization of the potentialities of the deliberate creation of law through specialized institutions.\textsuperscript{69}

In contrast with his innovative theories about administration and bureaucracy, Weber's contributions relating to the larger patterns of constitutive process appear somewhat conventional. Weber works with broad concepts of "political community," "state," "government," "public law," "private law," "separation of powers," "legislation," "adjudication," and so on,\textsuperscript{70} but does not weave these concepts into a systematic, comprehensive theory for inquiry. For Weber "political communities" are "states" when "belief in the specific legitimacy of political action" has increased until such communities "are considered to be capable of 'legitimizing,' by virtue of mandate or permis-

\textsuperscript{66} EHRICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 153 (1936).
\textsuperscript{67} Id. at 154.
\textsuperscript{68} Id. at 403, 404.
\textsuperscript{69} Id. at 430; cf. Patterson, supra note 40, at 81.
\textsuperscript{70} WEBER, MAX WEBER ON LAW IN ECONOMY AND SOCIETY 41 (1954).

For Weber's more systematic theories about bureaucracy, see Weber, FROM MAX WEBER: ESSAYS IN SOCIOLOGY Ch. 8 (1946); WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 329 (1947). See also La Palombara, supra note 3, at 170. Cf. 1 WEBER, ECONOMY AND SOCIETY 282 (1968).
sion, the exercise of physical coercion by any other community." 71

The role of law in this process is further specified:

For the purpose of threatening and exercising such coercion, the
fully matured political community has developed a system of
casuistic rules to which that particular 'legitimacy' is imputed.
This system of rules constitutes the 'legal order,' and the political
community is regarded as its sole normal creator, since that com-
munity has, in modern times, normally usurped the monopoly of
the power to compel by physical coercion. 72

His itemization of the "functions" of the modern state is in static
terms:

[T]he enactment of law (legislative function); the protection
of personal safety and public order (police); the protection of
vested rights (administration of justice); the cultivation of hy-
gienic, educational, social-welfare, and other cultural interests
(the various branches of administration); and, last but not least,
the organized armed protection against outside attack (military
administration). 73

Similarly, his delineation of different types of decisions is Austinian:

According to our contemporary modes of legal thought, the activi-
ties of political organizations fall, as regards 'law,' into two
categories, viz., lawmaking and lawfinding, the latter involving
'execution' as a technical matter. Today we understand by law-
making the establishment of general norms which in the lawyers'
thought assume the character of rational rules of law. Law-
finding, as we understand it, is the 'application' of such established
norms and the legal propositions deduced therefrom by legal
thinking, to concrete 'facts' which are 'subsumed' under these
norms. 74

Within this framework Weber does, however, appropriately empha-
size the importance of the deliberate, explicit prescription of authori-
tative policy and offer a highly perceptive account of the creation of
customary expectations. 75 His treatment of "application" and "ju-
dicial process" is, unfortunately, more concerned with styles in "legal
thought" than with sociological examination of decision process. 76

The conceptions of constitutive process employed by Pound are
wholly conventional and unsystematic. The four "theories of the
state" he distinguishes—the juristic or legal, the political, the philo-
sophical, and the sociological 77—make only the most general and ob-
lique reference to comprehensive processes of authoritative decision
and effective control and to the actual perspectives and operations of
participants in such processes. All these theories, Pound insists, have
their "special purpose," making it "futile to argue that some one of

72. Id. at 341.
73. Id. at 342.
74. Id. at 59.
75. Id. at 65.
76. Rheinstein, Forward to Weber, Max Weber on Law in Economy and
Society xxv (1954).
77. 2 Pound, Jurisprudence 287 (1959).
them alone is legitimate;" yet the principal focus of attention he establishes and maintains is upon the legal theory. "Juristically," he writes, "we must consider the state in two aspects."

