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The Meaning of Judicial Self-Restraint

RICHARD A. POSNER*

Judicial opinions these days fairly teem with those all-purpose terms of judicial abuse, "judicial activism" and "result-oriented," and their opposites, "judicial self-restraint" and "principled."¹ As with so much of the judicial vocabulary, these terms have become exceedingly shopworn, a substitute for rather than stimulant of thought, and maybe it would be best to discard them, along with "chilling effect," "facial overbreadth," "strict scrutiny," and the other clichés—some downright revolting²—of our trade. But I shall argue in this paper, to the contrary, that "judicial self-restraint," "judicial activism,"

* Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School. I am grateful to Paul Bator, Frank Easterbrook, Philip Kurland, Edward Levi, Helane Morrison, George Stigler, Geoffrey Stone, Cass Sunstein, and above all Henry Monaghan, for illuminating comments on a previous draft of this paper, which in a much abbreviated form was given both at the annual dinner of the Indiana Law Journal on April 8, 1983, and at a Symposium on Judicial Activism sponsored by the Federalist Society and held at the University of Chicago Law School on April 9, 1983.

1. Some examples: "Today's decision is a conspicuous exercise in judicial activism," *Engle v. Isaac*, 102 S. Ct. 1558, 1576 (1982) (dissenting opinion); "departs from principled constitutional adjudication"; "If ever a court was guilty of an unabashedly result-oriented approach, this case is a prime example," *Plyler v. Doe*, 102 S. Ct. 2382, 2409 (1982) (dissenting opinion); "a most unjustified form of judicial activism," *Matter of Gifford*, 688 F.2d 447, 450 n.2 (7th Cir. 1982) (en banc); "The majority has engaged in an extraordinary exercise of judicial activism," *Mosey Mfg. Co. v. NLRB*, 701 F.2d 610, 616 (7th Cir. 1983) (en banc) (dissenting opinion); "Things have reached the point where the result-oriented jurist will attain the result he desires whatever the words say that are to be construed," *SCM Corp. v. United States*, 675 F.2d 280, 286 (Ct. Cl. 1982) (dissenting opinion); "In a land weary of . . . judicial activism," *Joy v. North*, 692 F.2d 880, 898 (2d Cir. 1982) (dissenting opinion). The attentive reader will have noticed that all of these quotations are from federal court decisions. Although my analysis has implications for state as well as federal courts, my focus throughout will be on the latter.

2. Such as the standard judicial expression for the Supreme Court's abortion decisions: "*Roe* and its progeny," as in "*Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and progeny have established a woman's right to choose for herself whether to carry a pregnancy to term, at least until the fetus is viable." *J.P. v. De Santi*, 653 F.2d 1080, 1087 (6th Cir. 1981). For other examples of this usage see, e.g., *Harris v. McRae*, 448 U.S. 297, 312 (1980); *Murillo v. Bambrick*, 681 F.2d 898, 904 n.11 (3d Cir. 1982); *Baird v. Department of Public Health*,

“principled,” and “result-oriented” can be given precise meanings that will help to clarify the issues in the perennial debate over the proper limits of judicial lawmaking.

I. PRINCIPLED DECISIONMAKING

A. *The Formalist Fallacy*

I want to begin by recalling Holmes' attack on formalism in *The Common Law*. In the most famous sentence in American legal scholarship, he said: “The life of the law has not been logic; it has been experience.”³ He continued: “The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.”⁴ Holmes does not say here that it is a good or bad thing that law (he is speaking of judge-made law, the common law) has been shaped more by felt necessities, intuitions of public policy, and so forth than by logic. But it is pretty clear that he thought it inevitable, and—being a Social Darwinist⁵—not a bad thing; he is constantly putting the syllogism down (saying it couldn't wag its tail,⁶ and so on). Yet this is the same man who said the fourteenth amendment had not enacted a particular theory of political economy, that of *laissez-faire*; and what he meant, of course, was that it was wrong for the Justices to read that theory into the Constitution.⁷

599 F.2d 1098, 1099 (1st Cir. 1979). Maybe the pun in “*Roe*” is inescapable but there are many alternatives to “progeny” that would not call to mind inappropriate—or perhaps too appropriate—images. George Orwell identified the linguistic problem that “*Roe* and its progeny” illustrates: “The sole aim of a metaphor is to call up a visual image. When these images clash—as in *The Fascist octopus has sung its swan song, the jackboot is thrown into the melting-pot*—it can be taken as certain that the writer is not seeing a mental image of the objects he is naming; in other words he is not really thinking.” G. ORWELL, *Politics and the English Language*, in 4 COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL 127, 134 (S. Orwell & I. Angus eds. 1968).

3. O.W. HOLMES, *THE COMMON LAW* (1881).

4. *Id.*

5. See Holmes, *Herbert Spencer: Legislation and Empiricism*, in JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 104, 107-09 (H. Shriver ed. 1936); Gordon, *Holmes' Common Law as Legal and Social Science*, 10 HOFSTRA L. REV. 719, 739-40 (1982). “Social Darwinism” is sometimes thought to be just a synonym for *laissez-faire* capitalism leading to the recent suggestion that Holmes, at least *qua* judge, was not a Social Darwinist. See Elliott, *Holmes and Evolution: Legal Process as Artificial Intelligence*, 13 J. LEGAL STUD. 113, 126 n.57 (1984). But the term has a broader meaning, certainly in Holmes' thought; it is the idea that the Darwinian model of struggle resulting in the survival of the fittest provides an apt description of human society. War, the union movement, the market of ideas, and legislation are all aspects, along with conventional economic competition, of Darwinian processes in human society.

6. Letter from Oliver W. Holmes to John C.H. Wu, reprinted in *THE MIND AND FAITH OF JUSTICE HOLMES* 419 (M. Lerner ed. 1943).

7. See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (dissenting opinion). Although I am skipping around in Holmes' long professional life, his thinking was of a piece; any ambiguity in his thought cannot be dispelled by dating.

“The Path of the Law” contains the most compact expression of Holmes’ thinking on the role of the judges’ policy preferences or values in the making of law:

I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious. . . . When socialism first began to be talked about, the comfortable classes of the community were a good deal frightened. I suspect that this fear has influenced judicial action both here and in England⁸

It is apparent that Holmes thought it wrong that judges should allow a fear of socialism to influence their decisions. But on his terms, why? The essay continues:

I think that something similar has led people who no longer hope to control the legislatures to look to the courts as expounders of the Constitutions, and that in some courts new principles have been discovered outside the bodies of those instruments, which may be generalized into acceptance of the economic doctrines which prevailed about fifty years ago. . . . I cannot but believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions.⁹

The first sentence in the passage just quoted suggests a theory of constitutional interpretation that I shall come back to; the second, however, says little more than that judges ought to be better informed than they are. If, having read widely, a judge becomes convinced that socialism is really a bad thing or really a good thing I can find no basis in Holmes’ writings for regarding the judge as acting illegitimately if he decides—though only when precedents and other formal sources of law, including a constitutional text that may invite free interpretation, do not yield a determinate outcome—to embody his preference for or aversion to socialism in his judicial decisions. Hamilton tried to persuade his fellow New Yorkers to ratify the Constitution by arguing that life-tenured federal judges would protect the interests of the “comfortable classes” against the mob.¹⁰ Holmes would think this bad, as would almost all modern judges, but the question is why.

