The Role of Reason in the Rule of Law

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Accountability in our government must run ultimately to the governed. In the federal judicial branch, however, it does not run directly to the governed, because judges are neither placed in office nor removed from office by the electorate. The link from the judicial community to the governed must therefore be otherwise established. If not accountable to the electorate itself, federal judges must be answerable to the electorate's will as expressed through law. The possessor of no popular mandate, the judiciary enjoys only derivative authority, acquired through the mandate of the law. The legal universe is the handiwork of others: judge-made law, as such, has no place.

The role of the judge involves, first and foremost, an unstinting effort to apply the law as written. In a perfect world, elected representatives would draft laws of supreme clarity and judges would not disturb the indisputable meaning of legal texts. In our fallen world, however, law requires interpretation. Constitutional clauses are not shining models of clarity, but only the conveyors of clues and suggestions of intent. Statutes themselves are often vague and preambular in nature: the National Labor Relations Act,[1] the Securities Acts of 1933 and 1934,[2] the Sherman Act,[3] and the Reconstruction-era civil rights laws[4] have had layers of judicial flesh placed on the barest bones of congressional language. Even laws of legendary specificity, such as the Internal Revenue Code, have left interstitial questions unaddressed.[5] Moreover, absolute clarity may not even be an object of Congress, which depends in passing legislation, upon the art of compromise. The lack of clarity

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[1] 29 USC § 151 et seq (1982).

[2] Securities Act of 1933, 15 USC §§ 77a et seq (1982); Securities Exchange Act of 1934, 15 USC § 78j(b) (1982).

[3] 15 USC §§ 1-2 (1982).

[4] See 42 USC § 1981 et seq (1982).

[5] See, for example, *Paulsen v Commissioner*, 469 US 131 (1985).

on the part of those who make laws engenders suspicion of those who must interpret them. That unelected judges have been left to interpret the equivocal will of elected representatives must sometimes seem the final measure of our government's fall from grace.

What gives the judiciary the right to undertake this formidable task of interpretation? Interpretation has been called "the process by which a judge comes to understand and express the meaning of an authoritative legal text and the values embodied in that text."[6] For this task, the rule of law may provide guidance but no answer. Why, then, should the judge's answer merit public acceptance?

In this essay I examine the justifications for—and constraints upon—the judge's interpretivist function. The limits of the judicial function can best be understood by inquiry into the ways judges can be held accountable and the ways they cannot. I work from two premises: First, that judges are subject to the law, not above it. Second, that being subject to the law does not reduce the art of judging to an act of ritual intonation, uninformed by faculties of reason that elucidate the meaning of legal texts. Clearly, the framers of our Constitution contemplated something other than direct electoral accountability for judicial acts. The rule of law, as elucidated by the force of reason, fills that gap.

To be a judge is to exercise judgment, and some measure of what Justice Frankfurter called "creative power" is a legitimate and necessary part of the job.[7] That word "creative," however, must be closely watched. It implies the fashioning of new rules rather than the interpretation of existing ones. It conjures images of judges whose ideals and imaginings may get the better of them. Judicial restraint must place some bounds on the creative power. The level of public comfort is rightly higher with technicians than with dreamers on the bench.

Judicial reason and restraint, however, can be complementary concepts. Justice Frankfurter, the second Justice Harlan, and, more recently, Justice Powell have attempted to reconcile the two. By locating principles of restraint in the constitutional framework of government, each Justice avoided the extremes of thoughtless literalism and heedless idealism alike.

The contributions of these Justices form a potentially important, but curiously absent, part of the present debate over judicial

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[6] Owen M. Fiss, *Objectivity and Interpretation*, 34 Stan L Rev 739, 739 (1982).

[7] Felix Frankfurter, *Twenty Years of Mr. Justice Holmes' Constitutional Opinions*, 36 Harv L Rev 909, 911 (1923).

accountability and judicial activism, a debate that culminated in the nomination of Robert Bork to the Supreme Court. That debate highlighted two divergent views that alternatively would expand the "creative power" beyond all acceptable limits or would deny it altogether. To build upon that debate, one must first analyze judicial accountability, not by focusing solely on the differences between election and appointment, but by exploring the ways in which the judiciary is and is not accountable in its interpretative function. One may then appreciate how the work of Justices Frankfurter, Harlan, and Powell reflected the relationship between judicial accountability to reason and judicial commitment to restraint.

This article attempts to explore that relationship. In the first section of this essay, I discuss the unaccountable dimension of judicial power. In section II, I explore those concepts of judicial accountability that seem to me ultimately inadequate as justifications for judicial authority. Section III addresses the necessity of judicial accountability to legal reason; section IV, the place of legal reason within the federal judicial system. Finally, drawing on the tradition of Justices Frankfurter, Harlan, and Powell, section V outlines the relationship of legal reason to the obligations of judicial restraint.

I.

No organ of American government bears a greater burden of justification for its own acts than the federal judiciary. The existence of an undemocratic branch of government possessed of vast powers over democratic enactments has placed the judiciary in an uneasy posture. Those who would assail an unpopular constitutional decision need only invoke the virtues of popular governance. The opponents of a judicial ruling, far more than those of a legislative or executive action, may challenge not simply the wisdom, but the authority and the legitimacy of the act. The attack on a Supreme Court decision is more than on its merits—the assault is on a form of power whose distance invites popular doubt.

The insulation of the federal judiciary can be sharply contrasted to state judicial systems where democratic retribution remains a real threat. The rejection of three California Supreme Court Justices in a 1986 retention election underscored the dramatic differences in vulnerability between elected state and

unelected federal judges.[8] Being unelected means never having to confront the indignant caller, or answer the anguished letter, or stand before a sea of unsympathetic faces and explain one's vote. The contention that life tenure is unimportant would be made, if at all, only by someone who had never experienced the alternative.

The claim has been made, of course, that the representative branches of government have themselves become both more distant and less accountable than they once were. Government, at all levels, it is argued, has grown large, impenetrable, and dependent on legislative staff and agency bureaucrats whose public accountability is unclear and incomplete. PAC contributions, staff resources, franking privileges and access to the mass media all rest so disproportionately in the hands of incumbents that the vigor of electoral challenges may be compromised.[9] Paid television spots, the staple of most contemporary campaigns, have placed candidates behind a shield of professional managers, and have loosened the bonds between the elected and the electorate.

This assessment of our political health is no doubt a matter of dispute. Yet, even if one assumes its accuracy, the case for judicial activism is not strengthened. It is, to say the least, awkward for the advocates of activism to posit that a lessened measure of legislative accountability justifies a greater substantive judicial role.[10] For even a diminished level of political accountability would leave the judiciary the least responsive branch.

If the incumbents in the other branches have become more removed from the electorate, they are still less so than the members of the judiciary. Federal judges have tended to come from "the essentially upper-middle-class 'establishment.' "[11] They have generally been white, Anglo-Saxon, Protestant males from economically comfortable circumstances.[12] And they are lawyers. Justice Frankfurter once observed that "while the judges are swayed by the prevailing beliefs of a particular time, they are also guided by professional opinions and ways of thinking which are, to a certain extent,

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[8] See generally John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 Judicature 348 (April-May 1987).

[9] See generally Hedrick Smith, *The Power Game* 122-23 (Random House, 1988).

[10] The Supreme Court's decisions broadening the franchise and requiring the reapportionment of state legislatures are procedural responses to attacks upon democratic unaccountability and, as such, raise a different set of questions.

[11] Henry J. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court* 61 (Oxford, 2d ed 1985).

[12] See id at 57-62 (discussing the background characteristics of former and present Supreme Court Justices).

independent of and possibly opposed to the general tone of public opinion."[13] It is difficult to envision a change in this circumstance.[14] The judiciary, unlike the democratic branches of government, has been open to the members of one profession only, a profession whose strengths may indeed yield independence of mind but whose powers and privileges have not endeared it to, or even acquainted it with, the greater number of Americans.