First, we look on it as the immediate practical source of legal precepts and sanctions—as logically the condition precedent of law, whether as legal order or as a body of authoritative grounds of or guides to determination of controversies. It sets up and maintains tribunals and its organs promulgate or give the stamp of its authority to the precepts recognized and given effect in the judicial and administrative processes. Second, we have to look on it as a juristic person, in that certain interests are secured by attributing private rights to the state, so that for some public interests it is treated as a private owner (dominus) or a private contractor.79

The types of decisions Pound categorizes are, as this passage indicates, those inherited from Montesquieu and others. The modalities by which law is made are subsumed under the "sources and forms of law," with a quite nonhomogenous itemization of sources in which usage, moral and philosophical ideas, and scientific discussion are equated with adjudication and legislation.80 The application of law he finds largely in judicial and administrative processes, with emphasis upon the judicial, and his scholarly concern is more for the "intellectual processes" which accompany application than for the operational practices by which it goes forward.81 Pound's broadest and most unifying concept appears to have been that of "social control," but he equates religion, morality, and law as forms of social control, and his conception of law includes three disparate "meanings."82

These "meanings" are perceived as:

(1) [(R)egime of adjusting relations and ordering conduct by the systematic and orderly application of the force of a politically organized society. (2) The body of authoritative materials of or grounds of or guides to determination, whether judicial or administrative. . . . (3) What Mr. Justice Cardozo has happily called the judicial process, to which today we must add the administrative process—the process of determining causes and controversies according to the authoritative guides in order to uphold the legal order.83

In describing the "science of law today" as having "developed a functional attitude, asking not merely what law is and how it has come to be but what (in all its senses) it does, how it does it, and how it may

78. Id. at 287, 298. 79. Id. at 307. 80. 3 id. at 379. 81. 4 id. Ch. 20. 82. POUND, SOCIAL CONTROL THROUGH LAW 40, 41 (1942). 83. Id. at 40.
be made to do it better," Pound had a vision of a more comprehensive interrelation of social and legal process,⁸⁴ but there is scant evidence that he made this vision a working reality in his own inquiry.⁸⁵

The general theory advanced by Timasheff, with its emphasis upon intersecting processes of authority and control, could be adapted for comprehensive and realistic inquiry about constitutive process and public order decisions. Timasheff aspired not merely to account for the origins and "validity" of the particular rules of a legal system, but also to describe the dynamisms by which the whole "legal" apparatus is established and maintained. His insistence, however, upon organized and centralized power centers as indispensable components of control makes it difficult for him to observe how the top rulers of a community can, in "the highest rules of constitutional law," be subjected to effective self-limitation.⁸⁶ In his view, constitutional law "secures the distribution of dominance and submission within the social systems"⁸⁷ and "the constitutional order . . . exists as long as it is recognized by the active power center."⁸⁸ "In the modern state," he writes, "the active center is generally complex and highly structuralized."⁸⁹ He elaborates:

In accordance to the specific Constitution of a State, the monarch, the president, the premier, et cetera, may be considered as the head of the administration or as its supreme ruler. He has at his command a certain number of immediate helpers called ministers, and these in turn a certain number of higher officials. All are members of the same active center; the activity of each of them refers to the same passive periphery in its totality.⁹⁰

From this "complex structure" may come "a corresponding hierarchy of legal rules."⁹¹ At the top of the apex, in modern democracies, is the constitution:

Out of the mass of legal rules created with the help of the people's representatives, one complex is kept apart, sublimated, endowed with superiority. This is the constitution, the complex of rules expressing the hierarchy within the active center and the relative positions of its members. A constitution forms a truly superior level of legal rules if (1) a special procedure has been created in order to revise it, or (2) if every law which does not form a part of the constitution is considered to be valid only insofar it is compatible with the constitution, or (3) if both conditions are united, as in this country.⁹²