The legal tradition against which Holmes was rebelling has come to be called formalism. This is the idea that the judge has no will, makes no value choices, but is just a calculating machine. It had received naive expression in Blackstone’s metaphor of the judges as the “living oracles” of the law¹¹—that is, as passive transmitters rather than creators. At the time Holmes wrote

8. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 467 (1897).

9. *Id.* at 468.

10. See THE FEDERALIST No. 78, at 226, 227, 231-32 (A. Hamilton) (R. Fairfield 2d ed. 1981).

11. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69 (1765). Almost the same expression had been used by Cicero. See Dickenson, *The Law Behind Law*, 29 COLUM. L. REV.

The Common Law and *The Path of the Law*, Blackstone's intellectual descendants were no longer speaking of oracular utterance, but of logical deduction.¹² The judge got the principles of the law from his predecessors, from custom, from judges of higher courts, from legislatures, and from the Constitution, and deduced from those principles the correct outcome in each case before him. "So judicial dissent often is blamed, as if it meant simply that one side or the other were not doing their sums right, and, if they would take more trouble, agreement inevitably would come."¹³

I do not want to make formalism too big a target, however, by simply equating it with the misuse of the syllogism. Consider the following example. Rule 68 of the Federal Rules of Civil Procedure provides that if a defendant makes a settlement offer (no later than 10 days before the trial begins) and the plaintiff rejects it and later gets a less favorable judgment than the offer would have given him, the defendant is not required to pay any of the "costs" of suit that accrued after the date of the offer. The Civil Rights Attorney's Fees Awards Act of 1976¹⁴ provides that in a civil rights suit the judge may award the winning party a reasonable attorney's fee to be taxed as "costs" to the loser. It is easy to construct a syllogism in which the conclusion is that the defendant in a civil rights suit who makes a more favorable settlement offer than the judgment the plaintiff eventually receives does not have to pay a reasonable attorney's fee to the plaintiff, even though the plaintiff did win the case, albeit not as big as he had hoped. But there is a missing premise: that Congress in the Civil Rights Attorney's Fees Awards Act intended the word "costs" to mean "costs for all purposes," or at least "costs for Rule 68 purposes."

Formalism invites the misuse of the syllogism because syllogistic reasoning has so definitive an air. But formalism is not just a synonym for fallacy, nor is it always and everywhere foolish or hypocritical. That depends on the

113, 115 n.8 (1929). Hamilton gave this version in the Federalist No. 78: "The judiciary . . . can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment." *Supra* note 10, at 227. And Chief Justice Marshall this: "Courts are the mere instruments of the law, and can will nothing." *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 737, 866 (1824).

12. See, e.g., C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* viii (2d ed. 1879); 2 C. WARREN, *HISTORY OF THE HARVARD LAW SCHOOL* ch. 43 (1908). Cf. Cappelletti *The Law-Making Power of the Judge and Its Limits: A Comparative Analysis*, 8 *MONASH U.L. REV.* 15, 20-22 (1981). Of Langdell's contracts casebook, *supra*, Holmes wrote in an anonymous review:

there cannot be found in the legal literature of this country, such a *tour de force* of patient and profound intellect working out original theory through a mass of detail, and evolving consistency out of what seemed a chaos of conflicting atoms. But in this word "consistency" we touch what some of us at least must deem the weak point in Mr. Langdell's habit of mind. Mr. Langdell's ideal in the law, the end of all his striving, is the *elegantia juris*, or logical integrity of the system as a system. He is, perhaps, the greatest living legal theologian. 14 *AM. L. REV.* 233 (1880).

13. Holmes, *supra* note 8, at 465.

14. 42 U.S.C. § 1988.

society and the period. If all the judges agree on the premises for decision, which was closer to being true in Blackstone's time than in Holmes', formalism may describe the judicial process with tolerable though not complete accuracy; for the premises will strike the judges as axioms, and the specific case outcomes will be deducible from them. Logic really will be the life of the law in these circumstances—but not completely. Earlier I quoted Hamilton's statement from *The Federalist No. 78* that the judiciary has no "will." But just a few pages later he says:

It is not with a view to infractions of the constitution only, that the independence of the judges may be an essential safe-guard against the effects of occasional ill humours in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity, and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled by the very motives of the injustice they mediate, to qualify their attempts. . . . Considerate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the courts¹⁵

This looks like an invitation to judges to set their own sense of justice ("scruples") against that embodied in legislation, and in the guise of interpretation to make the legislation more civilized in application than it was in intention. This is not a formalist recipe; it suggests (and approves) a concept of judicial decisionmaking much like that described by Holmes.

Judges today agree less on the premises of decision than in Holmes' time. This is true even though statutes, which may seem to invite deductive treatment more than common law principles do and thus (at least if we ignore Hamilton's advice) to reduce the scope for judicial lawmaking, bulk larger today than when Holmes wrote. Many issues of statutory interpretation cannot be answered deductively when first raised, at least once the "canons of construction" are recognized for what they are—fig leaves covering decisions reached on other grounds,¹⁶ which are sometimes grounds perforce supplied by the judges out of their own stock of policy preferences. Some statutes, indeed, are so general that they merely provide an initial impetus to the creation of bodies of frankly judge-made law (as in antitrust); that is why the federal courts of appeals, which do not have a general common law jurisdiction, find that a great many of the issues they are called upon to decide are common law issues in a functional sense: the application of a body of judge-

15. *Supra* note 10, at 231-32.

16. See, e.g., K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 521 (1960); H. FRIENDLY, *Mr. Justice Frankfurter and the Reading of Statutes*, in *BENCHMARKS* 196 (1967); Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 800-17 (1983).

made law is required to decide them.¹⁷ Furthermore, the decline of pure common law has been matched by the rise of a style of constitutional law that is ever less anchored in the constitutional text, and therefore ever more like common law.¹⁸ Though in part at least this is the judges' fault, and therefore not a good reason for their acting unconstrained by the text, it is inevitable that as we get further and further away in time from the date of enactment of a constitutional provision interpretation will become freer, especially since many such provisions seem deliberately couched in vague and general terms.

And yet the formalist idea dies hard. In part it survives as a judicial defense mechanism¹⁹—a way of shifting responsibility for unpopular decisions to other people, preferably dead people, such as the framers of the Constitution, whose graves provide a convenient place for the buck to stop. I shall have more to say about this use of formalism later in the paper. But formalism also survives because it is widely believed.²⁰ Consider the argument in Henry Hart's article, "The Time Chart of the Justices," that the trouble with the Supreme Court is that the Justices do not have enough time for discussing the cases with one another and that if they discussed them more they would agree more often.²¹ This implicitly conceives the process of judicial deliberation as the search for technical answers to technical questions ("doing their sums right"), for as Thurman Arnold noted in a reply to Hart, discussions of value questions are as likely to harden as to soften the disagreements among the discussants.²² The scope and complexity of American law, the lack of disciplined legislative processes, the diversity of ethical and political opinion in the society, and the political character of the judicial appointing process make it inevitable that many judicial decisions will be based on value judgments rather than on technical determinations; and decisions so made are by definition not scientific, and therefore are not readily falsifiable and hence not readily verifiable either—and as a consequence are not always profitably discussible.