Finally, an erosion of political accountability in the other branches will not enhance the case for an activist judiciary because the judiciary's value has historically been affirmed in terms that are anti-democratic. Admirers and defenders of the courts have tended to see electoral independence as a virtue, not a defect. "[C]onstitutional protections would be subject to serious erosion," warned Justice Byron White in a 1987 speech to the American Bar Association, if judges were "compelled or . . . tempted to decide cases so as to please those who are . . . responsible for them being on the bench."[15]

The independence of federal judges is, not coincidentally, most controversial in times of constitutional ferment. The more unpopular the judiciary's course, the more significant electoral insulation is to the pursuit of it. This protected status, however, has been conferred on judges not out of awe but from necessity. Someone must possess the authority to implement the fundamental mandates of popular governance in the context of unpopular controversies. Yet within this authority lies the power of judges to affect the lives of others without their own jobs being affected—a power which, were it not so forcefully constrained by constitutional tradition, would come disturbingly close to being absolute.

The independence of judicial power has historically been of such importance because of the judiciary's capacity to question the legitimacy of legislative and executive action. If judges in this country were confined to reading contracts, the debate over accountability would soon be drained of passion. But any governmental body that defines the powers of other governmental bodies must possess some fixed idea of the limits of its own. Without this idea, the democratic balance is distorted, because there is nothing

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[13] Felix Frankfurter, *The Zeitgeist and the Judiciary*, in Philip B. Kurland, ed, *Felix Frankfurter on the Supreme Court: Extrajudicial Essays on the Court and the Constitution* 4, 5 (Harvard, 1970).

[14] But see Arthur S. Miller & Jeffrey H. Bowman, *Break the Monopoly of Lawyers on the Supreme Court*, 39 Vand L Rev 305 (1986).

[15] Ruth Marcus, *Justice White Criticizes Judicial Elections*, Washington Post A5 (Aug 11, 1987).

more dispiriting than the guardians of the law bending it to suit their predilections. If the law is less than a "brooding omnipresence in the sky,"[16] so also is it more than the preferences of the men and women who administer the federal judicial system. The unelected status of judges is not an invitation to stray from democratic mandates as much as a recognition that even the most popular law may need to be applied in unpopular circumstances. Thus the judge's insulation from electoral politics can be justified, not as a point of departure from law, but as an aid to evenhanded administration of it.

If we desire the blessings of an unelected judiciary, we also must accept the burdens of explanation and justification that inevitably accompany it. The legitimacy of judicial power is rarely self-evident: the question "By what authority?" is seldom out of sight. An innate caution more becomes the judiciary in a democratic system than does habitual assertiveness. And the lack of electoral accountability argues for judicial allegiance to meanings most plainly extrapolated from statutory and constitutional texts.

I concede the full power of the portrait of an unresponsive and unrepresentative federal judiciary. I would yet contend that the concept of judicial accountability is not, at the same time, a simplistic one. A lack of electoral accountability cannot negate the fact that the judiciary is a coordinate branch of government whose role is more than one of mere subordination to the other two branches. It is true that Article III of the Constitution contains no robust list of enumerated powers comparable to that of Article I, section 8; but it is likewise true that Article III establishes a separate judicial branch with careful provision for its independence. What other dimensions of accountability exist to justify the judicial function and what role for judges might they portend?

II.

The ways in which judges are accountable are less dramatic than the ways in which they are not. The dimension of unaccountability in judging (the judge's unelected status) was written into the Constitution,[17] while the principles of accountability have been slower to take shape. The principles of accountability are far

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[16] *Southern Pacific Co. v Jensen*, 244 US 205, 222 (1917) (Holmes dissenting).

[17] US Const, Art II, § 2 (The President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court. . . ."); US Const, Art III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour. . . .").

too infirm a foundation on which to build a case for an activist judiciary. What they may support is a role that does not drain the act of judging of all contribution from the judge—an interpretativist role with its own rules of restraint and obligations of fidelity. In this section, I explore some dimensions of judicial accountability that seem to me important but ultimately imperfect.

A.

I start with a form of accountability that bears little relationship to judicial philosophy—a judge's accountability for his or her personal deportment. The Code of Judicial Conduct begins:

> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. . . .[18]

These words have a wonderfully noble but dreadfully solemn tone, as though transposed from the gateway of a monastery. They also capture the essence of public expectations. Their spirit is carried forward in numerous specific statutes and ethical canons that apply to judicial conduct both on and off the bench. There are financial disclosure requirements[19] and statutory directives on when not to sit.[20] The phrase "appearance of impropriety" is ubiquitous.

Judicial conduct, however, may be more a matter of intuition than of codification. Because judges must maintain a proper judicial demeanor both on and off the bench, they attempt, among other things, to ensure that the daily dealings of their lives remain polite. Judges must also submit to a contraction of personal rights that others may take for granted. While judges may certainly hold opinions, their freedom to express them is limited by the requirements of the office.[21] Freedom to associate with persons whose cases may come before the court is circumscribed,[22] and membership in certain clubs is discouraged, if not forbidden.[23]

Judges may feel nostalgic for the freedom relinquished when

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[18] Code of Judicial Conduct, Canon 1 (ABA, 1972).

[19] See, for example, 28 USC Appendix—Judicial Personnel Financial Disclosure Requirements §§ 301-09.

[20] See, for example, 28 USC § 455 ("Disqualification of justice, judge, or magistrate").

[21] Steven Lubet, *Judicial Ethics and Private Lives*, 79 Nw U L Rev 983, 1003 (1985).

[22] Id at 996 (association with insurance company representatives).

[23] Id at 1003. See also Ruth Marcus, *Club Memberships: An Unresolved Issue for Judicial Nominees*, Washington Post A11 (Aug 8, 1988).

they take the oath. The exuberant joys of political participation and academic disputation are not easily dismissed. Judge Clement Haynsworth, a man of exquisite balance, is fond of telling junior judges on the Fourth Circuit that it is fine to remain interested in politics, so long as one never tries to influence politics. It is his gentle way of ushering his colleagues to the upper bleachers. An appellate courtroom, however, can be a tame substitute for a platform or credentials fight. The week before an election assumes an unfamiliar air—while partisan feelings run high throughout the neighborhood, the judge sports a car whose rear bumper reads "Support Youth Soccer." Impartiality is imperative, however; the blindfolded woman holding the scales of justice in her hand never so much as cast a ballot.

Such austerity may lend authority to judicial pronouncements, but whether the ethical precepts of the judge's life make the judicial branch of government any more accountable to the governed is problematic. It would be speculative to say that a strict code of personal accountability translates to political accountability as well. A judge of unswerving rectitude may yet march to a different drummer, beyond earshot of democracy, let alone its reach.

In fact, the need for disengagement on the part of federal judges may place them out of touch. Circumspection breeds isolation. Ironically, the impartiality that we require of judges may make them less accountable; they are withdrawn from the *vox populae* that informs political life. If you want to know what's *not* happening, the saying goes, ask a federal judge.

Like much of the debate over judicial accountability, this point has been somewhat simplified. Even federal judges have ways of staying in touch, though their windows into the community are no longer political. Trial judges see witnesses and jurors on a regular basis; many become exceptional observers and listeners. The judiciary is also the only branch of the federal government that is largely garrisoned beyond the nation's capital. Lower federal judges, unlike top executive officials or members of Congress, wake up every morning in their own communities. In the Fourth Circuit, those communities include Baltimore, Maryland; Abingdon and Charlottesville, Virginia; Charleston and Lewisburg, West Virginia; Durham and Morganton, North Carolina; Columbia, Greenville, and Spartanburg, South Carolina.[24] This fact does not mean that lower federal judges are "in touch," only perhaps that

[24] In other circuits, a significant number of appellate judges reside at the seat of court (for example, Philadelphia, New York, Chicago).

they are not in danger of losing touch through "Potomac fever."

