

MARTIN SHAPIRO*

*Stability and Change in Judicial Decision-Making:
INCREMENTALISM OR STARE DECISIS?‡*

Political Jurisprudence

For some time now a number of American lawyers and political scientists have been seeking to place courts and judges firmly within the matrix of politics and government rather than treating them as peculiar phenomena isolated from the rest of the governmental process. I have elsewhere called this movement "political jurisprudence."¹ That courts are political agencies is self-evident. They are part of government, they make public policy, and they are an integral part of the law-making and enforcement process which is the central focus of political activity. If legislatures are political and executives are political, then courts must be political since all three are inextricably bound together in the process of making law, and each sometimes performs the functions that each of the others performs at other times.²

Indeed that courts are political is so self-evident that there would be no dispute about the validity of the statement per se if it were not for the consequences that supposedly flow from it. The prestige and thus the effectiveness of courts, so the argument runs, depends upon the general public belief that courts are impartial agencies, neutral as between the various participants in social conflict who come before them. If the people were told that courts were political, the very belief system about courts that allows them to function effectively would be undermined.

It may not be particularly difficult for a judge or lawyer to argue that there are certain things about courts which are true, but never-

*B.A., U.C.L.A. (1955); Ph.D., Harvard University (1961). Associate Professor, Department of Political Science, University of California, Irvine.

‡The initial version of this paper was presented at the Mid-West Political Science Association Convention. April 22, 1965.

¹Shapiro, *Political Jurisprudence*, 52 KY. L. J. 294 (1964); Shapiro, *LAW AND POLITICS IN THE SUPREME COURT*, ch. I (1964).

²If my readers were primarily political scientists, I would now refer to the very large body of argument by Professors Lasswell, Easton, Almond et al which in varying ways defines politics in terms of severely sanctioned choice or the authoritative allocation of values. Quite obviously, if politics is authoritatively deciding who gets what, then courts are political, for this is precisely what they do every day.

theless should not be told. It is somewhat more difficult for a social scientist, who, quasi-scientist though he may be, has at least adopted the ethics of science.³ More important, if scholars continue to state that courts are not political, the consequences are going to be worse for the courts than freely admitting that they are. In the first place no scholarly conspiracy is going to keep a rather obvious truth from the public forever. In the second, the public already knows the truth in a vague and imprecise way. In the third place, the enemies of the courts, and particularly of the Supreme Court, begin waving the truth like a red flag whenever they can use it to damage the courts. The present situation is one in which the public knows the courts are political, but thinks that they should not be, need not be, and are currently in a state of aberration from their normal condition of apoliticism.

I submit that this is the worst possible public image for courts, and it will not be cured by loyally preserving a secret that is no longer secret. An apolitical jurisprudence actually gives comfort to the courts' enemies. Since the apolitical jurist can hardly deny that the courts are actually acting politically, all he tends to do is dramatize the discrepancy between the way they are acting and the way they "ought" to be acting, thus reenforcing public discontent.⁴ Thus even for those who are more concerned with maintaining the prestige of courts than seeking social truth, a political jurisprudence is the best answer.

Law students, lawyers and the population more generally should be told that courts are political agencies, that they typically act politically and that they are supposed to act politically. Having inoculated them with this truth before it takes them by surprise, we can then explain that a political system encompasses many roles, each qualitatively different from the next and each contributing something different to the political process. Both the School Board member and the ward heeler are politicians, i.e. actors in politics, but we do not expect them to act in the same way. To say that the President of the United States is a politician is not to question his honesty or capability in office. Courts then would be judged not on the basis of whether they acted politically, but on whether their political acts

³One prominent lawyer-political scientist has rather subtly suggested just such suppression recently, although even he took great pains to avoid directly saying that we should not say what we know about courts. See Westin, *Book Review*, 359 *Annals* 191 (1965).

⁴The prize example of this phenomenon is surely Kurland, *Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 *HARV. L. REV.* 143 (1964).

contributed usefully to American life and contributed in ways that other political agencies could not or have not. I submit that courts are going to score a lot higher on this basis than on that suggested by apoliticists. The task of political jurisprudence then would be to specify the role of courts, that is to describe the functional similarities, differences and interrelationships of courts to other political agencies, and, in the light of this description, prescribe what the courts might best contribute to the political system.

All of this is by way of preliminaries to the body of this article which seeks to show that we can describe a method of decision-making that is shared by courts and other political agencies. Such an effort is essential to political jurisprudence because it has traditionally been argued that courts are unique in that they have a peculiar, and nonpolitical, method of decision-making based on either neutral principles of law, or rational and non-discretionary operations of legal logic, or both. If I can begin to show that judges' decisions actually exhibit the same methods as those of other policy makers in the political process, then one of the key arguments against political jurisprudence will be at least partially undermined.⁵ Let me point out again, however, that to say that the judge uses the same method of decision-making as other politicians does not necessarily mean that he is subject to the same influences, pursues the same values or has the same level of decisional power as any other given political decision-maker.

It must be added that I am concerned here only with decision-making by appellate courts and more particularly with those decisions by appellate courts that involve judicial law-making. To avoid awkward repetition, I must ask the reader to add "appellate court" to all my subsequent references to judicial decision-making.⁶

Incrementalism

The theoretical work I propose to discuss has been done by two men who fall on the vague line between political science and economics, James March and Charles Lindblom. Both have recently presented theories of decision-making that might apply to both political and economic decisions and particularly to the peculiar mixture of

⁵From the social scientist's, as opposed to the lawyer's, point of view, the importance of what follows will be the attempt to show that judicial behavior can in fact be comprehended in one of the general theories of decision-making.

⁶I assume here that appellate court decisions do typically involve judicial law-making or at least the opportunity to approve or disapprove the law-making of lower courts or administrative agencies.

politics and economics that typically occurs in what we call the "public policy" sphere. Courts are very frequently involved in just such mixed questions of politics and economics.