B. *The Vice of Being Result-Oriented*

Critical though he was of formalism, Holmes like most contemporary legal thinkers believed that some considerations ought to be out of bounds to the judge even in cases where conventional legal materials gave out—cases that no version of formalism could decide. We can approach the question, "which

17. This argument is developed in Chapter 10 (Common Law Adjudication in the Federal Courts of Appeals) of my forthcoming book, *The Crisis of the Federal Courts*. See also T. Merrill, *The Common Law Powers of Federal Courts* (N.W. Univ. L. School, unpublished).

18. See Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 391-95 (1981).

19. Wittily described in A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 84-98 (1962).

20. See, e.g., R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977), especially Chapter 4 ("Hard Cases"), which argues that judges should not use policy notions to decide even the hardest cases.

21. Hart, *The Time Chart of the Justices*, 73 HARV. L. REV. 84, 99-100 (1959).

22. Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298, 1312 (1960).

ones?," by asking why judges are supposed to decide cases "without respect of persons," as the judicial oath puts it. The judge is not to decide even a very close case on the basis of which of the parties is the more appealing, more sympathetic human being, or which has the better or the nicer lawyer or more powerful friends in the news media, or which belongs to the judge's own class, race, or sex. We say that a decision influenced by any of these factors is not impartial. But that is just a conclusion. A decision is not impartial if factors that ought to be extraneous to the decisionmaking process influence it; but we must ask why certain factors are extraneous and others—the "felt necessities of the time," for example—are not.

A common but superficial answer is that if judges based decisions on unacknowledged personal preferences the law would be unpredictable. This assumes that judges would not declare the true grounds of decision in such cases. (If they did, the law would be predictable to the extent that different judges had the same preferences.) Indeed they would not declare the true grounds, but this is only because decision according to personal preference is so widely thought to be wrong that no judge would dare admit he was deciding cases on such a basis; and we have to consider *why* it is thought wrong. The reason I conjecture is that it would make the judiciary too autocratic. If a judge didn't like you or your friends or liked your opponent or his friends better, he would sit by and let you lose your property or your liberty. He could in effect declare you an outlaw. We do not want judges to wield such power. They would be "activist" in a sense if they did—but not, as we shall see, in the sense in which I want to use the word.

It is no answer that a judge would be appointed only if his preferences and prejudices matched those of the appointing authorities, who may be assumed to represent the dominant political forces of the society and whose preferences might on that account possess a certain legitimacy. Ideology is not the dominant factor in most federal judicial appointments;²³ even less important are the purely personal preferences and prejudices of the candidate. And while ideology does play a big role in appointments to the Supreme Court, the most powerful court in the land, often the views of the appointee are not well known to the President and Senate, or they change after the appointee becomes a Justice. Moreover, the preferences of the appointing authorities may not reflect the popular will years later when the judges they appointed are still in office. And even if they do, we don't want government to have as much power as it would if judges were perfect agents of the general will.

It is also thought wrong for judges to base decisions on partisan political factors. Suppose a federal judge is appointed by a Republican President with the support of two Republican Senators from his state and the entire membership of the Republican National Committee. Should not simple gratitude move

23. See R. Posner, *supra* note 17, ch. 2, where federal judicial selection is discussed and the literature referenced.

him to vote, at least in close cases, for the outcome that will advance the interests of the Republican Party? The answer is “no,” because we do not want the political parties to have the power over our lives that they would have if the judges were their agents, even if the party in power is the authentic spokesman of majority opinion.

So far I am on pretty solid ground. I do not know anyone who will argue that a litigant’s personal characteristics or party identity ought to influence a court’s decision. And at this level the term “result-oriented” is a meaningful pejorative. “Result-oriented” should not mean the decision of a case according to a principle that you do not like; that makes the term one of undifferentiated abuse. It should mean decision according to personal or partisan considerations generally agreed to be illegitimate. If this usage were accepted we would encounter the term “result-oriented” much less frequently in judicial opinions than we do, and the respite would be welcome. The term has become debased by being used to announce disagreement with the principle used to decide a case.

C. The Limited Virtue of Being Principled

The line between principled and result-oriented adjudication is unfortunately a fine one. Suppose it turned out that Judge A always voted against labor unions when they were parties to cases before him. If he did this because he disliked unions we could properly describe his decisions as result-oriented; but if the consistency of his votes resulted simply from the fact that he had formulated and was applying a principle that determined these outcomes, the label “result-oriented” would be inappropriate. I suggest the following practical, though only partial, test for distinguishing a principled from a result-oriented decision: it is principled if and only if the ground of decision can be stated truthfully in a form the judge could avow without inviting near-universal condemnation by professional opinion. If the only “principle” that explained a judge’s decisions in tax cases was that he thought tax collection communistic his tax decisions would be unprincipled, because he would never admit publicly—not in this society, not today—that this was his ground of decision. Likewise with deciding labor cases on the basis of a dislike for unions. The “unprincipled,” the “result-oriented,” are simply those grounds that at the particular historical moment are so generally rejected that they would never be announced as the true grounds of decision.

I said this was a partial test. To be a principled adjudicator means more than just being willing to state publicly the true ground of decision; it means being consistent. To take an extreme example, it would be unprincipled to decide all discrimination cases between black and white males in favor of blacks, on the basis of one principle, and all discrimination cases between a black man and a white woman in favor of the woman on the basis of another principle, if the two principles were inconsistent with each. Decision accord-

ing to principle, then, is decision according to a publicly stated ground that is consistent with the grounds the judge uses to decide other cases.

You will notice that I have spoken of "principle," not "neutral principle."²⁴ But all Professor Wechsler seems to have meant by "neutral" is "consistent," which is only one half of my definition of principled. A rule that in a lawsuit between a black and a white, the black shall always win (or shall always lose) is neutral because it abstracts from all particulars of the litigants and their dispute except the one made legally relevant by the rule being applied; it is, in other words, internally consistent. But although in one sense neutral, in another sense such a rule would be the epitome of result-orientation. My suggested "publicity" test makes the concept of principled adjudication less empty.

But maybe not much less. Deciding antitrust cases on the premise that the purpose of the antitrust laws is to promote economic efficiency is principled, and so is deciding them on the premise that the purpose of those laws is to decentralize economic power. Deciding criminal cases on the premise that public safety is the paramount good to be served by the criminal justice system is principled, and so is deciding them on the premise that the paramount good is to prevent the conviction of an innocent person. Deciding cases under the National Labor Relations Act on the premise that the Act seeks to foster the cartelization of labor is principled, but so is deciding such cases on the premise that the Labor Board has gone too far in shifting the balance of power from companies to unions. A commitment to principled adjudication does not dictate the choice between competing principles; it does not mean the judge will choose the best, or even defensible, principles, though it may make it more likely. So while "unprincipled" is a severe criticism to make of a judge's work, "principled" is at best a tepid compliment.²⁵

In particular, it is not true that so long as a judge is principled it doesn't matter what principles he applies. The terms of the statute he is applying, or precedent, or other sources of authoritative guidance to judicial decision-making may dictate that a particular principle be applied in a particular case. It is only when the springs of authoritative guidance run dry that the judge enters the area of legitimate judicial discretion. Thus, the open area in judicial decisionmaking is not the area in which decision by syllogism—formalism in its most pristine sense—is impossible, but the narrower area in which the judge, in default of authoritative guidance, has to bring *his* own policy preferences to bear in order to decide the case at hand. But nothing I have said so far provides a reason against a judge allowing fear of socialism, or hatred of big business, to influence his decision in those cases (which may be few or many) where even after conscientious and skillful study of the authoritative materials of decision he finds the law unclear in its application to the case.