Nonetheless, the list of "don'ts" in the life of a judge remains a daunting one: don't solicit funds;[25] don't practice law;[26] don't serve as an executor, administrator, trustee, guardian, or other fiduciary (except for family members).[27] To a remarkable extent, the federal judge is left to draw upon whatever experiences he or she has accumulated before going on the bench. As all this suggests, it is difficult to make the case for judicial accountability in terms of a judge's personal deportment—authority acquired through detachment is not ultimately consonant with the premises of democratic governance.

B.

It is also difficult to make the case for accountability in terms of the institutional constraints upon the federal judiciary. These restraints are well known and need be summarized only briefly. Courts, it is said, are "counterpunchers," acting only when others bring a suit.[28] Judges cannot initiate change. Unlike legislators, who can reach out to solve a problem, judges are like " 'defective clocks; they have to be shaken to set them going.' "[29] Even when parties do seek to litigate an issue, the federal courts may be closed if the case is non-justiciable or a candidate for deferral under, for example, *Pullman* abstention[30] or the political question doctrine.[31]

The inability of courts to initiate change also results in their inability to control it. Since cases are brought by others, and in response to the individual concerns of the parties, courts cannot control the "sequencing of innovation"[32] or devise and implement a coherent plan of action. They are limited to the portion of a problem presented by the litigants, and cannot of their own accord grapple with it in a larger context.[33] Abstract claims may conflict with the requirement of a concrete case and controversy, and risk

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[25] Code of Judicial Conduct, Canon 5(B)(2) (ABA, 1972).

[26] See 28 USC § 454 ("Practice of law by justices and judges.").

[27] Code of Judicial Conduct, Canon 5(D) (ABA, 1972).

[28] David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 Va L Rev 519, 551 (1988).

[29] Donald L. Horowitz, *The Courts and Social Policy* 38 (Brookings, 1977), quoting Lon L. Fuller, *The Forms and Limits of Adjudication* 26 (unpublished, 1961).

[30] See *Railroad Comm'n of Texas v Pullman Co.*, 312 US 496 (1941).

[31] See *Powell v McCormack*, 395 US 486, 518-49 (1969); *Baker v Carr*, 369 US 186 (1962).

[32] Horowitz, *The Courts and Social Policy* 39 (cited in note 29).

[33] See Shapiro, 74 Va L Rev at 552 (cited in note 28).

the intrusion of particularized judicial power upon the legislative mandate to devise general solutions to pressing social problems.

Further, judicial remedies are limited. Where legislatures can use a variety of techniques, such as taxes and subsidies in addition to simple directives and prohibitions, courts are largely limited to injunctions. Courts also have limited influence over the effects of their decisions. The judiciary "must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."[34] Courts may also be unable to predict the effect of their decisions on other actors in our system. A controversial decision, for example, may galvanize opposition to a cause.[35] Lacking any means of counteracting these effects, judges must attempt to minimize them in their decisions, and in so doing remain accountable.

Finally, federal appellate courts must, of necessity, accord a presumption of correctness to someone else, be it Congress, a state court, a trial judge, an administrative agency, or some other body. Statutes and regulations by themselves make judges more accountable; they remind judges that their first duty is always to implement the will of another. True, that will is not always self-evident. The statute's syntax may be bad, its meaning obscure. That, however, merely defines the challenge; a judge's act of faith to Congress remains the tedious, yet curiously satisfying search for legislative intent.

Each of these institutional limits is meant to foster accountability in the form of caution, deference, and restraint. Institutional restraints should ideally reinforce the profound lesson of *Erie*, that the demise of federal common law diminished the role of the federal judge's individual will. Institutional restraints should also serve as powerful reminders that the courts are susceptible to what might be termed priestly vulnerabilities and limitations (the latter not unlike that of the chessboard bishop which can move only diagonally on squares of the same color). In contemplation of these vulnerabilities and limitations, the judicial branch was long ago termed the "least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them."[36]

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[34] Federalist 78 (Hamilton) in Clinton Rossiter, ed, *The Federalist Papers* 464, 465 (Mentor, 1961).

[35] See Robert W. Bennett, *Judicial Activism and the Concept of Original Intent*, 69 Judicature 219, 220 (1986).

[36] Federalist 78, in *Federalist Papers* at 465 (cited in note 34). See also Alexander M. Bickel, *The Least Dangerous Branch* (Yale, 2 ed 1962).

The problem is that these institutional restraints appeared to snap in the heady days of judicial activism.[37] The political question doctrine was eroded,[38] the barrier of standing lowered,[39] the exercise of equitable restraint more readily cast aside.[40] The art of constitutional interpretation appeared to confer upon judges the full breadth of common law rulemaking powers.[41] Some of the Warren Court decisions were salutary (the reapportionment decisions, for example, revitalized the very democratic process to which judges must defer). Yet those decisions were achieved at a price. The certiorari power had permitted the Supreme Court to set an agenda, and once the institutional restraints proved no great obstacle to the agenda, they were never again to be fully relied upon as brakes on judicial flight. Although many of the doctrines of restraint enjoyed a resurgence during the 1970's,[42] they have not been restored to their former force. The lesson of the Warren Court has been that the removal of old institutional restraints and the creation of new substantive rights went hand-in-glove.

C.

Distinct from this set of institutional constraints are the more formal instruments by which the judiciary is held accountable under the Constitution. These are largely unavailing, however, because they are utilized, if at all, only *in extremis*. It is true, of course, that federal judges can be impeached, and that they hold their offices only "during good Behaviour." Relatively few have actually been impeached, however, and only a handful have been tried or convicted.[43] Impeachment of the President or any civil officer of the United States may proceed upon the commission of a criminal offense,[44] and while the "good Behaviour" standard may hold judges to a higher account, it is not completely open-ended. During the attempted impeachment of Justice William O. Douglas

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[37] See generally Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 Colum L Rev 1 (1964).

[38] *Baker v Carr*, 369 US 186 (1962).

[39] *Flast v Cohen*, 392 US 83 (1968).

[40] *Dombrowski v Pfister*, 380 US 479 (1965).

[41] *Miranda v Arizona*, 384 US 436 (1966).

[42] See, for example, *Younger v Harris*, 401 US 37 (1971) (equitable restraint); *United States v Richardson*, 418 US 166 (1974) (standing); *Gilligan v Morgan*, 413 US 1 (1973) (political question doctrine).

[43] See David M. O'Brien, *Storm Center* 97 (Norton, 1986).

[44] See US Const, Art II, § 4 (providing for impeachment of "[t]he President . . . and all civil Officers of the United States" in cases of "Treason, Bribery, or other high Crimes and Misdemeanors.").

in 1970, then-Congressman Gerald Ford advanced the argument that "an impeachable offense is whatever a majority of the House of Representatives considers [it] to be at a given moment in history."[45] But it takes some stretching to equate "good Behaviour" with popular judgments, and the standards for impeachment have generally not been so politically interpreted. As a result, the injunction that judges "shall hold their Offices during good Behaviour" is not a credible political threat.

The judiciary's relationship with the executive and legislative branches reveals instruments of accountability that are imperfect at best. It is true that Supreme Court decisions are subject to "reversal" by statute[46] or constitutional amendment. Such correctives remind us of the circular nature of our system: every decision is always appealable to another body. The appointment power allows the President—and the Senate through advice and consent—to influence the composition and direction of the federal courts. Further, Congress controls the jurisdiction and indeed the very existence of the lower federal courts,[47] and may make exceptions to the Supreme Court's appellate jurisdiction.[48] It also funds the operations of the federal courts and sets the salaries and standards of conduct for the judges. A more subtle lever of Congress's control over the courts is the power, through the creation of specialized courts,[49] additional judgeships,[50] and non-Article III courts,[51] to regulate the federal judiciary's workload.

The mere enumeration of these means of ensuring judicial accountability may demonstrate the opposite conclusion—that so long as the judiciary does not unleash a floodtide of public wrath, it enjoys a remarkable measure of independence. Each of the above levers of democratic influence over the judiciary possesses a signifi-

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[45] Cong Rec, 91st Cong, 2d Sess 11912, 11913 (April 15, 1970) (statement of Rep. Ford).