The theory set forth by March in his *Behavioral Theory of the Firm*⁷ and Lindblom in his *Strategy of Decision*⁸ (both March and Lindblom had co-authors whom I neglect simply to avoid having repeatedly to refer to the firm of Cyert, March, Braybrooke and Lindblom) will probably add another barbarism to our language—"incrementalism." For both authors are seeking to present a method of decision-making that proceeds by a series of incremental judgments as opposed to a single judgment made on the basis of rational manipulation of all the ideally relevant considerations. The theory of incrementalism has already been applied to one area of politics—the budgetary process of the national government—by Aaron Wildavsky in his *Politics of the Budgetary Process*.⁹ I wish to suggest that a similar application might be made to at least some aspects of the work of the courts.

Economic and political theories still frequently retain the disturbing mixture of descriptive and normative elements for which traditional political philosophies are often attacked. Incrementalism is no exception, and I will not, for the moment, attempt to separate the two in attempting to describe the theory. What incrementalism is, is easiest to explain by way of what it isn't, or rather what it is in reaction against. For a long time the ideal type for decisions in economics or politics was "rational decision-making" in which all relevant data was to be considered in the light of all relevant goals, the goals themselves to be precisely weighted according to the decision-maker's valational priorities. The basic sticking point with rational decision-making theories is that real decision-makers just did not act this way. The economists found that firms did not act rationally—that is so as to maximize their profits. The political scientists found that political decision-making bodies, particularly highly bureaucratized ones, tended toward decisions that compromised the conflicting interests of various participants on an ad hoc basis without agreement on either the facts or the priority of goals. This collision of rational decision-making theories with hard facts is marked by the popularity of such notions as "satisficing" rather than maximizing and definitions of public interest in terms of legitimizing processes rather than sub-

⁷CYERT & MARCH, *A BEHAVIORAL THEORY OF THE FIRM* (1963).

⁸BRAYBROOKE & LINDBLOM, *A STRATEGY OF DECISION* (1963).

⁹WILDAVSKY, *POLITICS OF THE BUDGETARY PROCESS* (1964).

stantive policies.¹⁰ At this point it might have been said that propositions about how decisions ought to be made were simply at odds with how decisions were in fact made. But then economists began to tell us that the marginal cost involved in gathering every piece of pertinent data and checking it against every available alternative policy in terms of all approved values would frequently itself be irrational in terms of input-output ratios. And students of politics began to urge that the self-preservation of a given political agency and/or the political process as a whole necessitated mediational decisions. It is not after all rational to destroy cherished institutions in the process of making "correct" public policy. Thus deviations from rational decision-making models not only did occur but ought to occur.

Incrementalism is the formal statement of this dissatisfaction with conventional models of decision-making. Let me briefly describe the tactics of incrementalism as presented by Lindblom.¹¹ Lindblom begins with propositions about "margin-dependent choice." The decision-maker starts from the status quo and compares alternatives which are typically marginal variations from the status quo. Formulation and choice among alternatives is derived largely from historical and contemporary experience. It follows that only a restricted number, rather than all rationally conceivable, alternatives are considered. Moreover only a restricted number of the consequences of any given alternative are considered. And those that are chosen for consideration are not necessarily the most immediate or important but those that fall most clearly within the formal sphere of competence of the analyst and with which he feels most technically competent to deal.

In the traditional, rational model of decision-making, means are adjusted to ends, but the incrementalist often adjusts what he wants to the means available. Similarly he constantly restructures both his data and values. He uses "themes" rather than "rules."¹² That is he does not say "if factor X is present, decision Y must follow," but "factor X is an important consideration." Lindblom's next rubric is "serial analysis and evaluation"—the notion that policy is usually

¹⁰Satisficing refers to accepting something less than the maximum of what is desired in view of the difficulty of achieving the maximum. Theorists of public interest, stymied by the difficulty of calculating whether the substance of a given decision was ideally best for the society, frequently focus on whether the decisional process was an "open" one admitting the participation of all parties or recognized by all parties as legitimate.

¹¹BRAYBROOKE & LINDBLOM, *op. cit. supra* note 8 at 81-111.

¹²*Id.* at 98.

made by following a long series of steps. Rather than attempting to solve the problem in one fell swoop the decision-maker whittles away at it. Indeed the analyst is likely to "identify . . . ills from which to move away rather than goals toward which to move."¹³ Finally analysis of a given policy area is likely to be carried on by several different agencies or institutions with consequently differing world views.

March in offering a "behavioral theory of the firm" presents a more analytically rigorous set of hypotheses about decision-making. Indeed I think Lindblom's employment of the phrase "strategy of decision" is an attempt to fend off criticisms of his lack of theoretical purity. Let me quote March's own succinct summary.

1. Multiple, changing, acceptable-level goals. The criterion of choice is that the alternative selected meet all of the demands (goals) of the coalition.
2. An approximate sequential consideration of alternatives. The first satisfactory alternative evoked is accepted. Where an existing policy satisfies the goals, there is little search for alternatives. When failure occurs, search is intensified.
3. The organization seeks to avoid uncertainty by following regular procedures and a policy of reacting to feedback rather than forecasting the environment.
4. The organization uses standard operating procedures and rules of thumb to make and implement choices. In the short run these procedures dominate the decisions made.¹⁴

It would be possible to spend considerable time on correlating March and Lindblom's propositions, but a few suggestions should suffice here by way of introduction. For instance March's first item, when extended from the firm to the political system, would seem to be a summary statement of the incremental politics which Lindblom says is the foundation of his strategy. For Lindblom's strategy is not an abstract model applicable to all decision-making everywhere, but is dependent on roughly the type of pluralistic politics to be found in Western constitutional democracies. No rigorous cause and effect relationship need be supposed. But a system containing multiple centers of decision-making, all or many of which have to come into agreement in order finally to arrive at and implement a decision, tends toward incremental decision-making if for no other reason than that rational decision requires a single set of rationally ordered goals, which is a condition difficult enough for one decision-maker to attain, and nearly impossible for more than one. The findings of March,

¹³*Id.* at 102.