24. See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

25. A point made in one of the early, and one of the best, comments on Wechsler's article. See Golding, *Principled Decision-Making and the Supreme Court*, 63 COLUM. L. REV. 35, 41 (1963).

Fear of socialism is just a pejorative expression for a belief which may be principled, in individualism, and hatred of big business just a pejorative expression for a belief which may be principled, in populism; it would muddle the term "principled" to confine it to grounds we happen to agree with or even those we think defensible.

To summarize very briefly where we are, I have suggested that there is an area in which a judge cannot decide cases simply by reference to the will of others—legislators, or the judges who decided previous cases, or the authors of the Constitution. Within that area the judge must draw on his own values and preferences to arrive at a decision. But he must do so in a principled fashion, "principled" implying not merely consistent but also enjoying sufficient public approbation that the judge is not afraid to state the "principle" in his opinions. Among these principles, and the focus of the rest of the paper, are activism and self-restraint.

II. THE VARIETIES OF SELF-RESTRAINT

A. *The Basic Classification*

The term "judicial self-restraint" could be used in at least five different senses: (1) A self-restrained judge does not allow his own views of policy to influence his decisions. (2) He is cautious, circumspect, hesitant about intruding those views. (3) He is mindful of the practical political constraints on the exercise of judicial power. (4) His decisions are influenced by a concern lest promiscuous judicial creation of rights result in so swamping the courts in litigation that they cannot function effectively. (5) He wants to reduce the power of his court system relative to that of other branches of government.

The first definition is useless for present purposes because I am interested in exploring the possibilities of self-restraint in the open area of judging, where by definition the correct decision cannot be obtained without bringing in personal policy preferences. Definition 2 identifies what I shall call the "deferential" judge, to distinguish him from the judge who is self-restrained in the sense used in definition 5; I shall argue later that the confusion of deference with the other sense has had an unfortunate consequence. Definitions 3 and 4 identify what I shall call "prudential self-restraint" and discuss briefly in this section before turning to the main focus of this paper: self-restraint as a substantive political principle used by judges in deciding certain cases in the open area (definition 5).

"Prudential self-restraint" has two aspects, the "political" (definition 3) and the "functional" (4). Most judges either practice the political version or would do so on a suitable occasion. There are limits beyond which even Supreme Court Justices cannot go without provoking effective retribution from Congress or, as in the case of Chief Justice Taney's confrontation with Lincoln

over habeas corpus,²⁶ seeing their judgments simply ignored. But I am not interested in exploring those limits, because usually they are broader than the boundaries of the other sorts of self-restraint I shall discuss.

The second kind of prudential self-restraint, the "functional," is based on recognition that decisions that create rights lead to heavier caseloads which can in turn impair the courts' ability to function (hence the word "functional"). Although it is always possible to add judges to a court, that is only a short-term solution to a caseload crisis; beyond some point, increasing the number of judges in a court system will only make the system work less well.²⁷ An interesting (and in light of the present overload of the federal system, an urgent) question that I can only touch on in this paper is whether it is legitimate for a judge to consider caseload effects when deciding a case. It clearly is in those areas of law such as jurisdiction and procedure where judicial economy (minimizing caseload) is accepted as a relevant consideration. If the issue in a case is standing to sue, or whether judicial review of administrative action lies in the district court or the court of appeals in the first instance, or whether a federal court should abstain when a parallel suit is pending in state court, or whether pendent jurisdiction should be broadly or narrowly construed, and the answer is not dictated by precedent, judicial economy will be one of the weights the judge will be expected to put in the balance in making his decision. And it will be weightier the heavier the caseload is. If you will grant me that new increments of demand for federal judicial services cannot be met by adding new judges or making other adjustments without dangerously impairing the quality of the federal courts' product, a failure to economize wherever possible on federal judicial resources may impose substantial social costs in the form of reduced judicial quality; and this is a legitimate consideration in any area of law where judicial economy is itself a legitimate consideration.

B. Separation of Powers Self-Restraint

My central concern is with what I shall call "separation of powers judicial self-restraint," or less clumsily "structural restraint." By these terms, which describe judicial self-restraint in an accepted sense²⁸ that I should like to see become the exclusive sense in order to minimize ambiguity, I mean the judge's setting as an important goal of his decisionmaking the cutting back of the

26. See C. SWISHER, 5 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD 1836-64, at 847 (1974).

27. See Posner, *Will the Federal Court of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 SO. CAL. L. REV. 761, 762-64 (1983), and Chapters 3-4 of Posner, *supra* note 17.

28. See, e.g., Mason, *Judicial Activism: Old and New*, 55 VA. L. REV. 385 (1969) ("[s]hould it [the Supreme Court] stand aloof, exercise self-restraint, defer to legislature and executive, leave policy-making to the initiative of others?").

power of his court system in relation to—as a check on—other government institutions. (In the remainder of this paper, “self-restraint” means separation of powers self-restraint, unless otherwise indicated.) So if he is a federal judge he will want his court to pay greater deference to decisions of Congress, of the federal administrative agencies, of the executive branch, and of all branches and levels of state government (including state courts). It is not a liberal or conservative position as such, because it is independent of the policies that other governmental institutions happen to be following. It will produce liberal or conservative outcomes depending on whether the courts are at the moment more or less liberal than other institutions. If you doubt me, read Bernard Siegan’s recent book and the admiring review of it by Mark Pulliam,²⁹ and you will see that a movement is afoot (among scholars—not as yet among judges) to make the majority opinion in *Lochner* the centerpiece of a new activist jurisprudence.³⁰

Because separation of powers judicial self-restraint implies a low profile for the courts, it tends to produce outcomes similar to those produced by prudential self-restraint in either its political or its functional form. The forms of judicial self-restraint are related in another way. They all can be seen as proceeding from recognition of the federal courts’ special vulnerability, though this is not necessarily the most illuminating perspective. The federal courts, one has been told over and over again until the point has become thoroughly hackneyed, lack the power of purse or sword, lack the legitimacy conferred by an electoral mandate, yet have responsibility for countermanding the elected branches. They do this not only when enforcing the Constitution but also when enforcing federal statutes in accordance with the intent of the enacting rather than the current Congress. Hence, the argument continues, the courts are the weakest branch of the federal government. They can preserve their influence only by conserving their political capital, which can be squandered not only by too freely countermanding the other branches but by the decline in professional respect for the quality of the courts’ decisions that must accompany any rapid expansion in the number of judges and any substantial relaxation of the traditional limitations on justiciability.

Yet the recent history of the federal courts suggests that it is not their political capital that is running out so much as their judicial capital—their ability to supply judicial decisions of reasonable quality. Although there have been some

29. See B. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1980); Pulliam, Book Review, 18 *WAKE FOREST L. REV.* 971 (1982).