[46] See, for example, Civil Rights Restoration Act of 1987, Pub L 100-259, 56 USLW 45 (1988).

[47] *Sheldon v Sill*, 49 US (8 How) 441 (1850).

[48] *Ex Parte McCardle*, 74 US (7 Wall) 506 (1868).

[49] See, for example, The Federal Courts Improvement Act of 1982, 96 Stat 25, 37-38, codified at 28 USC § 1295 (1982) (creating the United States Court of Appeals for the Federal Circuit and delegating to it exclusive appellate jurisdiction in all federal patent and trademark cases).

[50] Omnibus Judgeship Act of 1978, Pub L No 95-486, 92 Stat 1629 (1978) (federal district and circuit judges—additional appointments).

[51] See, for example, 28 USC § 151 et seq (1982) (creating federal "Bankruptcy Courts"). There are, of course, constitutional limits on Congressional power to redistribute the business of the federal courts to these courts. See *Northern Pipeline Construction Co. v Marathon Pipe Line Co.*, 458 US 50 (1982) (holding unconstitutional the broad grant of jurisdiction to the bankruptcy courts contained in 28 USC § 1471).

cant drawback. The external correctives for judicial excess, for example, all take time; more in the case of a constitutional amendment, less, perhaps, in a statutory "reversal" or in an appointment of a Supreme Court Justice to shift the philosophical balance on that Court. Time, however, is something the democratic branches may not have—a president's term grows only shorter, and public anguish over a court decision may recede as other matters crowd the public consciousness and as citizens adjust.

Further, many of these instruments of accountability are subject to their own peculiar limitations. For example, a withdrawal of federal jurisdiction in a given area of controversy is undesirable for a very practical reason: some forum must remain to decide the federal question, and state courts may not provide the ideal setting to interpret statutes and resolve issues of national import. Also, while the power over appropriations or over creation of specialized tribunals may provide a vehicle for the expression of congressional displeasure with some aspect or other of judicial operations, such blunt instruments cannot serve as a reliable means of holding particular activist judges to account.

These formal means of response and oversight at the disposal of democratic branches, if limited, are nonetheless important. They encourage a fruitful dialogue between the three branches, and they constitute a distant thunder as the federal judiciary goes about its work. But one cannot make the case for judicial accountability in these terms any more than one can in terms of a code of personal judicial conduct, institutional limitations, or doctrinal constraints. The checks on the exercise of the judicial function—whether intrinsic (e.g., the jurisprudence of justiciability) or extrinsic (e.g., the impeachment and amendment process)—tend to be episodic and weak. Indeed, they were designed to be that way, for only an independent judiciary can carry out its constitutional duty of enforcing the law even in unpopular circumstances and even against the other branches of government. A real danger of judicial activism is that these imperfect checks will be exercised more frequently, and that the constitutional position of the judiciary will be undermined. For this reason—and out of necessity—the plea has so often been for judicial self restraint.

D.

The doctrine of judicial self restraint states, quite simply, that judges should refrain from transporting their personal visions into law. The doctrine seeks to differentiate judicial tasks from political ones. It asks the judge to follow Professor Wechsler's famous ex-

hortation to neutral principles rather than congenial results.[52] The greatest judges have, in fact, been those who paid this icon of their craft far more than lip service.

At the same time, the history of self restraint has not generally been a glorious one. It is because of the absence of governmental self restraint that the Magna Carta was presented to King John at Runnymede and that almost six centuries later a system of constitutional checks and balances was thought indispensable to our system of government. More bluntly, any human appetite may overcome the feeble defenses the will can mount against it. It is not irreverent to ask why self restraint is more likely to be successful for a judge than for a dieter. Left purely to oneself, without the support and encouragement of spouses, physicians, clinics, and advisory regimens, the dieter's natural appetite may prevail. For judges, no less than for dieters, it may be more exhilarating simply to let go. In the name of personal liberty, society permits the dieter to do so. When the judge jettisons self discipline, however, the rule of law suffers, and the system of social restraints in which "We the People" have placed our faith has been ill used.

The various concepts of accountability discussed in this section are not without significance, but they do not make the case for judicial accountability. Ultimately they seem unsatisfying explanations for the authority granted the judicial branch. Are federal judges thus unaccountable, at least in relation to the powers that they exercise? If they are, then the force of a judge's own intellect and experience has little legitimate role in a decision.

III.

The unaccountable judge is still accountable to reason. A judge, it is said, must issue reasoned decisions. The judicial system as a whole is designed to promote reason as the paramount judicial virtue. To reason, moreover, is to reason *from* the received postulates of the law, not *outside* of them. Legal reason represents the process of applying impersonal principles of law to varying facts. Thus conceived, reason may chart the course between the subjective dangers of the pragmatic and the ideological. The great danger of pragmatic judging is that it is divorced from underlying legal principle; the danger of the ideologic, that it is severed from the subtleties of real life facts.

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[52] Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv L Rev 1 (1959).

This is not to suggest that accountability to reason substitutes for accountability to the electorate. The judge's accountability to reason does not render the judge's reasons the equal of those of elected legislatures. The judge is sworn to interpret faithfully a statute even when a legislature may arguably be "unreasonable" in enacting it. In fact, rationality review under the Due Process and Equal Protection Clauses has been so permissive,[53] and the canons of statutory construction in connection with plain language so strict,[54] precisely in order to reduce the power of judicial reason as an independent political force. The judicial commitment to rationality and logic may not invade a democracy's right to select "flawed" reasons for its actions so long as they meet with popular consent.

Still, the federal judiciary does enforce a background requirement of reason for public acts. The Fifth and Fourteenth Amendments do prohibit state action that is arbitrary or capricious;[55] the basic principles of statutory construction state that the legislature may not be presumed to have done an absurd or useless thing.[56] If politics blends appeals to the mind and to the heart, the judicial power is more purely one of persuasion. The promise of an independent judiciary is that it can afford to venture a voice of reason, and the genius of the constitutional system is that not every step of judicial reason is an illegitimate act.

The judicial and the political voices must, of course, be differentiated. The political voice is driven by the need to win immediate assent. Judicial persuasion is not addressed to the upcoming election or to the one beyond, but aspires toward ultimate social acceptance. Political speech is phrased in terms of pure policy; judicial persuasion in terms of reason as compelled by law. Still, reason itself is ultimately subject to the requirement of political acceptance. The judiciary is permitted to deflect the darker potential of political movement only to the extent that its powers of reason eventually win public assent. As Alexander Bickel put it:

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[53] See, for example, *Williamson v Lee Optical of Oklahoma*, 348 US 483 (1955); *Railway Express v New York*, 336 US 106 (1949).

[54] See, for example, *Consumer Product Safety Comm'n v GTE Sylvania, Inc.*, 447 US 102, 108 (1980) (the task in interpreting a statute is to give effect to the will of Congress, and where this intent has been expressed in reasonably plain terms, "[the] language must ordinarily be regarded as conclusive.").

[55] See, for example, *Wolff v McDonnell*, 418 US 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government.").

[56] *Consumers Union of the United States, Inc. v Sawhill*, 512 F2d 1112, 1118 (Temp Emergency Ct App 1975). See also *United States v Turkette*, 452 US 576, 580 (1981).

> The Supreme Court's law . . . could not in our system prevail . . . if it ran counter to deeply felt popular needs or convictions, or even if it was opposed by a determined and substantial minority and received with indifference by the rest of the country. This, in the end, is how and why judicial review is consistent with the theory and practice of political democracy.[57]

It is important to understand the significance of defining judicial accountability in terms of reason rather than, for example, "fairness." I do not imply that the reasoning judge is cold and conscienceless, or that the obligation to reason extinguishes the obligation to be fair, compassionate and just. To believe that the contribution of the judiciary is more one of reason than of wisdom is to recognize its ultimate accountability to the rule of law and its sworn obligation to translate it faithfully. Reasoning judges are not always literalists; they are, however, interpretativists who recognize a collective wisdom in the rule of law far greater than their own.