¹⁴CYERT & MARCH, *op. cit. supra* note 7 at 113.

and of many others who have studied large organizations, that such organizations, even though theoretically organized on a strictly hierarchical basis, in reality consist of coalitions of decision-making units each with somewhat differing goals, is what makes theories of decision derived from the organizational behavior of private firms applicable to political life.¹⁵

March's second and third hypotheses are obviously closely related to several of Lindblom's propositions and indeed add a certain operational precision to Lindblom's formulation. March actually reduces the boundaries of decision even further than does Lindblom. He specifies not only the consideration of a restricted number of alternatives, but of only one alternative at a time, with the first workable alternative attempted accepted as the preferred solution. Lindblom's general formulation suggests rather continuous decisional activity. March's finding that the search for alternatives begins only when the present policy fails may indicate that Lindblom's point about moving away from ills may apply not only to the direction but the initiation and timing of incremental decisions.

March's notion of feedback expresses the same thought as Lindblom's reference to historical and contemporary experience and emphasizes a point that Lindblom makes repeatedly. In the face of uncertainty about consequences the best decisional tactic is to take minor steps which will elicit new information and allow one to pull back without excessive loss if the new information indicates unexpected trouble. Finally, March notes the use of regular procedures, which also has a damping effect on change. No change at all occurs so long as the regular procedures yield acceptable results. Thus March emphasizes what is not always clear in Lindblom, that the other side of the coin of incremental *change* is a limitation and routinization of decision-making which produces a relatively slow tempo of new decisions, each of which constitutes a relatively smaller change from the status quo than even the general theory of marginal dependent choice would require.

Indeed March's emphasis on operating procedures and rules of thumb represent an important point for us. Lindblom's preoccupation

¹⁵As a concrete example, the sales division of a large firm may have quite different goals than the engineering division, and the engineering quite different goals than the safety division. Or, put somewhat differently, each division is likely to define the goals of the firm somewhat differently than the other divisions.

with "themes" rather than rules seems to me to overrepresent one political style at the expense of another. Certain political decision-makers in certain political settings may seek to avoid anything that looks like a hard and fast rule, but others, in other settings, may customarily operate through formulating and changing rules, which they take to be binding on themselves as well as others. March emphasizes that the rules are rules of thumb that are modified on the basis of feedback. In short, policy makers desire several somewhat conflicting conditions for decision to operate simultaneously. They want to be free to change their minds. They want to be free to concentrate on the most important decisions and so must develop means of handling myriads of routine decisions routinely. Finally, they wish to be free of the constant pressure of those who wish them to alter decisions they have already made. Thus, in order to obtain decisional freedom, policy makers will sometimes adopt a thematic approach which, by avoiding rules, gives them maximal flexibility and may expose them to less criticism than a hard and fast rule would. Or they may adopt rules of thumb, which will relieve them of future decisions and may serve as a shield against pressure by allowing them to insist that they too are now bound by the rule and so cannot make the decision some outside group desires.

Incrementalism and Judicial Decision-Making

After this summary of the work of March and Lindblom, let me turn to the question of how notions of incrementalism may be applied to the study of courts and law. Here we are concerned with two bodies of scholars with differing interests, but two that can find a common ground in the application of incremental theory to judicial decision. First the political and social theorist is interested in constructing generalizations that will comprehend and integrate various modes of behavior. If it can be demonstrated that the theory of incrementalism adequately accounts for the decisions of judges as well as bureaucrats and business executives, then the value of the theory, qua theory, is increased since the purpose of social theory is to identify widespread regularities lying beneath superficially diverse kinds of behavior. On the other hand, from the point of view of the student of courts in particular, the successful application of incremental theory to judicial decision-making would increase our understanding of the relation of courts to other agencies that also act incrementally, and provide a new framework around which to organize what we know of the actual behavior of courts.

To the extent that incrementalism is a descriptive theory of how decisions are made, it must be tested against actual decisions. In the field of law we have a huge body of decisions relatively accurately recorded and indexed in precisely the way necessary to trace series of decisions on the same question. Moreover, legal institutions, compared to other political agencies or even large private firms, have a particularly efficient communications system which keeps all analysts relatively well informed of what the last decision was, which is, of course, essential in a strategy that uses the last decision as the base for reaching the next. Thus, at first glance, it would seem that legal materials might provide a rich and convenient body of data on which to test incremental theory. This impression is certainly bolstered by consideration of the lore of Anglo-American jurisprudence in which *stare decisis* and the case by case process of inclusion and exclusion play central roles. At least superficially this lore suggests series of policy decisions in which changes of policy occur incrementally, each new decision based on the previous one and differing from it on the basis of feedback from earlier results. The theory of *stare decisis* stands directly opposed to that of incrementalism. For the theory is that there are rational and immutable legal principles imbedded somewhere in the life of the law and that the technique of *stare decisis* facilitates the legal system's discovery of those principles. We are all aware of the old notion that the case is not the law but the best evidence of the legal principle. From our point of view what is interesting is that the theory behind *stare decisis* (which is in conflict with incrementalism) has foundered, while the technique (which is basically in harmony with incrementalism) marches bravely on. The theory has foundered on the rock of the *ratio decidendi*. First the *ratio* was thought to be what the judge said the principle involved was, then whatever principle was necessary to get from the facts to the holding, no matter what the judge said. Then it was discovered that no single case had a single *ratio*, and finally that in any given instance, not one but several lines of cases (from each of which a different *ratio* could presumably be derived) bore on any litigational situation.¹⁶ So the notion of solving a dispute by reference to an agreed principle disappeared and the rational theory behind *stare decisis* disappeared with it.