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84. 1 POUND, JURISPRUDENCE 349 (1959).
85. For a somewhat broader notion of constitution, see Pound, The Development of Constitutional Guarantees of Liberty (1957).
86. For a useful survey, see Pound, Law and the State—Jurisprudence and Politics, 57 HARV. L. REV. 1193 (1944).
87. TIMASHEFF, AN INTRODUCTION TO THE SOCIOLOGY OF LAW 17 (1939).
88. Id. at 21.
89. Id. at 280.
90. Id. at 303.
91. Id. at 202.
92. Id. at 304.
From such perspectives, the application of "the term constitution" to "nondemocratic states" is "only a misuse of the term." In his discussion of "changes in law," Timasheff suggests that "the idea of legislation grew up on the ability of power structures to enforce special commands," as was illustrated "in many advanced legal systems of the Ancient World," and insists that "customary law can be distinguished from customs and habits only by answering the question whether this or that rule is recognized by power (especially the Power of the State) or not." Obviously, nondemocratic states, even as non-state entities, have constitutive processes, whether or not they are called "constitutions," and communities change their prescriptions in processes of communication and collaboration that may be described only with difficulty as state-approved commands. Less emphasis upon organized power centers and more attention to the shared expectations of community members—which may assert a high degree of effective power wholly apart from such organized centers—could transform Timasheff's theory into a much more adequate instrument of inquiry into constitutive process.

The American legal realists, despite their clear and direct focus upon authoritative decision and their stress upon the law-making role of courts, did not extend their insights to new or comprehensive conceptions of constitutive process. They were content to work with largely conventional categorizations both of the phases of decision process and of the different types of decisions. Their principal concern was with the role of "judicial process" in the prescribing and applying of functions, with other structures and functions being accorded only peripheral attention. The approach closest to innovation was that of Llewellyn, though even he left his major conceptions diffuse and undeveloped. For "purposes of study," Llewellyn finds it wise to break "The Law-Job" in any group into four "lesser-phases":

93. Id.
94. Id. at 288.
95. Id. at 312.
96. For an early emphasis, see Cardozo, The Nature of the Judicial Process (1921); cf. Frank, Courts on Trial Ch. 22 (1949).


It is well known that the realists built upon Bentley, The Process of Government (1908) which expounds a somewhat sketchy and popular notion of constitutive process.
I. The disposition of trouble-cases.

II. The preventive channeling and the reorientation of conduct and expectations so as to avoid trouble.

III. The allocation of authority and the arrangement of procedures which legitimatize action as being authoritative.

IV. The net organization of the group or society as a whole so as to provide direction and incentive.

In specification of these different phases, he writes:

As the first job finds centered around its doing such institutional devices as tribunals, legal procedure, advocacy, peace-makers and jails; as the second finds centered about its doing such institutional devices as rules of substantive law, statute books, law publishing houses, sanitary inspection departments, traffic lights, preventive policing generally—and most of usage, and much of education; so this third task or function finds centered on its doing the “constitutions” of states and of minor interest-groups, and in general the institutional devices for allocating authority to persons or bodies and for fixing the time or manner or procedure whereby their say, when said, is to gain standing as being the say: the legislature must be “in session” (though with the clock turned back); the two houses must concur, by vote, and with a quorum; the bill must have been “read” the proper number of times.

The more conventional approach of the realists may be illustrated by Frank’s mildly cynical account of authority structures within the United States:

Nor did the framers of our federal constitution swallow Montesquieu whole. That instrument, to be sure, in Article I vests the legislative power in Congress; in Article II, the executive power in the President; in Article III, the judicial power in the federal courts. But the allocation is not watertight. The Constitution was, indeed criticized on that score when its adoption was being debated. The Federalist, defending against that criticism, made it plain that the Constitution “abandoned the doctrinaire theory of the absolute separation of the functions of government as it was stated, for example, in the Massachusetts Constitution.” In fact, it was definitely admitted that it was wholly impossible accurately to define the boundary lines between the various departments, and consequently the true policy was to devise such a balance of interests and motives as would insure, not an absolute separation, but a substantial and enduring interdependence of the three classes of powers.

In the light of Frank’s consistent emphasis upon the vagaries of “fact finding,” it is especially interesting that he nowhere develops a


98. Id. at 1383-84. For comparable conceptions, see LLEWELLYN & HOEBEL, THE CHEYENNE WAY Chs. 10-11 (1941). For an application of the basic insights to the United States constitutive process, see Llewellyn, The Constitution as an Institution, 34 COLUM. L. REV. 1 (1934).