Perhaps reason has won its place purely by default. How else, one may ask, is the step from received law to final judgment to be taken? Judges may rule neither by emotive oratory nor through stoic silence. They possess neither the moral authority nor the democratic sanction to rule by fiat. Reason holds at least the hope that an impersonal process will subdue the temptation to elevate a personal preference.

To place any faith in the constraining power of judicial reason may seem foolish. In the name of reason, there has been much rationalization. Reason does not provide an infallible path to right decisions. One judge's reason may be another's irrationality. Judges who believe they are faithful to the dictates of reason may arrive at opposite results. One may surely wonder how accountability is to be derived from a method that allows judges to reach "reasonable," yet conflicting, judgments. The idea, then, that judicial power is any more legitimate because it aspires to be reasoned is certain to evoke a skeptical response.

This was not always so. The judicial role as one of reasoned judgment was once a truism. Today, it is under severe attack. On a practical level, crowded dockets filled with complex cases threaten reasoned reflection as never before. On a theoretical level, the legitimacy of reason as a path to judicial judgment has been called into question. The Critical Legal Studies movement regards judicial reason as mere pretext for the preservation of established pre-

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[57] Bickel, *The Least Dangerous Branch* at 258 (cited in note 36).

rogatives and rejects the distinction between legal reason and political rhetoric. From a quite different quarter, Judge Robert Bork has eloquently underscored the potential of any process of subjective thought to subvert the objective dictates of the given law. The various assaults on legal reasoning underscore the vulnerability of the judiciary, as the unaccountable branch, to the intrusion of subjectivity. The danger, however, is that these attacks may lead us to deny the role of reason as a central component of the rule of law.

I am aware that reason itself has fallen into disrepute. After the Vietnam War and Watergate, official reasoning generally came to resemble a tool of deception. The mistrust that these events engendered has not spared the law. Since the law itself was viewed as a malleable commodity, judicial reasoning was seen as open to exploitation by those whose agenda was to preserve the status quo. To invoke a fidelity to reason in legitimating the judicial function was to identify the neutrality of logic with the law's oppressive thrust.

The Critical Legal Studies movement attacks the legitimacy of the legal system as a whole, defining legal reason as little more than a rationalization of the preferences of those in power. The Critical scholars thus deny the determinacy of legal reasoning, as well as the distinction between legal reason and political dialogue. "Law is simply politics dressed in different garb; . . . Legal doctrine is nothing more than a sophisticated vocabulary and repertoire of manipulative techniques for categorizing, describing, organizing, and comparing; it is *not* a methodology for reaching substantive outcomes."[58] Although the Critical Legal Studies movement is more subtle than this brief summary suggests, its depth of disenchantment is accurately recorded. As Professor Kennedy has stated, "Legal thought can generate equally plausible . . . justifications for almost any result."[59] The relationship between Critical Legal Scholars and literary deconstructionists has been close.[60] If legal texts, like literary texts, lack rational determinacy, then

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[58] Allan C. Hutchinson and Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 Stan L Rev 199, 206 (1984) (emphasis in original). See also Mark Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 Yale L J 1205, 1206 (1981). But see Christopher D. Stone, *From a Language Perspective*, 90 Yale L J 1149, 1166-68 (1981) (maintaining that legal reasoning is "special" and separate from political debate).

[59] Duncan Kennedy, *Legal Education as Training for Hierarchy*, in David Kairys, ed, *The Politics of Law: A Progressive Critique* 40, 48 (Pantheon, 1982).

[60] See generally J. M. Balkin, *Deconstructive Practice and Legal Theory*, 96 Yale L J 743 (1987) (relating the deconstructionism of Jacques Derrida to interpretation of legal texts).

judges are more easily exposed as protectors of privilege and power, not the oracles of neutral law.

Ironically, proponents of judicial restraint have also called into question the ability of judges to reason objectively. Once this ability is doubted, judicial accountability to law, and to democracy, becomes attenuated; judicial reasoning may be seen as a ready smokescreen for judicial activism. Reason, in fact, is a tool all too readily co-opted by educated elites, in this case activist judges.[61] It is only a short hop from the reasoning judge to the "wise" judge; in fact, the line between the two may be so difficult to draw that faith must be placed not in the human frailty and idiosyncrasy of judicial reason, but in the sturdy corpus of law. Judge Robert Bork, drawing in part upon the powerful legacy of Justice Hugo Black, has argued that legal reason is no substitute for literal fidelity to legal texts. Judge Bork has argued that where "constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other."[62] Interpretation of constitutional clauses is to be defined by the intent of the framers, not the reasons of the judge. A system of moral or ethical values "without objective or intrinsic validity"[63] is irreconcilable with that intent. Invariably, the search for another's intent must take precedence over the judge's own reason.

These opposing assaults have placed the historic justification for judicial acts at risk. If the process of judicial reason represents, on the one hand, an act of hierarchical oppression or, on the other, a departure from the rule of law, then the legitimacy of the judiciary's interpretative function is in doubt. Or, to put it another way, if these critiques are correct, the only acceptable role for a judge in a democratic society would be the most formalistic, bringing to bear upon a case as little independent force of intellect as possible.

Yet the judge's accountability to reason is not distinct and apart from the judge's accountability to law. Reason is but an ingredient in the interpretation of law. To recognize this is to rescue the judicial function from parrotry, but it is not to set the judge above the law. If Bork's contribution is in building upon the foundations of Black's literalism a philosophy of intentionalism, the question nonetheless remains: What exactly is the judicial role

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[61] Robert H. Bork, *The Struggle Over the Role of the Court*, 34 National Review 37 (Sept 17, 1982).

[62] Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind L J 1, 8 (1971). See also Raoul Berger, *Government by Judiciary* (Harvard, 1977).

[63] Bork, 47 Ind L J at 10 (cited in note 62).

when the lawmaker's intent is obscure? To support judicial reason is to recognize that the law often does not come equipped with marching orders. Lawsuits frequently involve an amalgam of statutes with strange voids and contradictions, precedents whose arrows point in opposite directions, facts that elude and confuse, and propositions about human nature on which no two people would agree. All this complexity gives the judge no right to indulge a preference; rather it imposes the obligation to reason, and it affords the opportunity to legitimate with logic the inchoate expressions of the given law.

Insisting that the interpretativist act of reason cannot constitute a task for judges is not only unrealistic; ultimately, it denies the value that the legal profession has historically used to define itself and its special contribution to the social order. From the beginning of law school, students sense that reason and analysis are sustaining professional values. A special premium is placed upon these skills, not simply as a matter of socratic gamesmanship, but because these skills are among the most valued in the workplace, whether that workplace is the law firm, the courtroom, or the classroom. The term "legal reasoning" represents the profession's attempt to differentiate its own process of thought from that of other disciplines. Yet legal reasoning is no occult art, but variations on a single question: Does principle A apply to fact B?[64] If such reasoning were an end in itself, legal training would be an empty exercise, stimulating, perhaps, but pointlessly so.

The law's faith in reason must represent something more. Reasoning is a proxy for other values and preferences: order over chaos, evolution over revolution, thought over passion, prolonged argumentation over precipitate action. These, I would argue, are values the federal judiciary should respect—not because judges are pillars of the present power structure, but because the process of change has been constitutionally established, and because change and the power of rhetoric to achieve change are generally the province of the political branches of government.

As a law professor, I would meet students who were dismayed that the legal profession had sought to define itself in terms of a process, however worthwhile the process might appear to be. Why, they would ask, is not the paramount professional value helping the less fortunate among us or achieving international peace or any number of ecumenical ends on which people could agree? The

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[64] See the disarming acknowledgement to this effect in Richard A. Posner, *The Jurisprudence of Skepticism*, 86 Mich L Rev 827, 858-9 (1988).

problem is that while a consensus might exist as to those ends, no consensus would ever be reached on the best means to achieve them. What individual lawyers may do is, of course, a matter of preference, choice, and personal conviction. The most the profession as a whole can attempt is to establish the process by which inescapably divergent views on intractably hard questions can be ventilated. Inevitably, this process values that which lawyers profess to do best: argumentation, analysis, and critical reasoning.