30. Compare Professor Epstein’s suggestion for using the takings clause of the fifth amendment to limit redistributive taxation. Epstein, *Taxation, Regulation, and Confiscation*, 20 *OSGOODE HALL L.J.* 433 (1982); see also Epstein, *Not Deference, But Doctrine: The Eminent Domain Clause*, 1982 *SUP. CT. REV.* 351, 360 n.19. Another recent contribution to the *Lochner* revival movement is Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined*, 31 *EMORY L.J.* 785 (1982), which begins: “This study concerns the possible revival of a sleeping giant, the common law and constitutional tradition barring governmental grants of monopoly in the ordinary trades.” *Id.*

stirrings of revolt by the political branches against the self-aggrandizement of the judicial branch in the last two decades, nothing comparable to Franklin Roosevelt's court-packing plan is yet visible on the horizon.³¹ This is in part because some of the groups on whose behalf the courts have been aggressive lately, notably women and blacks, are politically influential, and therefore protect the courts' vulnerable political flanks, and in part because the political branches are happy to shift responsibility for unpopular policies to the federal courts, which are a kind of lightning rod since the judges cannot be voted out of office. Since those courts are inherently weak yet seem to be getting away with a big power grab from the political branches, there is a presumption that those branches are cooperating in the shift of power—and with it responsibility—to the courts. Thus, not the autonomy of the federal courts, but their capacity to function effectively, has been called into question—by a caseload crisis that is, however, partly the result of the federal courts' self-aggrandizing decisions. I cannot describe the federal caseload crisis here,³² and will merely remark that some of the federal judicial overload must be due to the many new rights declared by the Warren and Burger Courts. These chickens have now come home to roost. For in the setting of a caseload crisis the hostility of the political branches, even if not great enough to give rise to restrictive legislation can cause acute discomfort to the courts. If Congress and the President will not help the courts to solve their crisis—if indeed they will wage a kind of guerrilla warfare against the judges, as by denying them proper salary increases—the profligate expenditure of the courts' political capital in the last two decades may turn out to have serious consequences after all.

The distinction between structural and prudential restraint is not the only one I want to insist on. Another is between structural restraint and circumspection in general, or devotion to *stare decisis*—implying deference to other judges in the same judicial system—in particular. I do not mean to suggest that deference is not a good thing, merely that it is a different thing from self-restraint in a useful sense. A decision overruling *Marbury v. Madison*³³ would be pretty wild stuff but it would be self-restrained in my terminology because it would reduce the power of the federal courts vis-a-vis other organs of government. Similarly, to speak of two real overrulings, *Erie R.R. v. Tompkins*³⁴ and *Mapp v. Ohio*,³⁵ both criticized as reaching out to decide important questions not adequately briefed or argued by the parties (in *Erie* not even raised),³⁶

31. Cf. Monaghan, Book Review, 94 HARV. L. REV. 296, 300-01 (1980).

32. See references cited *supra* note 27.

33. 5 U.S. (1 Cranch) 137 (1803).

34. 304 U.S. 64 (1938), overruling *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

35. 367 U.S. 643 (1961), overruling *Wolf v. Colorado*, 338 U.S. 25 (1949), insofar as *Wolf* had held that the exclusionary rule in search and seizure was not applicable to the states.

36. On *Erie* see the discussion (not a criticism) in *In Praise of Erie—and of the New Federal Common Law*, in H. FRIENDLY, *supra* note 16, at 155, 171-72 n.71. On *Mapp* see 367 U.S. at 672-77 (Harlan, J., dissenting); the issue of the continuing validity of *Wolf* had been raised by the petitioner in *Mapp*, but was later abandoned.

Erie is a self-restrained decision in my terminology because it reduced the power of the federal courts vis-a-vis the state courts; *Mapp* is activist because it had the opposite effect.

Activism as I want to use the word is just the opposite of self-restraint as I have defined it, and thus is distinct not only from boldness but also from intrusiveness into private activity. When a court creates private remedies for enforcing a statute, or new defenses to the enforcement of contracts, it may well be taking power over the allocation of resources away from private persons and putting it in its hands, thereby enlarging the power and reach of government. But unless it is acting contrary to the will of the other branches of government it is not being activist in my terminology, for it is not enlarging its power at the expense of any other government institution. Some of the objections to judicial activism can be made against judicial intrusiveness into private activity, such as that it draws down the courts' political capital too far; and what I earlier called "functional" self-restraint embraces the avoidance of intrusiveness as a special case. But judicial nonintrusiveness is not the same thing as judicial self-restraint in the separation of powers sense. Otherwise *Lochner* (which struck down a governmental restraint on economic liberty) would be an example of judicial self-restraint and the term would be hopelessly muddled.

C. *Restraint as a Contingent Good*

Once we abandon the usage in which self-restraint is a synonym for goodness in judicial decisionmaking, and judicial activism for badness, it becomes apparent that whether history will commend a judge's choice of where to locate on that axis will depend on the particular historical situation in which the judge finds himself. There is no inconsistency in arguing that it would have been a disaster for Chief Justice Marshall—the Marshall of *Marbury v. Madison*³⁷ and *Gibbons v. Ogden*³⁸—to have embraced judicial self-restraint and for Chief Justice Burger to have embraced judicial activism. If the courts are too miserly in using their powers to check the other branches of government, they might as well not be a part of the system of checks and balances, though the Constitution meant them to be. But if they are too profligate they risk having their role in the system cut back or taken away from them altogether.

In suggesting that judicial self-restraint is a contingent, a time-and-place-bound, rather than an absolute, good, I may seem to be overlooking powerful arguments (in addition to the "political capital" argument that I have already addressed) that restraint is always and everywhere the right judicial policy for the federal courts. But a brief review of these arguments reveals serious objections to each.

37. 5 U.S. (2 Cranch) 137 (1803).

38. 22 U.S. (9 Wheat.) 1 (1824).

1. The familiar argument that proceeds from a general concern with the menace of too powerful government can be parried by pointing out that any power that the federal courts gather to themselves is obtained at the expense of other powerful institutions of federal and also state government.

2. Although one can argue that the framers of the Constitution envisaged a smaller role for the federal courts than they have played virtually from the beginning,³⁹ we do not know how loose a garment the framers meant to weave. As Holmes said:

when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.⁴⁰

It is true that in the opinion from which this quotation is taken Holmes was arguing that the Constitution was not meant to fasten a straitjacket on government. There is a principled difference between interpreting the Constitution broadly with regard to governmental powers and broadly with regard to judicially enforceable rights against government;⁴¹ it is the difference between restraint and activism in the sense in which I am using those terms in this paper. But to state the difference is not to justify it as a basis for action. If as we have been taught by Thayer, Holmes, Frankfurter, and others it is wrong to interpret the Constitution as a straitjacket on legislative and executive action, it is not obviously right to treat it as a straitjacket on judicial action.

It is true that the federal courts today bear little resemblance to the royal courts of Westminster in the eighteenth century on which the federal courts were originally modeled. But the legislative and executive branches bear little resemblance today to their eighteenth century antecedents, and to try to turn the clock back, as by holding that the existence of independent regulatory agencies violates the separation of powers, would be the greatest adventure in judicial activism yet. Furthermore, it is hard to imagine why the framers of the Constitution would have bothered to give the federal judges such extraordinary guarantees of independence if they had not expected them to be aggressive in protecting individual rights against encroachment by other

39. I want to elide rather than evaluate that argument here. Reading the useful compilation of references to the judiciary in the debates in the constitutional convention and the state ratifying conventions and in the Federalist Papers in SCHULZ, *CREATION OF THE FEDERAL JUDICIARY: A REVIEW OF THE DEBATES IN THE FEDERAL AND STATE CONSTITUTIONAL CONVENTIONS, AND OTHER PAPERS*, S. DOC. NO. 91, 75th Cong., 1st Sess. (1937), I am struck by the importance that the discussants attached to having a powerful federal judiciary.

