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RIGHTS, REMEDIES AND RESTRAINT

PETER M. SHANE*

For at least the past half century of constitutional debate, the phrase "judicial restraint" has been associated with one of two polar tendencies in constitutional law, the other usually referred to as "judicial activism."¹ Both tendencies are amenable to a variety of descriptions but, whatever the content given to each phrase, there should be nothing in the bare words of either label to give intrinsic rhetorical advantage to its proponents.

Rhetorical parity, however, seems not to exist. Without respect to the substance of their ideas, proponents of "activism" often seem forced these days to the political defensive, hastening to urge in various ways that their activism is really not all that activist.² This contemporary defensive stance is, in part, surely connected to the declining fortunes of "activism" generally. During the 1960s, when political "activism" seemed the admirable opposite of passivity or thoughtless acceptance of the status quo, judicial activism sounded like one more good kind of activism. Against the more conservative backdrop of the 1980s, "activism," for some, has taken on connotations of irresponsibility, even immaturity.

Moreover, proponents of judicial restraint enjoy a rhetorical advantage because the phrase "judicial restraint" is linked also with a meaning outside the political debate over activism.³ It denotes a judicial sense of self-discipline that is not a polar political tendency, but a universally admired judicial virtue connected with the conscientious discharge of an institutional role. To oppose "judicial restraint" in the political sense does not question "judicial restraint" in the latter, institutional sense at all, but, because the same words are involved, the point is easily obscured in political debate.

To sort out these separate senses of "judicial restraint," I wish to

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1. Van Alstyne, *Judicial Activism and Judicial Restraint*, in 3 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 1031 (L. Levy, K. Karst & D. Mahoney eds. 1986).

2. See, e.g., Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 *HARV. L. REV.* 465 (1980).

3. This point is thoughtfully made in *Notes and Comment*, *THE NEW YORKER*, Aug. 3, 1987, at 17-20.

focus on three professors-turned-judge whose scholarly work has helped to raise public interest in the current debate over the judicial role. The political contest over "judicial restraint" rhetoric boiled up notably, of course, in the Senate's hearings on the Supreme Court nomination of one of these scholars, Judge Robert Bork.⁴ Judge Bork had propounded a political theory of restraint, a version of what I shall call "restraint through ratification." His theory argued, in effect, that courts, as often as is plausibly defensible, should ratify the political choices made by elected officials and by government agencies directly accountable to them.⁵ This theory thus counseled a narrow interpretation of those occasions on which the Constitution commands judicial interference with political value choice. Although his writings address the point less, Judge Bork's protectiveness of political discretion would presumably counsel modesty also in remedial design once liability is found. It would be inconsistent if Judge Bork were not concerned that remedies be tailored as narrowly as possible to avoid interference with discretionary political decisions that could not be strongly justified as necessary to relieve a perceived wrong.

Two other prominent scholars and judges, Judge Richard Posner and Judge Frank Easterbrook, both of the United States Court of Appeals for the Seventh Circuit, have likewise advocated political theories of "restraint through ratification." Judge Posner, in particular, has elaborated at some length his views of restraint, linking his theory to a larger set of perceptions concerning what he diagnoses as a "crisis" in the federal court system.⁶

Taking these scholars' political theories of judicial restraint as my springboard, I wish to pose through this essay the following question: Would a judge who is admirably "restrained" in the sense of "self-disciplined" always construe rights narrowly and design remedies modestly? Or, more formally, does a *political* theory of restraint in the interpretation and remedial protection of constitutional rights follow from the best possible conception of the universally admired ideal of judicial self-discipline—what I have called the *institutional* concept of judicial restraint?

My answer, it will turn out, is negative. But the case I want to make against any linkage between restraint as self-discipline and restraint

4. See SENATE COMM. ON THE JUDICIARY, NOMINATION OF ROBERT H. BORK TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT, S. EXEC. REP. NO. 7, 100th Cong., 1st Sess. (1987) [hereinafter SENATE COMM. REP.]. Judge Bork subsequently resigned from the United States Court of Appeals for the District of Columbia Circuit.