IV.

Reason, not surprisingly, defines the federal judicial system. Three judicial practices in particular serve to reinforce the primacy of reason—the duty to explain, the threat of reversal, and the tradition of dissent. Each exposes the reasoning of the individual judge. Nothing in the Constitution requires the written justification of judicial decisions, but a judiciary accountable to reason cannot resort to arbitrary acts. As Judge Frank Coffin puts it, "[t]he act of writing tells us what was wrong with the act of thinking."[65] The danger is that this duty of exposition can be evaded. It requires candor from judges in addressing the strongest arguments against their own views. It requires that crowded dockets not generate too many summary dispositions. Finally, it requires that the reasoning process not begin anew with each decision: while a legislator is always free to break with the past, a judge must respect precedent to prove "that law binds judges along with the rest of us and judicial decisions are not simply the constantly varying assessments of constantly varying judicial personalities."[66] The duty of exposition seeks to remind the judge that the power to do something is not the same as the right to do it—that right can be earned, if at all, through reason.

Other practices within the federal system also point to the dominant role of reason. A dissent, of course, helps "keep[] the majority accountable for the rationale and consequences of its decision."[67] But there are other ways in which a federal judge is answerable for his or her analysis. The reasoning of a single appellate judge, for example, has no operative effect. In the federal circuit courts, it takes at least two to decide, and in the Supreme Court, it takes a committee of five. Such simple arithmetic encourages rea-

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[65] Frank M. Coffin, *The Ways of a Judge: Reflections From the Federal Appellate Bench* 57 (Houghton, Mifflin, 1980).

[66] Paul Gewirtz, *Reverse Discrimination*, The New Republic 13 (Oct 24, 1988).

[67] William J. Brennan, Jr., *In Defense of Dissents*, 37 Hastings L J 427, 430 (1986).

soning in a collegial rather than a solitary setting; even the solitary reflections of the judge are framed by the consideration that others must be persuaded. The collegial aspects of reason can be further expanded. In the Fourth Circuit, proposed opinions are circulated for comment not only amongst the three panel members, but to every member of the circuit. The fact that a non-panel judge has no vote on the case has proved no impediment to criticism. It is not unusual to have a dozen letters debating a particular point of controversy within the court. All of us pay homage to this relentless criticism of our reasoning—in retrospect. At the time, it is tempting to say to a tenacious colleague, "Spare me your reasons; just tell me your vote."

The reasoning of district and circuit judges is under vertical as well as lateral assault. It is fair to question the efficacy of reversal as a sanction, but judges, like anyone else, find it more satisfying to have their analyses agreed with and affirmed. One might argue that reversals exist to promote discipline within the federal system and that, if anything, they tend to discourage rigorous thought. It is also true, as district judges are fond of reminding circuit judges, that the last word is not always the most reasoned one. But the justification for appeals is not necessarily the "correct" result they may produce, but their tendency to encourage reasoned judgment by subjecting it to reexamination. That, at least, was the theory of the Evarts Act of 1891 which created the courts of appeals.[68]

Power often stems from force; influence from persuasion. Since the judiciary lacks the former, it must rely on the latter. Judicial performance ought to be scrutinized as a persuasive rendering of law. Judge Posner has spoken of "the threat of searing professional criticism" as "an effective check on irresponsible judicial actions."[69] Academic criticism bears something of the same relationship to the judicial branch that journalistic criticism bears to the political branches. If academic criticism is less public, it is more analytic and thus addresses the judicial branch on its own terms. The public response to a decision may turn more on its result than on its reasoning. If strict adherence to standards is to be an element of judicial accountability, a professional as well as a political yardstick of performance will be necessary.

None of this elaborate process guarantees that judicial decisions will be objective acts. Yet those who discount the objectivity of reason are left with even more subjective alternatives in its

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[68] Act of March 3, 1891, ch 517, 26 Stat 826.

[69] Richard A. Posner, *The Federal Courts: Crisis and Reform* 229 (Harvard, 1985).

place. The two current attacks on legal reason—deconstructionism and literalism—both end by conceding to the judiciary the very power that they seek to displace. Regarding deconstructionism, Professor Fiss argues that:

> The law aspires to objectivity, so the nihilist observes, but he concludes that the nature of the constitutional text makes this impossible. The text is capable of any number of possible meanings, and thus it is impossible to speak of one interpretation as true and the other false. . . . For the deconstructionist, it makes little difference whether a text is viewed as holding all meanings or no meaning: Either brand of nihilism liberates the critic as meaning-creator.[70]

Unlike the deconstructionist, the literalist professes to find determinate meanings in the constitutional text and downplays the role of reason in the interpretative process. To the deconstructionist, the text means little; to the literalist it means everything. Like the deconstructionist, however, the literalist ironically cedes to judges the very latitude that the duty of reason is designed to restrict. The illusion of literal answers, wrote Professor Bickel,

> gives [judges] a great sense of freedom, it induces a happy activism without afterthought and sometimes even without forethought; in short, it lightens the load of personal and institutional responsibility. But behind the screen of the illusion, thus embraced, will operate—and operate less deliberately than they should—the judge's own convictions.[71]

The idea of judicial accountability to reason still leaves unanswered questions. The first is: What are the tools and implements of judicial reason? The second is: Given the unelected and unaccountable dimension of the judicial power, is there any inherent correlation, as there must be, between reason and restraint?

Professor Fiss has argued that judicial reason can retain its objectivity: there are "disciplining rules, which constrain the interpreter and constitute the standards by which the correctness of the interpretation is to be judged; . . . [there is also] an interpretive community, which recognizes these rules as authoritative."[72] Professor Fiss errs, however, in suggesting that the tools of interpretation are the cosmic constitutional values—"equality, liberty, prop-

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[70] Fiss, 34 Stan L Rev at 742 and 762 (cited in note 6).

[71] Bickel, *The Least Dangerous Branch* 97 (cited in note 36).

[72] Fiss, 34 Stan L Rev at 744 (cited in note 6).

erty, due process," as adapted to "the prevailing morality."[73] To claim so spacious a mandate for judicial interpretation is to confirm the fears of its detractors: that judicial reason has no foundation in objectivity or restraint.

I am not suggesting that the general language of the great constitutional clauses permits judges to strip them of effect. The Equal Protection and Due Process Clauses must mean something, and the fear that some judges may abuse them does not permit others to aver they have no use. Does not the Constitution permit differences of degree? There is a difference, for example, between holding that constitutional equality condemns discrimination against suspect classes and that it embraces a bill of fundamental economic rights. There is a difference too between voiding the intrusion on familial institutions posed by the aberrational state law in *Griswold v Connecticut*[74] and embarking upon an ambitious expansion of the privacy concept.

Are such differences of constitutional degree in the end only differences of pragmatism and expediency? Or do they enjoy some principled foundation in the role of judicial reason? In the final section of this essay, I will argue that they do enjoy a principled foundation. Both the unaccountable status of federal judges and the structural mandates of federalism and separation of powers together accord a presumption of correctness to democratic enactments. I will attempt to show that Justices Frankfurter, the second Justice Harlan, and Justice Powell preserved the principles of both reason and restraint in finding that the powerful presumption of democratic legitimacy was, nonetheless, still less than absolute.

V.

The recent debate over constitutional adjudication has been polarized. Some view the Constitution as an "empty vessel" into which judges must pour content.[75] This content is thought to come from "moral leadership" or "prophecy,"[76] the "fusion of constitutional law and moral theory,"[77] or a "higher law" of "natural rights."[78] None of these sources of content, however, sufficiently

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[73] Id at 753.

[74] 381 US 479 (1965).

[75] Arthur Selwyn Miller, *Toward Increased Judicial Activism: The Political Role of the Supreme Court* 23 (Greenwood, 1982).