In conjunction with this kind of examination of the theory of *stare decisis*, it is worth noting that legal materials not only present a promising field for testing incremental theories but the theories and

¹⁶STONE, LEGAL SYSTEM AND LAWYERS' REASONINGS 37, 229-235 (1964).

their intellectual history, so to speak, may help to orient us in the current jurisprudential disputes we encounter among legal theorists. Professor Wechsler's call for neutral principles¹⁷ has been attacked basically because of the difficulty of defining "neutral" — a difficulty he himself admits. But from a slightly different point of view, his call for decisions which enunciate principles (neutral or not) that will be applicable in every future case of the same sort, is an example of a rational decision-making strategy that the incrementalists argue is not, and cannot be, employed because it makes impossible demands on the decision-maker. Indeed I think the two principal and superficially contradictory criticisms of Wechsler's position are both essentially incremental arguments, and that their superficial contradiction can be resolved by translating these attacks into the language of incrementalism. Professor Bickel has attacked Wechsler because, if the Supreme Court were to govern its decisions by neutral principles of constitutional law, it would have to make certain major incursions on Congressional powers at inopportune moments, incursions that might create crises that would weaken the Court.¹⁸ On the other hand, Wechsler has been criticised because so few neutral principles are available, and they are so difficult to formulate, that if the courts were to act only when they found and could articulate a neutral principle, they could hardly act at all. It is almost impossible to imagine a rule that, formulated today, would yield desirable results in every imaginable future case.¹⁹ In fact both these arguments boil down to the position that courts must be satisfied with incremental decisions if they are to make policy decisions at all.

The whole "jurisprudence of values" movement may also be subject to criticism along the lines proposed by the incrementalists, for that movement is a response to a felt need somehow to provide the law-maker with a rational and complete, ultimate set of goals by which rationally to guide his day-to-day decisions. A jurisprudence of values or teleological jurisprudence may be simply the translation of rational decision making models into the legal sphere. If teleological jurisprudence requires the judge to govern his decisions by a completely articulated set of valuational priorities, it makes the same unreasonable demands in the sphere of values as do the pro-

¹⁷Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 77 (1958). See also Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001 (1965).

¹⁸Bickel, *Forward: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

¹⁹These arguments are more fully described in Shapiro, *The Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles*, 31 GEO. WASH. L. REV. 587 (1963).

ponents of “rational” decision-making. If, however, teleological jurisprudence is simply concerned with emphasizing that legal decisions are by nature purposive rather than puzzle-solving, then it might do well to adopt incrementalism as a method of purposive decision-making rather than seeming to impose a valuational task that is far beyond the judge’s, or indeed anyone’s, capabilities. On the other hand, the transfer of ultimate questions of value from jurisprudence into legal philosophy — and thus out of their own bailiwick and into somebodies else — which has been characteristic of the sociological jurists, most notably Roscoe Pound, has often been criticised as a piece of intellectual sleight of hand. It may instead have been an early instance of incremental theory. For if you seek to practice Pound’s social engineering without a set of ultimate values (the jural postulates I take to be “standard operating procedures”), I think you are in fact practicing incrementalism.

But we need not go so far afield to find incrementalism in our current jurisprudential debates. Karl Llewellyn in his great retreat from judicial realism, *Deciding Appeals — The Common Law Tradition*,²⁰ gives us a full-blown theory of incrementalism in law, with the same mixture of descriptive and prescriptive elements we find in Lindblom, although he uses a different language than Lindblom to express fundamentally the same point of view. (Those who have read Llewellyn will know that when I say different language I mean that almost literally.) He argues that much of the lawyer’s distress at the supposed disregard by American courts of *stare decisis* in recent years is the result of excessive enchantment with logical deductive styles of decision-making, and that courts at their best do and should solve problems by evolving on-the-spot solutions that, given the practical limits of knowledge and prediction, seem best for the situation. He argues in effect that if lines of precedent are viewed not as fluctuations around a locus of principle, but as the record of a series of marginal adjustments designed to meet changing circumstances, then the legal system will regain for the viewer the coherence and predictability that are obscured when we attempt to view the work of the courts through the traditional theories of *stare decisis*. For Llewellyn finds in his own examination of the decisions of modern American courts that they typically seek to make incremental changes in policy in the light of feedback from earlier decisions. I leave you to Llewellyn for numerous examples in both private and public law.

²⁰LEWELLYN, *DECIDING APPEALS—THE COMMON LAW TRADITION* (1960).

While we are still at this jurisprudential level, it might be well to note the relation between incrementalism and the work on judicial attitudes, which has preoccupied a good number of social scientists lately, and I suspect annoyed a good number of lawyers.²¹ If the work of the courts can be reduced to a few simple variables based on judicial attitudes, then there would seem to be no reason to introduce an incremental theory which by comparison to the techniques of the attitudinalists leads to rather imprecise and diffuse descriptive results. The work of the attitudinalists, however, inevitably focuses on who won, not how they won, in the sense of what legal doctrines were employed to bring victory to one party or the other. To the extent that we are concerned with courts as participants in the law-making process, the doctrinal content of decisions, as well as the pattern of victories and defeats, seems, to me at least, extremely important. For it is the legal doctrines enunciated that in effect become the new provisions of the statutes under consideration. While the techniques of those who concern themselves with attitudes may succeed in developing a complete explanation of why each judge favors the party he does, incrementalism may help us to understand how courts shape the doctrinal content of their opinions, and thus will give us a more complete picture of the political activity of courts than would attitudinal research alone.

I wish now to work my way through the various propositions of incremental theory and suggest that certain aspects of judicial behavior at least superficially correspond to each, in the hope that in the next few years some students of courts will examine whether the correspondence is more than superficial. Before doing so, however, I wish to issue a warning against a pseudo incrementalism which has become a favorite tactic of the United States Supreme Court. I refer to the segregation and reapportionment decisions. An uninformed observer might view the *School Segregation Cases*²² and the subsequent decisions outlawing segregation in one public facility after another²³ as presenting an incremental pattern. But it seems fairly clear that at the time of the school decision the Justices had already made up their minds on the desegregation of all publicly owned property. The

²¹The early work on judicial attitudes is described in Shapiro, *op. cit. supra* note 1 and Schubert, *Bibliographical Essay, Behavioral Research in Public Law*, 57 AM. POL. SCI. REV. 433 (1964). For the most recent and methodologically sophisticated work see SCHUBERT, *THE JUDICIAL MIND* (1965).