40. *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

41. See Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 284-85 (1982).

branches of government—and plainly they did;⁴² and though the framers' thinking ran more to property rights than to what we call civil liberties⁴³ the constitutional text is not so confined.

3. One can argue on behalf of structural restraint that the courts are less democratic than the other branches of government—and they are—but for this to be a telling point you would have to meet Professor Ely's defense of the Warren Court's activism as having made government more democratic.⁴⁴ More fundamentally, you would have to show why we should have more democracy than we do (or as much as we do), and this is not such an easy thing to show. There is a standard syllogism: the theory of our system is that law is made by elected representatives; federal judges are not elected representatives; therefore lawmaking by federal judges is usurpative. But it overstates the framers' devotion to democracy.⁴⁵ The framers were smart enough to know that judges made law⁴⁶—that the English judiciary on which the federal courts were modeled had made the law of England—but they nonetheless ordained an appointed federal judiciary with life tenure, thereby making sure that the judges would not be electorally accountable. What can fairly be inferred from the constitutional scheme is that the judges are not to exercise the same free-wheeling legislative discretion as the elected representatives, the difference being captured in Holmes' metaphor that the judge unlike the legislator is "confined from molar to molecular motions."⁴⁷ The problem with this as a motto of judicial self-restraint is that the sum of a large number of molecular motions may be molar; judicial law creation may be incremental but the increments add up. Although the democratic principle has become a more pervasive feature of our system since the original Constitution, that cuts both ways: it makes the federal judiciary more anomalous, but maybe an even more necessary counterweight to the democratic branches of government.

4. One can argue that the federal courts are not good at exercising the functions they have annexed from other parts of government (running prisons, for example)—and they are not—but this argument compares real courts, warts and all, with an ideal vision of other government institutions. Many people don't think American government is performing well at any level these days—a point, however, that can be turned by arguing that the federal courts have sapped other government institutions of their sense of responsibility and self-respect, by taking away their authority.⁴⁸ To which the riposte is: prove it.

In any event, this last argument is about the here and now—not about restraint versus activism *sub specie aeternitatis*. And it shows moreover that

42. See *supra* note 39.

43. See, e.g., DAHL, A PREFACE TO DEMOCRATIC THEORY, ch. 1 (1956).

44. See J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 74 (1980).

45. See the excellent discussion of "Madisonian Democracy" in DAHL, *supra* note 43, ch. 1.

46. See *supra* note 15 and accompanying text.

47. Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917).

48. The classic exposition of this argument is Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 155-56 (1893).

even if we confine our attention to the present, it is difficult to talk convincingly about judicial self-restraint across the whole constitutional landscape. Everyone must agree that the federal courts can go "too far" and maybe have done so lately, but to *prove* this would first require a detailed examination of particular areas of federal judicial activism—prisons, and busing, and capital punishment, and abortion, and review of administrative agency action, and relaxation of traditional standing requirements, and many others—and only then could one attempt an overall assessment, arrived at inductively rather than deductively.

There is, however, some persuasive if indirect evidence that judicial activism in its contemporary form has indeed gone too far. The overload of the federal courts is one bit of evidence. A summary of Chief Justice Warren's judicial philosophy by a recent and on the whole admiring biographer is another:

Warren's craftsmanship as a jurist was thus of a different order from that identified with enlightened judging by proponents of judicial restraint. Warren saw his craft as discovering ethical imperatives in a maze of confusion, pursuing those imperatives vigorously and self-confidently, urging others to do likewise, and making technical concessions, if necessary, to secure support. In believing his concessions on matters of doctrine to be "technical," Warren was defining his own role as a craftsman. It was a role in which one's sense of where justice lay and one's confidence in the certainty of finding it were elevated to positions of prominence in constitutional adjudication, and where craftsmanship consisted of knowing what results best harmonized with the ethical imperative of the Constitution and how best to encourage other justices to reach those results.⁴⁹

Whatever this is, it is not judicial craftsmanship; to identify one's personal ethical preferences with natural law and natural law with constitutional law—the chain described by Professor White—is to abandon legal craft. As the courts move deeper into subjects on which there is no ethical consensus, such as abortion and capital punishment and prison amenities, judicial activism in the form attributed by Professor White to Chief Justice Warren becomes ever more partisan, parochial, arbitrary, and finally reckless.

I would go one step further, and suggest that contemporary judicial activism is unprincipled. You will recall my "publicity" test for a principle: a ground of decision that the judge is willing to state openly. Although activist decisions contain principles (e.g., "one man one vote"), contemporary activism is not a principle because no judge will espouse it in a judicial opinion. The activists denounce activism with gusto, illustrating the adage that hypocrisy is the tribute that vice pays to virtue. Chief Justice Warren never said in an opinion that he wanted to shift power from the other institutions of government to the courts in pursuit of his ethical visions. Indeed, as we

49. G. WHITE, EARL WARREN: A PUBLIC LIFE 229-30 (1982), quoted in Dennis Hutchinson's perceptive review of White's book, *Hail to the Chief: Earl Warren and the Supreme Court*, 81 MICH. L. REV. 922, 923-24 (1983).

shall see, activists frequently adopt the formalist style to conceal the degree to which they are asserting judicial power. Activists are ashamed to admit in public what they are about; they make you read between the lines. Although activism is respectable enough among academics today, it still is not sufficiently respectable among the general public for judges to dare to admit that they are activists; and this is the best evidence that judicial activism, 1984 model, is indeed unprincipled.

III. SOME IMPLICATIONS OF MY DEFINITIONS

A. *Holmes Again*

I started this paper by asking why Holmes was opposed to making hostility to socialism an element in judicial decisionmaking, and the answer, it should now be clear, is that to do so would be inconsistent with structural restraint, which was a more important part of Holmes' judicial philosophy, being rooted in his Social Darwinism and a skeptical habit of mind, than his dislike of socialism. In areas where considerations of judicial self-restraint were irrelevant, as they usually are when a judge is expounding private judge-made law as distinct from public law, Holmes decided cases, tort cases for example, in accordance with the individualistic, anti-collectivist—one might even say anti-socialist—philosophy that came naturally to him but that he subordinated to considerations of judicial self-restraint when there was a conflict.⁵⁰

B. *Self-restraint and Judicial Personality*

It should also be clear by now that self-restraint in the sense in which I am using the term does not, or at least need not, come from being a modest, deferential, timid judge—words inapt to describe Holmes, Brandeis, or Frankfurter, the leading judicial exponents of self-restraint. They had no lack of self-esteem or self-confidence and no above-average reverence of precedent. They merely thought the courts ought to be deferring to the other branches of government more than they were doing, though with important exceptions—freedom of speech for Holmes and Brandeis, federal criminal procedure for Frankfurter. The exceptions are significant because they suggest that judicial self-restraint could no more constitute the entire judicial philosophy of an intelligent person than judicial activism could. Even in cases where the materials of decision in a narrow sense do not dictate the outcome of the case at hand, so that the judge's personal policy preferences or values have to be brought in to decide it, the policy of judicial self-restraint is not the only policy the judge ought to think about. Holmes was not necessarily inconsistent in wanting to restrict government regulation of speech and the

50. See, e.g., *United Zinc & Chem. Co. v. Britt*, 258 U.S. 268 (1922) (the sulphuric acid attractive-nuisance case).

press more than the courts were doing and regulation of wages and hours less. Even if the language and history of the first amendment could not be said to have dictated his position in freedom of speech cases, they at least offered a handhold; they created an open area in which a belief in a Darwinian struggle for survival among competing ideas could be made law, without usurpation.