[76] Michael J. Perry, *The Constitution, the Courts, and Human Rights: An Inquiry Into the Legitimacy of Constitutional Policymaking by the Judiciary* 98-99 (Yale, 1982).

[77] Ronald Dworkin, *Taking Rights Seriously* 149 (Harvard, 1977).

[78] Thomas C. Grey, *Do We Have an Unwritten Constitution?* 27 Stan L Rev 703, 715

accounts for the ways in which judges themselves are unaccountable, and each offers judges too much chance to indulge their personal beliefs.[79]

Others contend that the Constitution has established "explicit rules as to how the great issues of every age should be decided."[80] The answer to whether a judge is acting properly is "found by looking at the relevant written constitutional provision and checking to see if it is being enforced according to its plain words as originally understood."[81] According to this view, the Constitution constrains judges to "interpret the document's words according to the intentions of those who drafted, proposed, and ratified its provisions and its various amendments."[82]

Neither of these views has fully taken into account the implications of judicial accountability to reason. The judicial covenant with reason has a paradoxical effect upon the role of the judge. While it limits the indulgence of personal preference, it enlarges the legal context from which the judge must draw. It underscores a tension that the polar positions in the constitutional debate have managed to obscure: that a constitution may at the same time provide few answers and impose serious constraints. Those constraints lie, however, as much in the document's structural principles as in its literal text, as much in the unaccountable status of judges as in the Framers' intentions.

This tension harkens back to the great debates between Justices Black and Harlan, both of whom regarded themselves as practitioners of restraint. Justice Black was a consummate literalist who found answers in the clear commands of the constitutional text. Harlan relied on the larger constitutional principles of separation of powers and our system of federalism. Respect for these principles, Justice Harlan believed, would "go farther toward keeping judges from roaming at large in the constitutional field"[83] than the illusory specificity of the Bill of Rights.

It is important to recognize that Judge Bork and Justice Harlan also represent distinct schools of restraintist thought. The

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(1975).

[79] See Berger, *Government by Judiciary* 4 (cited in note 62).

[80] Edwin Meese, III, *Toward a Jurisprudence of Original Intent*, 11 Harv J L & Pub Pol 5, 7 (1988).

[81] Id at 10.

[82] Robert H. Bork, Remarks Before the University of San Diego Law School (Nov 18, 1985), quoted in Alex Kozinski & J. D. Williams, *It is a Constitution We Are Expounding: A Debate*, 1987 Utah L Rev 977, 986.

[83] *Griswold*, 381 US at 502 (Harlan concurring in the judgment).

great strength of the Bork school is its insistence upon external standards, standards extrinsic to the judges themselves. Its contribution has been to place a heavy burden of justification upon courts that seek to pursue an activist course. Its deficiencies, on the other hand, lie in the assumption that external standards will always yield answers, and in the suggestion that intentionalism or originalism leaves little for the judge to do but look.

The Harlan school shares with the Bork school the fundamental premise of restraint. Its chief sources of restraint, however, have been the constitutional principles of federalism and separation of powers. Federalism and separation of powers provide a powerful presumption of democratic legitimacy but not a definitive answer to every constitutional dilemma. The Harlan school holds that there remains a role for reason within the rule of law.

This view is represented not only in the work of Justice Harlan, but in that of Justices Frankfurter before him and Powell afterward. Frankfurter, more self conscious than Harlan or Powell, fretted frequently about the source of his decisions. To him, the idea of literal answers leaving no room for judicial insight was a mirage. The lack of definite answers, however, left the Justice uncertain whether his was the voice of legal reason or idiosyncratic preference. Frankfurter warned against enforcing "individual views instead of speaking humbly as the voice of the law by which society presumably consents to be ruled."[84] He sought to adopt a "philosophy of intellectual humility" in approaching cases,[85] and he strove to avoid "confounding the familiar with the necessary"[86] and the "unwise" with the unconstitutional.[87] Personal preferences were not to be confused with constitutional mandates:

> Were my purely personal attitudes relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. . . . As a member of this Court, I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or

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[84] Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U Pa L Rev 781, 794 (1957).

[85] Felix Frankfurter, *Mr. Justice Brandeis and the Constitution*, in Archibald MacLeish and E. F. Pritchard, Jr., eds, *Law and Politics: Occasional Papers of Felix Frankfurter (1913-1938)* 122 (Harcourt, Brace, 1939).

[86] Felix Frankfurter, *Justice Holmes Defines the Constitution*, in *Law and Politics* at 67 (paraphrasing Tocqueville) (cited in note 85).

[87] *Dennis v United States*, 341 US 494, 552 (1951) (Frankfurter concurring).

how mischievous I may deem their disregard.[88]

The turmoil into which Frankfurter threw himself was quite intense. "There are times," he wrote, "I can assure you—more than once or twice—when I sit in this chair and wonder whether [judging] isn't too great a power to give to any nine men, no matter how wise, how well disciplined, how disinterested. It covers the whole gamut of political, social and economic activities."[89]

All this articulation of one's own anguish may strike some as an unnecessary expenditure of energy. On the other hand, Justice Frankfurter got one point profoundly right. The business of judging cannot be made easy, because clear answers cannot always be laid out. There is a role for judicial reason. Yet the duty to make great choices carries with it the temptation to formulate wise policy. How then might the obligation to reason be accommodated to the imperative of restraint?

The accommodation derives in part from the fact that the structural premises from which Frankfurter, Harlan, and Powell reasoned have a constitutional origin. The careful distribution of power into three distinct departments and the explicit checks of each department on the other are means by which the virtues of republican government can be achieved.[90] In fact, "[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty."[91] The organizing principle of the Constitution, so plain as to escape reflection, is to devote one of the first three articles to each separate branch.

The constitutional structure also embodies a division of power between a federal government with limited powers and states with the residuum. At the time of constitutional creation, the states retained "all the rights of sovereignty which they before had, and which were not . . . *exclusively* delegated to the United States."[92] Under the constitutional system of federalism, the States, in all "unenumerated cases," retained "their sovereign and independent jurisdiction."[93] Those powers that were delegated were "few and

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[88] *West Virginia Board of Education v Barnette*, 319 US 624, 646-47 (Frankfuter dissenting).

[89] Felix Frankfurter, *Federalism and the Role of the Supreme Court*, in Philip B. Kurland, ed, *Of Law and Life and Other Things that Matter: Papers and Addresses of Felix Frankfurter* 129 (Harvard, 1965).

[90] Federalist 9 (Hamilton), in *Federalist Papers* at 71, 72-73 (cited in note 34).

[91] Federalist 47 (Madison), in id at 300, 301.

[92] Federalist 32 (Hamilton), in id at 197, 198. See also Federalist 39 (Madison), in id at 240.

[93] Federalist 40 (Madison), in id at 247, 251.

defined"; those that remained were "numerous and indefinite."[94] Despite assurances from the Framers that the federal government could exercise only those powers expressly delegated to it, the Tenth Amendment was added to the Constitution "to put the obvious beyond peradventure."[95] Constitutional liberty was as much a matter of the dispersion of governmental power as the enumeration of individual rights. As Justice Harlan explained:

> Our federal system, though born of the necessity of achieving union, has proved to be a bulwark of freedom as well. We are accustomed to speak of the Bill of Rights and the Fourteenth Amendment as the principal guarantees of personal liberty. Yet it would surely be shallow not to recognize that the structure of our political system accounts no less for the free society we have. Indeed, it was upon the structure of government that the founders primarily focused in writing the Constitution. Out of bitter experience they were suspicious of every form of all-powerful central authority and they sought to assure that such a government would never exist in this country by structuring the federal establishment so as to diffuse power between the executive, legislative, and judicial branches. The diffusion of power between federal and state authority serves the same ends and takes on added significance as the size of the federal bureaucracy continues to grow.[96]

Nevertheless, these structural postulates of the Constitution are premises only. They do not absolve judges of the obligation to reason. Nor do they answer whether a particular exercise of political power is lawful. Federalism and separation of powers suggest an answer by creating a presumption, a presumption that the federal judicial power should grant state legislative power maximum room to maneuver. But Harlan believed that this presumption could be overcome. In *Poe v Ullman*[97] and *Griswold v Connecticut*,[98] Harlan argued that the State could not "enforce its moral judgment by intruding upon the most intimate details of the marital relation with the full power of the criminal law."[99] In overcom-

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[94] Federalist 45 (Madison), in id at 288, 292.