²²*Brown v. Board of Educ.*, 347 U.S. 483 (1954).

²³See, e.g., *Dawson v. Mayor and Council*, 350 U.S. 877 (1955); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955); *Johnson v. Virginia*, 371 U.S. 836 (1962) (all *per curiam*).

seeming incrementalism of the later decisions on beaches, sports arenas, etc. is really only a product of the discrete and serial form that litigation necessarily takes, combined with the Justices' desire to keep their cards close to the vest until each was played. I take it that the series of decisions that has led us to one man — one vote was of the same variety. The decisions here did formally proceed step by small step, but with the benefit of hindsight it now seems clear that a majority of the Justices at the time of *Baker v. Carr*²⁴ actually jumped directly to the one man — one vote decision which they then implemented by successive decisions.²⁵ Even here, of course, some element of true incrementalism enters since presumably the Justices could have stopped short of full implementation in the later decisions if the adverse feed-back from *Baker* had been strong enough.

On the other hand, let me suggest that the obscenity decisions from *Roth v. United States*²⁶ on are incremental. Indeed since each new decision has added a new doctrinal step, while completely preserving all the old, a vertical cut through the latest will yield a kind of geological cross section of the whole incremental history of obscenity law. All this should also indicate that the presentation of an incremental theory of judicial decision-making does not imply that all judicial decisions are incremental. It is sufficient for a beginning to show that some of them are, and the theory is most useful in the long run if it is found that most of them are, or that they typically are.

The heart of both March's and Lindblom's formulation is that the analyst begins with the status quo as his base and then considers, not all possible alternatives, but those similar to the status quo. Furthermore, March specifies that the status quo is generally maintained until failure occurs. Failure stimulates the search for alternatives, and the first satisfactory alternative invoked is accepted. Now this seems to me a startlingly accurate description of a major variety of litigation. The typical instance in which we encounter judicial law-making is one in which one party in effect clothes himself in the existing state of the law, while the other in effect requests the court to change the law. The litigant requesting change will only succeed if he can convince the court that the existing law fails to meet the social situation, and the whole craft of the lawyer is aimed at sug-

²⁴369 U.S. 186 (1962).

²⁵See *Gray v. Sanders*, 372 U.S. 368 (1963); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964).

²⁶354 U.S. 476 (1957). See for analysis of current Supreme Court doctrine, *Fleishman, Obscenity: The Exquisitely Vague Crime*, 2 LAW IN TRANS. Q. 97 (1965).

gesting the minimum alteration in the law necessary to help his client, for he knows it is the minimum alteration that he is most likely to get. The first satisfactory alternative, in the sense of the alternative requiring minimum change, is likely to be accepted. Indeed it might be possible on the basis of experience with judicial behavior to modify March's hypothesis from "first satisfactory alternative" to "alternative involving minimum change necessary to satisfy."

To some readers it may appear misleading to assign the legal status quo to one of the two contending parties when judicial law-making occurs. For in such instances the judge is often confronted with two rival interpretations of a statute which may be said to have no status quo since it is vague enough to admit the rival interpretations. Just how frequently an appellate judge chooses the interpretation that "changes" the statute because that interpretation will yield better results, rather than choosing the interpretation that he believes would maintain the status quo, is a matter for investigation. Yet while we do not know just how often this occurs, we do know that it does occur, for at least the most extreme instances, those in which a court overrules one of its previous decisions, are readily observable.

However, even in the classic instances of rival interpretations of an existing statute, each of which is equally plausible in terms of the wording of the statute and its past interpretations, the decisional situation is still basically one of marginal choice based on the status quo. The status quo is the statute's general intention, and counsel for each party argues that his specific interpretation more appropriately relates the statute to the circumstances. In a sense the judge does not face a choice between status quo and change, since, if there has been no previous authoritative interpretation of the statute on all fours with the new situation, whatever he decides will be new. Yet neither judge nor counsel are free to propose any interpretation they like. All potential interpreters are constrained by both technical canons of statutory interpretations and common sense rules of logic to stay relatively close to the statutory language. The status quo here becomes the rather vague one of the very statutory intent that is in dispute. But vague as it is, it remains an anchor around which cluster various marginal choices. While we may argue whether the value of limestone or cement ought to be used in calculating depletion allowances under a statute allowing such calculation on the basis of "the commercially marketable mineral product," no one is going to argue that the value of the bridge eventually made out of the cement should be the basis of calculation.

The very purpose of briefs is to narrow a court's range of alternatives and to present only those requiring the least movement in the law necessary to meet a new situation. I call your attention to a recurring situation in Supreme Court supervision of administrative agencies. The agency, let us say the I.R.S. or the I.C.C., finds a "loophole" in the statute. It seeks to close the loophole by administrative lawmaking. In the subsequent litigation the private party will plead the statute — that is, the status quo. The Court is likely to take the stance of defender of the Congressional act against subsequent administrative alteration unless the agency can demonstrate both the failure of the statute and that the means it has adopted to correct that failure can be harmonized with congressional intent and language. In short the whole legal context of administrative decision-making, and of judicial review of such decisions, forces both administrators and courts to operate within the narrow range of alternatives compatible with the congressional statute.