99. Frank, IF MEN WERE ANGELS 216-17 (1942).

100. See, e.g., Frank, A MAN’S REACH: THE PHILOSOPHY OF JUDGE JEROME FRANK 180 (1965).
conception of a viable intelligence function. The difficulty that the realists generally had with constructing, as contrasted with realistically observing, is concisely expressed by Frank:

Life, experience, as it comes to all men, teems with variety. The variety gives richness. But that variety also means an untidy, balky, untamed existence. No clear, clean patterns are easily discernible. Uniqueness, untypicals, discontinuities, unsameness constantly present themselves. We encounter surprises, shocks, frustrations—unclassifiable, deviant things and events. Life shows up as kaleidoscopic, anarchic, impermanent, inexact, shot through with chance, danger and caprice.  

The more promising current developments in theory, which even purport to focus upon constitutive process as a whole, would appear to come not from legal scholars or lawyers, but from professional political scientists and associated workers. Since ancient times political philosophers and analysts have been concerned with the interrelations both between power and other values within community processes and between authority and control within power processes. In more recent decades, stimulated by improvements in methodology in the social sciences generally and by demands for comparative studies, more specialized political scientists have been seeking to create both new comprehensive theories about aggregate processes and their interrelations and new intellectual procedures for the detailed empirical investigation of such processes and interrelations.

The various theories these specialists proliferate differ greatly in their terminological emphases upon "processes," "groups," "interests," "systems," "structures and functions," "decision-making," and "communications," but the broader frames of the empirical references they make and the intellectual procedures they recommend would appear to be much the same. The principal limitation remains a certain awkwardness in relating authoritative expectations, whether formalized or not, to the facts of control. Distinctions are inadequately drawn between the decisions that are genuinely constitutive and the vast number of ordinary decisions that have no significant impact—other than confirmatory—on the principal allocations of power. What remains un-

101. FRANK, FATE AND FREEDOM 93 (1945) (emphasis added).
102. For a useful critical review of these developments, see VILE, note 3 supra. For more popular accounts, see MACKENZIE, POLITICS AND SOCIAL SCIENCE (1967); MAYER, COMPARATIVE POLITICAL INQUIRY, A METHODOLOGICAL SURVEY (1972); MEHAN, THE THEORY AND METHOD OF POLITICAL ANALYSIS (1965). See also Dahl, Power, in 12 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 405 (1968); Easton, Political Science, id. at 282; Eulau, Political Behavior, id. at 203; Gross, Political Process, id. at 265; Janowitz, Political Sociology, id. at 298; Truman, Political Group Analysis, id. at 241; THE METHODOLOGY OF COMPARATIVE RESEARCH (R. Holt and J. Turner eds. 1970); Almond, Political Theory and Political Science, 60 AM. POL. SCI. REV. 869 (1966).
done in all the different emphases is the detailed specification of the higher-level, more comprehensive theory in terms of the different phases of decision process and of the different types of decision outcomes, both authoritative and controlling, which might facilitate employment of all the relevant intellectual skills in relating these decision phases and outcomes to their particular conditions and consequences in social and community process.¹⁰³

¹⁰³. For one of the better approximations to a comprehensive constitutive process, though handicapped by an inadequate conception of authority, see Almond & Powell, Jr., note 9, supra.

Many of the proffered theories founder upon a too limited conception of the intellectual tasks of inquiry, emphasizing almost exclusively the explanatory or scientific task. For a broader perspective, see Caldwell, note 9, supra; McDougal, Lasswell, & Reisman, The World Constitutive Process of Authoritative Decision, in The Future of the International Legal Order 73 (Falk & Black eds. 1969).

For a pioneering effort in presenting the constitutional law of a national community, see Canadian Constitutional Law in a Modern Perspective (Lyon & Atkey eds. 1970).