Being timid could, of course, make a judge unwilling to challenge the other branches of government, and therefore self-restrained. But this is not the inevitable consequence of timidity; the timid judge might be unwilling to reexamine his predecessor's activist decisions. So if it is wrong to equate judicial self-restraint with timidity it is equally wrong to equate judicial activism with boldness. But a quite different type of personality or mind-set, the skeptical, might lead a judge to adopt a restrained posture—and did for example, in the case of Holmes and of Learned Hand. Skepticism may make a judge unenthusiastic about exercising power, because he lacks confidence it will do any good and therefore is unwilling to compete in the power arena with the other, thrusting branches of government.

Judicial self-restraint can have other sources besides personality. It can arise from a straightforward concern with the overload on the federal courts system—a natural concern for any federal judge to feel today—or from fear of retribution by the political branches against a hyperactive judiciary. It can also come from theory—from the “capital preservation” theory that I mentioned earlier, or from a theory of the separation of powers such as was implicit in my earlier rejection of the idea that a judge should decide cases as the agent of the political party that supported his appointment. And judicial self-restraint is often opportunistic—as, of course, judicial activism often is also. The judge does not like his brethren's policy preferences but rather than say so he takes the “neutral” stance that the courts ought to be doing less—of everything.

C. *Attitude Toward Precedent*

Although I do not want to overemphasize personality, the distinction I have tried to make between embracing self-restraint as principle and having a cautious personality has value as an antidote to the following argument often made by liberal commentators on judicial decisionmaking.⁵¹ There are liberal and conservative (which the argument equates to restrained) judges. The former believe in interpreting judicial powers expansively in the service of the liberal political agenda, the latter in avoiding judicial innovation. Therefore a good liberal judge gives little weight to precedents that are not liberal but the good conservative judge gives great weight to all precedents, liberal as well as

51. See examples cited in Lamb, *Judicial Restraint on the Supreme Court*, in *SUPREME COURT ACTIVISM AND RESTRAINT* 7, 24 (S. Halpern & C. Lamb eds. 1982), and in Rees, *Cathedrals Without Walls: A View from the Outside*, 61 *TEX. L. REV.* 347, 354 n.32 (1982).

conservative.⁵² If this view is accepted, and the judiciary is dominated by successive waves of liberals and conservatives, the law will necessarily grow more liberal even if over time the number of liberal and conservative judges is the same. This is a clue that the argument, with its built-in ratchet, is wrong. If a liberal judge is one who seeks to advance the liberal agenda, a conservative judge is one who seeks to advance the conservative agenda. You could be a timid liberal or a timid conservative, a bold liberal or a bold conservative. You could, along the less partisan axis that I have been discussing, be an activist judge who was deferential toward precedent or a restrained judge who was not deferential toward precedent. Attitude toward precedent is independent of the judge's position on any of the other axes along which he must align himself.

D. Formalism and Realism

Closely related to the confusion between judicial self-restraint and deference toward precedent are confusions between judicial self-restraint and legal formalism and between judicial activism and legal realism. There is a sense in which formalism is a timid (when it is not merely a hypocritical) judicial philosophy because it denies the creative element in judging. But judicial self-restraint is not a correlate of timidity, and formalism is actually alien to its exercise. Formalism is not a usable method of deciding difficult cases in today's legal culture but a way of describing the judicial process falsely. The purpose of the false description is to conceal the exercise of power. The activist judge has need for such concealment. He is trying to enlarge the power of his court at the expense of other institutions of government, and some of them may resist the encroachment. Denying that he is exercising discretion (power) is part of his political rhetoric. But the practitioner of judicial self-restraint is trying to reduce rather than enlarge his power. It is in his interest to emphasize, as Holmes did,⁵³ the inescapable, though in the hands of a disciplined judge the limited, element of will ("value judgments") in judicial decision; for by thus demystifying the exercise of judicial power he advances his agenda, which involves reducing that power.

E. Candor

A corollary is that the practice of candor is more congenial to the restrained than to the activist. Candor requires admitting that the judge's personal policy

52. "Although judicial restraint normally refers to a Court's recognition of and deference to the law-making functions of the legislative branch, it also includes a Court's upholding its predecessor's decisions. Indeed, . . . the rule of *stare decisis* is fundamental to the philosophy of restraint." Lamb, *supra* note 51, at 24.

53. A theme of G. Edward White's excellent recent study, *The Integrity of Holmes' Jurisprudence*, 10 HOFSTRA L. REV. 633 (1982). For a good example, see Holmes' dissent in *Olmstead v. United States*, 277 U.S. 438, 470 (1928) ("We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part").

preferences or values play a role in the judicial process. This admission promotes judicial self-restraint in its separation of powers sense by exposing judges as people exercising political power rather than passively recording and transmitting (and maybe amplifying just a bit) decisions made elsewhere in the government. It is no surprise that a frequent defense of judicial activism is that it is not activism at all, but the opposite: the passive—and, one often adds, the fearless—carrying out of the commands of the Constitution, or the legislature, or a higher or a prior court.⁵⁴ An extreme illustration is provided by Professor Mark Tushnet's recent statement that if he were a judge he would ask himself in each case, "which result is, in the circumstances now existing, likely to advance the cause of socialism? Having decided that, I would write an opinion in some currently favored version of Grand Theory [in constitutional law]."⁵⁵ We have come full circle from the days when judicial activism was motivated by fear and loathing of socialism. But whatever the motivation, the need to dissemble is the same, and makes judicial activism in the *Roe v. Wade* era as in the *Lochner* era unprincipled.

F. Strict Construction

There is much debate today over constitutional and (to a much lesser extent) statutory construction. Should it be "loose" or "strict"? Should we, indeed, abandon as a contemptible fiction the notion that a statute or constitution can be construed?⁵⁶ I do not intend to join the debate here but merely want to note briefly its relationship to judicial self-restraint as I define it. It may seem intuitive that the more loosely the Constitution is interpreted, the more activist the courts must be. But it seems so only because of the tendency to equate "loose" with "broad" construction, and there is only an empirical, not a logical, relationship between the two terms. If Congress

54. See, e.g., Johnson, *The Role of the Judiciary with Respect to the Other Branches of Government*, 11 GA. L. REV. 455, 474-75 (1977). Professor Bickel described one exemplar of this style of judicial activism as follows:

It is not, then, that Justice Black would hide his own fundamental convictions from public view. It is just that he is in the happy position of being able to enforce as law, not merely his own convictions, but the literal constitutional text. For he ever returns us to the text and offers his results wrapped in its cellophane, with locked-in flavor, untouched by contemporary human hands. A. BICKEL, *supra* note 19, at 92. The passive pose is not a monopoly of liberal activists. Here is the key passage from the decision that struck down the Agricultural Adjustment Act, an important New Deal statute:

It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. . . . When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty, to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.

United States v. Butler, 297 U.S. 1, 62-63 (1936).

55. Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 424 (1981).