Another striking way in which the legal context of administrative decision-making enforces incrementalism can be found in the long standing practice doctrine. Courts frequently hold that the long standing practice of an administrative agency acquires the force of law. As a practical matter this does not freeze the status quo at any instant in the agency's past practice. Instead it forces the agency to put the highest priority on gradual changes, made incrementally in whatever direction the agency wants to go. If the agency can do its law-making in this way, each new decision will acquire the legal mantle of long standing practice. Any decision that deviates sharply from past practice may not only be struck down, but will damage the impression of long standing, consistent practice the agency is trying to build up to strengthen its legal position. Repeated deviation may mean the courts will fail to find any long standing practice and thus revoke the agency's license for administrative law-making, which in fact the long standing practice doctrine usually constitutes.²⁷

We have here not only the narrowing of alternatives, and a status quo basis for decision-making, but Lindblom's serial analysis and evaluation and March's reaction to feedback rather than predicting the environment. The administrative agency may in fact have made a long range forecast of the environment and formulated the great leap forward necessary to meet a new environment. But if the courts force it to meet the environment by a gradual series of shifts

²⁷See SHAPIRO, LAW AND POLITICS, *op. cit.*, *supra* note 1 at 154-56.

in its long standing practice, the agency willy nilly will pick up feedback from each shift and would have to be peculiarly bull-headed not to further modify its estimate of the environment on the basis of this feedback.

To move on, Lindblom notes that incremental decision is typically marked by the consideration of only a restricted number of consequences for any given policy. It seems to me that this proposition is identical with the old legal cliché that the great virtue of the doctrine of cases and controversies²⁸ is that the judge need not decide abstract questions but is confronted with a concrete situation in which he can see the concrete consequences to the parties that will follow from one decision or another. Now to be sure, judges usually look somewhat beyond the consequences to the given litigant, but the whole context of litigation is likely to hold them closely to at least the types of claims represented by the litigants. A judge in a condemnation proceedings in which the only issue is fair value must ask himself how his decision will affect the further claims of property owners and of the city. He may consider, either consciously or unconsciously, whether the housing project to be built is one the city needs, but the rules of his game exert strong pressure on him not to do so. And he is highly unlikely to consider the consequences of urban renewal for mass transportation or the psyches of the renewed. In short he considers only those aspects of the entire problem of the most immediate concern to him even though these may not be the most important aspects of the problem as a whole in any ultimate sense.

Another of Lindblom's propositions, that incremental decisions are remedially oriented, should strike a familiar note with those who are familiar with modern jurisprudential writings. He says "The characteristics of the strategy . . . encourage the analyst to identify . . . ills from which to move away rather than goals toward which to move."²⁹ Edmond Cahn in his *Sense of Injustice*³⁰ and *The Moral Decision*³¹ has put forward exactly this proposition to explain and rationalize the decisions of courts confronted by situations in which the mechanical application of existing law does not seem to yield just results. Cahn is basically troubled because the courts do make decisions based on considerations of justice and morality in spite of

²⁸See *Muskrat v. United States*, 219 U.S. 346 (1911). *Cf. Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227 (1937).

²⁹BRAYBROOKE & LINDBLOM, *op. cit. supra* note 8 at 102.

³⁰CAHN, *SENSE OF INJUSTICE* (1949).

³¹CAHN, *THE MORAL DECISION* (1955).

their inability to articulate a rational set of moral principles or a systematic answer to the question, what is justice? He must predicate a special, psychological-physiological, empathic "sense of injustice," indwelling in each individual, in order to justify proceeding without rationally articulated rules of decision. He must do this because he is basically unable to free himself from the notion that the rational decision-making model with fully articulated goals or values is somehow the right one. He is forced to the *deus ex machina* of the sense of injustice to counterbalance what he considers the general rule of rational decision-making. If we give up our special attachment to rational decision-making, we can give up the sense of injustice along with it and simply take Cahn's message to be that courts are capable of, and willing to make, policy decisions remedying evils they see before them without requiring, or being able to erect, systematic structures of goals or values.

Just as the "remedial" aspects of incrementalism tend to reduce Cahn's philosophizing to a set of descriptive statements, I think some attention to the aspect of incrementalism that Lindblom labels "adjustment of objectives to policies" may help us to view another judicial problem in the normal light of politics rather than in the shadow of the peculiar sort of debate into which students of courts often plunge. Lindblom's basic point here is that considerations of availability of means often and necessarily affect, and indeed partially define, what goals we are going to pursue. This point has, I think, always been evident in many of the more "routine" areas of law. The need to pursue certain legal goals within the context of what the real situation will bear is attested to by such concepts as "the reasonably prudent man," "innocent third party purchaser," and "last clear chance." All of these concepts represent compromises between certain ideal goals and what can actually be expected of imperfect human beings in an imperfect society. Movements toward and away from absolute warranty, for instance, have always focused on what manufacturing and marketing conditions would bear rather than notions of absolute fairness or responsibility. Somehow in these areas students of law are quite accustomed to modifying their goals and cutting their losses under the impact of the real world. Indeed such adoption of judicial behavior to reality is generally applauded and encouraged.

March's final proposition, stressing the use of standard operating procedures and rules of thumb, which in the short run dominate the decisional process, is so strikingly applicable to the legal process

that little comment is necessary. The terminology is slightly different in law. But legal doctrines or rules are precisely those standard operating procedures or rules of thumb by which judicial decision-makers dispose of most of the cases that come before them. The clear and present danger rule³² is a familiar example, but it is hardly necessary to belabor the point that, in every field of law, doctrines which fall somewhere between the status of fixed elements in the law and random dicta by individual judges play an important part in the decision of cases. We know that in the short run most decisions are going to be routinely determined by the given state of doctrine. We also know that in the long run the doctrine is going to change. March's proposition neatly fits that strange paradox of law in which we can at one and the same time be almost absolutely sure that the case tomorrow will be decided according to doctrine X and that ten years from now doctrine X will have disappeared. The rest of incrementalism explains how and why it disappears.