[95] Raoul Berger, *Federalism: The Founders' Design* 80 (U Okla, 1987).

[96] John M. Harlan, *Thoughts at a Dedication: Keeping the Judicial Function in Balance*, 49 ABA J 943, 943-44 (1963).

[97] 367 US 497, 522 (1961) (Harlan dissenting).

[98] 381 US 479, 499 (1964) (Harlan concurring in the judgment).

[99] *Poe*, 367 US at 548 (Harlan dissenting); see also *Griswold*, 381 US at 500 (Harlan concurring in the judgment) (referring to the reasons stated in his *Poe* dissent).

ing the presumption of restraint, the Harlan opinions in *Poe* and *Griswold* did not reject the role of reason. In their recognition of the boundaries of judicial power, in their search for a limiting principle of intervention, in their quest for rulings grounded in familial institutions and traditions, these opinions, whatever their shortcomings, are not examples of an indiscriminate exercise of judicial power.

If Justice Harlan's opinions in *Poe* and *Griswold* confirm that the structural principles of the Constitution do not relieve judges of their responsibility to reason, they also suggest that there is no invariable link between those principles and restraint. The principles of federalism and separation of powers do suggest, however, that the instances of intervention should be few in number and limited in scope. Nonetheless, reasoning from these structural principles does not "obviate all constitutional differences of opinion among judges, nor should it."[100] Nowhere is this more apparent that when the structural principles themselves collide.

Justice Rehnquist's opinion in *National League of Cities v Usery*,[101] Justice Powell's dissenting opinion in *Garcia v San Antonio Metro. Transit Authority*,[102] and Justice Scalia's dissenting opinion in *Morrison v Olson*[103] illustrate the occasional reluctance on the part of Justices prominently associated with restraint to defer to congressional judgments. In *National League of Cities*, the Court, per Justice Rehnquist, refused to allow Congress to impose minimum wage and maximum hour standards directly on the states or their various political subdivisions, even though Congress was exercising its otherwise "plenary power" to regulate commerce.[104] In *Garcia*, Justice Powell warned in dissent that the majority's decision to overrule *National League of Cities* would reduce the Tenth Amendment to "meaningless rhetoric" whenever Congress acts pursuant to its commerce power.[105] In *Morrison*, Justice Scalia dissented from the Court's upholding the independent counsel provisions of the Ethics in Government Act of 1978 because he feared, among other things, the "fragmentation of executive power."[106]

It can be argued that in these cases Justices Rehnquist, Pow-

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[100] *Griswold*, 381 US at 501 (Harlan concurring in the judgment).
[101] 426 US 833 (1976).
[102] 469 US 528, 557 (1985) (Powell dissenting).
[103] 108 S Ct 2597, 2622 (1988) (Scalia dissenting).
[104] 426 US at 842.
[105] 469 US at 560.
[106] 108 S Ct at 2641.

ell, and Scalia were pursuing an activist course in urging the unconstitutionality of congressional action. However, the framework of the arguments merits careful observance. Rehnquist, Powell, and Scalia were defending the very structural principles that Frankfurter and Harlan had earlier championed. The *National League of Cities* majority and the *Garcia* dissent claimed that the legislative judgment had undermined the constitutionally mandated balance of power between the federal government and the States. In the *Morrison* dissent, the legislative judgment was alleged to undermine not only the constitutionally mandated doctrine of separation of powers, but the political accountability of the executive itself. The great cautionary note, of course, is that federal antitrust laws,[107] child labor laws,[108] and much New Deal legislation[109] had also been set aside in the name of this same fidelity to our federal system of government. The question still remains, therefore, whether reasoning from the structural postulates of the Constitution bears any inherent connection to judicial restraint.

The application of structural principles has for the most part resulted in the exercise of restraint. The case of Justice Powell is illustrative. His commitment to separation of powers made him reluctant to read private rights of action into statutes or to reduce requirements of standing that would thrust courts into "abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions."[110] In *San Antonio School District v Rodriguez*, where the Court rejected a constitutional challenge to Texas's system of public school finance, Powell returned to Justice Brandeis's famous maxim that each state in our federal system is free to " 'serve as a laboratory; and try novel social and economic experiments.' "[111] More pragmatic than Frankfurter or Harlan, Powell often justified judicial deference in terms of a lack of judicial experience—"[w]e have relied for generations upon the experience, good faith and dedication of those who staff our public schools."[112] It was as though the general grant of federal question jurisdiction and the infinite variety of judicial dockets deprived the courts of the exper-

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[107] *United States v E. C. Knight Co.*, 156 US 1 (1895).

[108] *Hammer v Dagenhart*, 247 US 251 (1918).

[109] For example, *Carter v Carter Coal Co.*, 298 US 238 (1936).

[110] *Warth v Seldin*, 422 US 490, 500 (1975). See also *Cannon v University of Chicago*, 441 US 677, 742 (1979) (Powell dissenting).

[111] 411 US 1, 50 (1973) (quoting *New State Ice Co. v Liebmann*, 285 US 262, 280, 311 (1932) (Brandeis dissenting)).

[112] *Goss v Lopez*, 419 US 565, 595 (1975) (Powell dissenting).

tise belonging to a committee of Congress or an executive department. Similarly, the remoteness of the Supreme Court deprived it of the hands-on experience of state and local officials. Not only school officials,[113] but also prosecutors,[114] police,[115] state trial judges,[116] military authorities,[117] and welfare workers[118] enjoyed considerable freedom in their fields of expertise. As with Harlan, the deference Powell accorded democratic processes was not absolute.[119] But Powell's commitment to a devolution of authority led him to abjure flat declarations of principle in favor of a presumptive reliance on the structural principles that acknowledged the respective spheres of Congress and the states. Like Frankfurter and Harlan, Powell's solutions to the great constitutional dilemmas were more suggested than compelled; the language of the document did not absolve the Justice from applying the structural principles within it.

That the structural principles of separation of powers and federalism do most often result in restraint does not necessarily prove that they should. I believe that they should, however, primarily because of the arguments advanced in the earlier sections of this essay. The federal judiciary is not generally accountable for its actions, and many of the explanations offered on behalf of its accountability seem to me unsatisfactory. Accountability to reason is among the most promising gifts the legal profession has to offer, but in the end even this gift is no guarantee of objectivity or justice.

One is left, as always, with human imperfection and those who strive to make the most of it. The three Justices I have described did not abdicate their role of reason nor did they abandon their obligation of restraint. None of the three were activists, yet neither were they literalists. Their judicial vision was simultaneously one of breadth and one of limits. Limiting, because their philosophy had its taproots in the structural constraints of constitutional law. Broadening, because that same law had failed to leave an infallible blueprint, and a reasoned interpretation by the Justice was still essential. To some, that interpretation will always seem subjective.

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[113] Id at 584 (Powell dissenting); *San Antonio Independent School District v Rodriguez*, 411 US 1 (1973).

[114] *Imbler v Pachtman*, 424 US 409 (1976).

[115] *Neil v Biggers*, 409 US 188 (1972).

[116] *Ristaino v Ross*, 424 US 589 (1976).

[117] *Greer v Spock*, 424 US 828, 842 (1976) (Powell concurring).

[118] *Mathews v Eldridge*, 424 US 319 (1976).

[119] See, for example, *Moore v East Cleveland*, 431 US 494 (1977).

To Frankfurter, Harlan, and Powell it did not appear so. Theirs was a reason coupled with a remonstrance toward impatience, a belief that slow solutions, democratically achieved, were worth the wait. To them, what today might meet with derision still seemed possible: that judges might employ their own faculties of reason and yet retain their integrity as servants of another's will.