56. For a witty discussion of "interpretivism" versus "noninterpretivism" see Kurland, *Curia Regis: Some Comments on the Divine Right of Kings and Courts "To Say What the Law Is"*, 23 ARIZ. L. REV. 581 (1981).

abolished the right to jury trial in federal civil cases, it would take a very loose construction of the seventh amendment to avoid a declaration of unconstitutionality. In arguing that statutes should be declared unconstitutional only when their unconstitutionality was beyond doubt, Thayer was asking that the Constitution be construed loosely when doing so would promote separation of powers self-restraint.

Confusion is compounded because strict *statutory* construction often and maybe generally promotes what I earlier called "functional" self-restraint. Suppose the question is whether to create a private damage remedy for the violation of some statute. The statute is silent, but the court is confident that creating the remedy would advance the legislators' purposes. The strict constructionist would nevertheless tend to hold back. By doing so he would reduce the power of the legislature, thus illustrating the biblical adage that the letter killeth but the spirit giveth life. But he would also reduce the business of the courts. The effect is general: the more legislation there is, the busier the courts are; so if through strict construction the courts make the legislatures work harder to produce legislation, they will produce less, and the courts will have less work to do. But if strict statutory construction promotes judicial self-restraint in its functional sense, it retards it in its separation of powers sense by curtailing the legislature's power. Strict construction and fidelity to judicial self-restraint cannot be equated.

IV. THE PLACE OF SELF-RESTRAINT IN A JUDGE'S JUDICIAL PHILOSOPHY

I said that I do not think judicial self-restraint can supply a complete philosophy of judicial decisionmaking. This is not only or mainly because many questions that federal judges are called upon to decide do not involve an issue of restraint. (This is true even in constitutional cases; for example, when the courts adjudicate preemption issues under the supremacy clause, they are arbitrating disputes between Congress and the states.) It is also because the value of restraint is only one factor in responsible judicial decisionmaking. A judge is evaluated on a number of different dimensions of his performance, many having nothing to do with whether he is activist or restrained. Self-discipline (implying among other things due submission to the authority of statutes, precedents, and other sources of law), knowledge of law and thoroughness of legal research, a lucid writing style, a power of logical analysis, common sense, experience of life, a commitment to reason and relatedly to the avoidance of "result-oriented" decisions in the narrow sense in which I should like to see the term used, openness to colleagues' views, intelligence, hard work—all are qualities admired in the activist and the restrained alike; all are indeed the bedrock elements of judicial workmanship.

Since candor is more likely to be admired by admirers of judicial self-restraint and formalism by admirers of judicial activism, it might appear that one would have to take a stand on the question of restraint versus activism before one

could set a value on the balance between candor and formalism in a judicial opinion. But I am not sure this is quite correct. Although total candor is in any event inappropriate in public documents of government, such as judicial opinions, too great a lack of candor will make an opinion unprincipled under my "publicity" test of principle.

The quality of self-discipline provides a key to the proper role of personal policy preferences in judging. The self-disciplined judge *tries* to decide a case without bringing in such preferences. He does not try to evade the controlling decision of a higher court by misstating that decision or distorting the facts of his case. When the legislature's purpose can be discerned he decides the case in accordance with that purpose. He is the honest agent of others until the will of the principals can no longer be discerned and then he perforce becomes a principal himself. The higher up on the judicial totem pole he is the more often he has to depart from the honest agent's role. But a self-disciplined judge plays that role when it is possible honestly to do so.

And then? I begin by observing that the open area is not fixed but depends in part on how bold, on the one hand, or deferential on the other, the judge is. Some judges give more weight to *stare decisis*, some less. This is not a matter of whether a judge is activist or self-restrained; *stare decisis* determines the power of current relative to former judges rather than of judges relative to other types of government officials. Although no responsible analyst of the American judicial process would think it right for judges either to follow *stare decisis* rigidly or not to follow it at all, there is a middle ground—whose dimensions I shall not try to plot in this paper—in which good judges differ as to how much weight to give it.

Sometimes the result of rejecting *stare decisis* is to narrow rather than enlarge the open area, as where a decision is overruled that had given the judges a broad discretion. But subject to this important qualification it is true that the judge's place on the boldness-deference axis determines how large an area of judicial indeterminacy he thinks he faces and therefore how broad a role he thinks his policy preferences should play in judicial decisionmaking. Within that area, however broad or narrow it is, the judge will have to pick from a large menu of competing policies, of which activism and self-restraint are only one pair. "Liberalism" and "conservatism" are another. One recoils from these terms because of their vagueness and their emotional and partisan overtones, yet properly defined they are neither irrelevant nor meaningless—the former in its modern sense referring to the belief that there should be extensive regulation of economic life but not of personal behavior, the latter referring in some versions to the opposite weighting of social and personal regulation and in others to *laissez-faire* in both the personal and economic domains. The concepts we call "liberalism" and "conservatism" have their roots in competing conceptions of human nature that are as old as Western civilization itself.

It does not detract from Holmes' greatness—it may be an element of his greatness—that his belief in Social Darwinism infused many of his opinions:

not only in the “hard” cases for which he is not widely admired today,⁵⁷ but also in his first amendment cases. His concept of the marketplace of ideas,⁵⁸ which he used to expand the scope of the first amendment, is Darwinian, and his Social Darwinism appears to underlie his deference toward legislative experimentation; the dissent in *Lochner* is a Darwinian document.⁵⁹ It shouldn’t matter to our assessment of Holmes as a judge whether we think Social Darwinism a good thing or a bad thing so long as we don’t think it childish, vicious, idiosyncratic, or partisan (in the sense in which his adopting the democratic or the republican campaign platform of 1900 as his judicial *vade mecum* would have been partisan and therefore unprincipled, result-oriented). The effort of a powerful mind to bring the big ideas of his age into the law, in the limited area where judicial craft alone will not decide a case, should not be deprecated. But I emphasize “big” ideas. They need not be—in our society they are unlikely to be—ideas on which there is a social consensus. But if they are idiosyncratic the judge has no business using them to decide cases. That would make the law too quirky, unpredictable, uncertain. Even in the open area the judge must remain impersonal to the extent of confining his policy choices to values that are widely, though usually they will not be universally, held.

I have said repeatedly that the judge’s own policy preferences ought to come into play only at the point where the technical materials for decision give out; but while this makes for convenient exposition and is true in most cases, it does not work all the time. *Fiat justitia, ruat caelum*, is not a workable slogan for judges. If insistence on enforcing some statute in accordance with its true purpose would result in Congress’ refusing to appropriate any money for the operation of the federal courts, maybe the judges should not enforce the statute in accordance with its purpose. Maybe Taney was wrong in the habeas corpus case,⁶⁰ and not as a matter of law, either. Maybe in extreme cases the political version of judicial self-restraint should trump devotion to judicial craftsmanship.

But this is a detail and in closing it is only necessary to remind the reader that the main effort of this paper has not been to defend judicial self-restraint but to refurbish the concept so that it can play a useful role in debates over the legitimate exercise of power by judges. Our language is not so impoverished that we must make a single term denote different and at times contradictory themes in the appraisal of judges.

57. Such as *Buck v. Bell*, 274 U.S. 200, 207 (1927): “Three generations of imbeciles are enough.”

58. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (dissenting opinion).

59. See *supra* notes 5 & 7.

60. See *supra* note 26 and accompanying text.