We have already noted some seeming conflict between this last proposition and what Lindblom calls the "reconstructive treatment of data" under which he stresses the use of themes rather than rules. In legal materials we find a parallel situation in which courts sometimes do and sometimes do not use a fairly firm and definite rule providing that if one or more elements are present then a particular result must follow. For instance, the Supreme Court holds that if violence or the immediate threat of violence is present in a labor-management dispute, the state may intervene in matters that would otherwise be the sole concern of the National Labor Relations Board—the so-called violence exception to the primary jurisdiction of the N.L.R.B.³³ Where courts must determine whether a given crime involves moral turpitude, they almost invariably hold that where fraud was an element in the offense, the crime does involve turpitude.³⁴

On the other hand courts frequently take precisely the thematic tack Lindblom describes, simply naming various factors all of which they will consider, but none of which they will bind themselves to treat as decisive. A clear example is the now largely defunct fair-trial rule under which no given lapse in criminal procedure in and of itself rendered a trial unfair, but the Supreme Court was, in each instance, to determine whether the trial was fundamentally fair as a

³²See Mendelson, *Clear and Present Danger—From Schenck to Dennis*, 52 COLUM. L. REV. 313 (1952).

³³*San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

³⁴Shapiro, *Morals and the Courts, The Reluctant Crusaders*, 45 MINN. L. REV. 897, 926 (1961).

whole.³⁵ The balancing doctrine often used in conjunction with the First Amendment, where the Court weighs the interest in infringing upon speech against the interest in preserving it, is another example.³⁶ Obviously under either doctrine the Court is absolutely free to decide any case any way it wants to since no single element of law or fact is allowed to dictate the legal conclusions.

This thematic approach may often be used to preserve a court's options in future decisions. Here is a quotation from a Supreme Court opinion dealing with a rather tricky problem of railway abandonment on a southern line. The Justices are quite obviously looking over their shoulders at the problem of New York commuter runs which may come before them in the future.

In some cases . . . the question is whether abandonment may justly be permitted, in view of the fact that it would subject the communities directly affected to serious injury while continued operation would impose a relatively light burden upon a prosperous carrier In cases falling within the latter category, such as those involving vital commuter services in large metropolitan areas where the demands of public convenience and necessity are large, it is of course obvious that the Commission would err if it did not give great weight to the ability of the carrier to absorb even large deficits resulting from such services. But where, as here, the Commission's findings make clear that the demands of public convenience and necessity are slight . . . it is equally proper for the Commission, in determining the existence of the burden on interstate commerce, to give little weight to the factor of the carrier's overall prosperity.³⁷

Of course it is understood that the court will do its own reweighing of the weighing it orders the Commission to do.

Perhaps the most dramatic examples of the alteration and mixture of rule of thumb and thematic techniques and the tactical advantages of each to various courts and litigants are to be found in those areas, particularly labor and antitrust law, where per se rules are much in fashion. In such areas disputes about whether courts should or should not adopt per se rules are in effect disputes about whether they should use the rule or thematic approach. And, of course, courts have sometimes adopted and sometimes rejected the per se approach. Per se rules, however, offer an extreme example. Probably most common is the situation in which a court's doctrine is

³⁵See *Palo v. Conn.*, 302 U.S. 319 (1937); *Betts v. Brady*, 316 U.S. 455 (1942).

³⁶See *Barenblatt v. United States*, 360 U.S. 109 (1959).

³⁷*Southern Ry. v. North Carolina*, 376 U.S. 93, 105 (1964).

relatively clear and predictable, in other words, is a rule of thumb or standing operating procedure, but nevertheless is sufficiently imprecise to allow the judge some of the freedom of the thematic approach particularly through his choice of emphasis on particular portions of the relevant law and facts.

Another feature of what Lindblom calls this "reconstruction" strikes home immediately in the judicial process. "Fact-systems are reconstructed as new ones are discovered. Policy proposals are redesigned as new views of the facts are adopted."³⁸ At the most elementary level, all of us have many times been struck by the way in which, in a given case, the facts look so much different in the majority opinion than in the dissent. The majority's frightened child, shivering in his cell, cut off from his loving parents, and confessing in loneliness and desperation, may become the dissenters' hardened juvenile delinquent, refusing to see his mother and confessing as a final gesture of defiance. The poor little Seventh Day Adventist, who, forbidden by her conscience to work on Saturday, is struck off the unemployment compensation rolls, moves my heart precisely because I almost instinctively think in terms of an economic system in which there are plenty of five day jobs. She moves my heart slightly less when a dissenter shows that, in the Southern town in which she lives, practically the only employment for women is in the textile mills which work a six day week. Thus the lady's religion conveniently allows her to refuse every available job and continue to live off the taxpayers indefinitely.³⁹ I am not saying that judges necessarily pick and choose their facts to support their decisions, but that judges typically decide on the basis of some model or abstraction from the facts and that the way they construct this model affects their decisions. No matter what its technical relation to the doctrine of presumption of constitutionality, is not this the real story of the Brandeis brief? By the way, here attitudinal studies and incrementalism cross paths again, for judges may structure the facts of any given case to verify their pre-existing attitudes toward the parties, and the factual models on which policies are based and modified may change as new judges with different attitudes take a hand in painting the factual picture.

Finally March, within the context of the single firm, and Lindblom, dealing with the political system as a whole, emphasize that analysis is done by many participants and that the policy product

³⁸BRAYBROOKE & LINDBLOM, *op. cit. supra* note 8 at 98.

³⁹See *Sherbert v. Verner*, 374 U.S. 398 (1963).

of the system as a whole results from the interaction of these multiple centers of analysis. I think we can find this phenomenon, not always but sometimes, in multi-judge courts, and in multi-court systems, for instance the circuits when interpreting federal statutes, or the highest courts of the several states in working out commercial law which must govern many interstate transactions. The basic lore of common law is, of course, one of multiple decision-making under the label of "case by case" development of the law. More concretely the typical process of federal statutory interpretation is likely to involve decisions by several circuits. Agreement among successive circuits will fix the initial interpretation. Conflict among the circuits will defer a final interpretation and, at least in theory, eventually lead to a decision by the Supreme Court. Thus the circuits form a multi-unit decision-making system in which agreement or disagreement among the units is likely to materially influence the system's final decision. To the extent that the courts of certain states find the judicial decisions of certain other states highly persuasive, legal decision-making as a mutual product of two state court systems will occur. Nearly every practicing lawyer is in possession of rough rules of thumb as to which states' reports his own state's judges are likely to treat most hospitably. Of course the chain of appeal within each of the states, and of the federal courts, particularly when there are two levels of appellate courts, constitutes multiple decision-making in and of itself.