5. See Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). See *infra* text accompanying notes 13-16, 20-26.

6. R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985).

through ratification operates on two levels, and one is more problematic than the other. One level considers self-discipline in the enunciation of rights. On this level, Ronald Dworkin, among others, has forcefully portrayed one version of what I shall call the "rule of law" concept of judicial restraint, which yields a portrait of a judge likely to be far less acquiescent than Judges Bork, Posner, or Easterbrook would prefer.⁷ I would argue that Dworkin's model judge is admirably restrained in the institutional sense, but has a political conception of the court's role vis-à-vis other institutions that is both more attractive and less acquiescent than the conception implicit in the Bork, Posner, or Easterbrook theories.

The second, more problematic level involves the design of remedies. Here, I believe, the "rule of law" model addresses the issue of an appropriate judicial role less directly. With respect to the elaboration of rights, the "rule of law" version of judicial restraint appeals to principle as a source of justification for judicial decisions that invalidate the decision-making preferences of nonjudicial institutions. The relationship, however, between principle and the details of remedial design in broad-gauged institutional cases is too attenuated to permit an argument that principle does much to discipline a judge undertaking the remedial task. I believe, therefore, that a judge following the "rule of law" model of restraint must appeal to another understanding of the judicial role that might afford a plausible source of judicial self-discipline. Under the "rule of law" model of judicial restraint, a judge should limit his or her own role in complex cases to institutional reforms likely to produce a stronger institutional dedication to legal compliance and hence, over time, fewer occasions for judicial supervision.

Because of the occasion of this Symposium and because of where Judges Posner and Easterbrook sit, I shall use several Seventh Circuit cases to explore the issues I raise. My thesis, however, namely, that judicial self-discipline may argue politically against acquiescence in political decisionmaking, is obviously intended to have broader applicability.

I. RIGHTS AND RESTRAINT

A. *Restraint Through Ratification*

1. Judges Bork and Easterbrook

No one questions the infinite malleability of the term "judicial restraint," but it is possible to place all "judicial restraint" theories into one

7. See generally R. DWORKIN, *LAW'S EMPIRE* (1986).

of two categories. The first, "process-oriented" category consists of theories that would manifest themselves in rules for, or attitudes toward, the process of judicial review that have no obvious connection with who is likely to prevail in legal disputes between private individuals and the government. The second, "result-oriented" category consists of theories that would manifest themselves in rules for, or attitudes toward, adjudication that make it more likely the government will prevail in such disputes.

In a number of judicial opinions, Judge Bork has advanced his current version of one familiar process-oriented theory of judicial restraint, namely, constitutional originalism.⁸ His argument, in essence, is that the Supreme Court should recognize constitutional rights only if they are soundly based on arguments tied closely to the Constitution's text, structure, and history. Neutrally implemented, this position says nothing about who would win such disputes. Assuming some sense in which originalism is a plausible stance, it is likely, for example, that a Supreme Court restrained by originalism would offer less protection than it has against legislative malapportionments,⁹ and more protection than it has against unreasonable searches and seizures.¹⁰ Judicial creativity, in these two areas, seems to have strayed from the original Constitution, but in opposite political directions.

In contrast, Chief Justice Marshall, in *McCulloch v. Maryland*,¹¹ articulated a now-familiar result-oriented rule of judicial restraint. Assuming Congress has undertaken some measure for a constitutionally authorized purpose, Marshall interpreted the Constitution as precluding courts from inquiring further than whether the measure could be viewed as merely "appropriate" for its purpose. Any "appropriate" measure would be constitutional, even if a judge thought the measure clearly unwise.¹² In modern terms, the Supreme Court now sustains legislation as within Congress's implied powers if some minimally rational connection exists between the legislation and a constitutionally authorized purpose. This stance, deferential as it is to Congress's policy judgments, surely

8. See, e.g., *Barnes v. Kline*, 759 F.2d 21, 56-59 (D.C. Cir. 1985) (Bork, J., dissenting) (dissenting from grant of standing to members of Congress to challenge presidential pocket veto), *vacated sub nom. Burke v. Barnes*, 479 U.S. 361 (1987); *Dronenburg v. Zech*, 741 F.2d 1388, 1396-97 (D.C. Cir. 1984) (upholding discharge for homosexuality of Navy petty officer).