Certainly, taking the role of the courts in the context of the political system as a whole, the phenomenon of multiple, interacting policy-making centers has been widely recognized as crucial to judicial behavior. For instance, where the federal courts make federal law by statutory interpretation, they add their decisions to those already made by Congress in passing the statute, and frequently those of the agencies responsible for administering and thus initially interpreting it. The court's decisions are likely to provoke further agency decisions and perhaps further congressional action, with the courts then making more decisions yet in response to new Congressional and agency action. Thus courts are part of the succession of policy decisions, none of which is decisive or final, but each of which affects all the others, that is typical of incremental decision-making.

Conclusion

I hope that I have made out a sufficient case for incrementalism as an adequate description of judicial decision-making at least to justify further investigation. But what difference does it make? That

is, supposing that judicial decisions can be described as incremental decisions, what advantage is there in doing so, particularly for those interested primarily in law and courts rather than political and social theory? There seem to me to be three advantages to this mode of description. The first has already been mentioned. If courts and other governmental decision-makers share a common method of decision-making, the position of the political jurist who is seeking to understand courts as an integral part of the political system is strengthened and made considerably easier.

For those not particularly concerned with political jurisprudence, the principal advantage of incrementalism is of quite a different sort. We know that the old mechanical view of *stare decisis* was wrong. In neither theory nor practice is it possible to ignore the existence of judicial choice and thus judicial law-making. Yet we still constantly run across the lawyer's and judge's concern for precedent, stability, long-standing practice, etc. The result is a kind of paradox in which we must tell one another that *stare decisis* is dead, but there are many instances in which something remarkably like it is still hopping around, or that *stare decisis* is the rule, but that there are so many exceptions to the rule that we are no longer sure what is the rule and what the exception. In teaching, I think it is still typical to begin with *stare decisis* and thus establish all sorts of stereotypes in the student's mind that later have to be broken. The theory of incrementalism may explain, or at least describe, the phenomena of stability and gradual change in law just as well or better than *stare decisis* without importing into the lawyer's and particularly the law student's mind all the rusty machinery of analytical jurisprudence which we then have to work so hard to throw out again.

Essentially lawyers have been unable to escape from *stare decisis* because they continue to require some theory that will account for the fact that law changes while law stays the same. This stability cum change has often been taken to be a peculiar phenomenon of common law requiring for its explanation that peculiar theory of the common law, *stare decisis*. Stability with change is not a peculiar feature of common law but a general feature of Anglo-American political systems. The theory of incrementalism adequately accounts for just that respect for the status quo coupled with marginal change that *stare decisis* takes us down so many tortured and basically fictional bypaths to describe. Incrementalism could thus be used as a tool for teaching and understanding judicial decision-making that would coherently organize the actual process of decision without re-

quiring us to drum the ideology of stare decisis into the law student and risk his subsequent shock and alienation when he discovers that stare decisis itself has been drummed out of the jurisprudential corps.

This point leads me to the third advantage of incrementalism. With the decline of mechanical jurisprudence and the general admission of the inevitability of judicial law-making, a vast unease has fallen over legal scholarship. All the orthodox limitations on judicial choice, which used to stabilize and confine both the judges and the commentators, seem to have been swept away. Deprived of these comforts, many legal scholars have fallen into desperate fears of excessive judicial action even while approving the actual actions of the courts. This ambivalence has not improved their scholarly disposition. Indeed in their general state of alarm, they tend to see every hint of judicial action, either in the courts themselves or in jurisprudential writing, as one more step toward disaster. Anyone who is not busy in helping to rebuild some sort of fence around judicial action and thus in reestablishing the security and serenity that the legal profession enjoyed when the law was a grand and mysterious edifice, but one whose structure was clear and certain to the lawyers, is viewed as irresponsible and dangerous. Indeed there are dark hints that they do not really love the law. The results are likely to be scholarly forays that contain more wit than light,⁴⁰ or learned discourses that chastise others for bowing to reality rather than orthodoxy.⁴¹

This malaise can be cured, I think, when we can demonstrate that the admission of judicial choice, that is, of the politicism of courts, is *in and of itself* also the imposition of a set of limitations on courts. The new jurisprudence does sweep away the traditional, mechanical limits on judicial action, but it does not leave a vacuum that the doyens of the establishment law schools must work desperately to fill. The new jurisprudence recognizes the freedom of judges but also specifies the limitations on that freedom.

Incrementalism is, it seems to me, the most effective way of emphasizing the limiting functions of the new jurisprudence, and hopefully comforting those who see judicial extravagance lurking everywhere. For the core of incremental doctrine is respect for the status quo and movement from the status quo only in short, marginal steps carefully designed to allow for further modification in the light of

⁴⁰See Kurland, Book Review, 32 U. CHI. L. REV. 386 (1964).

⁴¹See Gunther, *The Subtle Vices of the "Passive Virtues"—a Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

further developments. If you will examine all the orthodox pleas for careful and honest treatment of precedent, precise and cautious legal language, narrowly drawn holdings, respect for traditional legal concepts, and logical, case by case progress toward legal improvement, you will simply have found the message of incrementalism in the language of legal orthodoxy. Incrementalism is a theory of freedom *and* limitation. As a descriptive theory incrementalism recognizes the freedom of decision-makers, including judges, but emphasizes that in the real world decision is narrowly confined. As a prescriptive theory incrementalism requires of the judge, as political decision-maker, that he act cautiously and according to the rules of legal craftsmanship so dear to the hearts of legalists. The principal advantage of incrementalism to the legal fraternity may well be that it provides a middle and common ground for those who revel in the new found freedom of judges and those who fear the excesses of that freedom.