9. Justice Harlan seemingly devastated Justice Black's effort to locate an originalist basis for a "one person, one vote" rule for federal elections in the textual requirement that Representatives be chosen "by the People of the several States." *Wesberry v. Sanders*, 376 U.S. 1, 30-42 (Harlan, J., dissenting) (construing U.S. CONST. art. I, § 2).

10. *California v. Greenwood*, 108 S. Ct. 1625, 1631-37 (1988) (Brennan, J., dissenting) (dissenting from approval of warrantless searches of sealed trash bags outside home).

11. 17 U.S. (4 Wheat.) 316 (1819).

12. *Id.* at 324-25.

results in the government winning more lawsuits than would be the case if the Court policed not the mere *rationality* of legislation but its overall *reasonableness* or even its *necessity*, guided by a more full-blown analysis of costs and benefits to the public.

The Posner and Easterbrook theories and the theory of Judge Bork that is most controversial are all result-oriented in the *McCulloch*-sense. Each theory, if played out against currently conventional understandings of constitutional meaning, begins (and ends) with a preference for governmental decisions made by agencies that are elected or are directly accountable to elected officials. Although the theories are different, it is a fair statement that the appeal of the three theories to any particular citizen will depend in large part on the degree to which that citizen shares this underlying preference.

Judge Bork's theory, propounded in his now-infamous "Indiana Article,"¹³ prefers the decisions of politically controlled agencies because "society," in Bork's view, has consented "to be ruled undemocratically [only] within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach of majorities by, the Constitution."¹⁴ By an enduring "principle," Judge Bork means a rule, derived from the Constitution, that can differentiate between justified and unjustified claims of right without any value choice by the deciding judge. Unless the rule may be so applied, it cannot be used neutrally so as to earn the allegiance of citizens. The statement, "[G]overnment may not interfere with any acts done in private,"¹⁵ is not a neutral principle for Bork because there is no clear signal in the Constitution as to which private acts should be immune to interference and which should not.¹⁶ To implement the rule, a judge would have to draw distinctions between protected and unprotected acts according to the judge's, not the Constitution's, view of things.

Judge Easterbrook takes a quite similar stance, although he might not characterize his narrow rules of decision as "principles." Legal texts, for Judge Easterbrook, including statutes and the Constitution, are the culmination of particular bargains and compromises, each of which has a

13. The article, on which much heated discussion focused during the confirmation hearing on Judge Bork's nomination to the Supreme Court, is Bork, *supra* note 5, at 1.

14. *Id.* at 3.

15. *Id.* at 7.

16. *Id.* at 7-10. Bork suggests that the stated principle might be neutral if the Court would apply it in all cases, but we know this is not the case: "The Court, we may confidently predict, is not going to throw constitutional protection around heroin use or sexual acts with a consenting minor." *Id.* at 7.

limited domain.¹⁷ Each rights-creating bargain removes some potential area of decisionmaking from private hands, and subjects it to government rule. To maximize the realm of unregulated private conduct, Easterbrook argues that the scope of any regulatory statute should be limited to the precise deal for which the lawmakers contracted and, thus, to the precise subject matter domain of their bargain. Statutory domains should not be expanded in the name of principle, unless the law clearly delegates such an expansionist role to the courts.¹⁸ Courts can pursue the same strategy in constitutional interpretation. Thus, if, perchance, the framers of the Constitution intended to insure access to contraceptives for married couples, but made no choice regarding unmarried couples, courts following Easterbrook, in a case involving unmarried partners, would likewise make no law protecting unmarried couples. Because of the limited domain of what might be called "the framers' bargain," courts would forbear from making law without inquiring whether any *principle* independently justifies dissimilar constitutional treatment of married and unmarried sexual partners. Such would be their approach unless, under the textual provision involved, the Constitution clearly delegated to courts the task of making law as to matters on which the framers took no view.

Judge Bork's theory represents a version of judicial restraint that is clearly geared to produce more government victories because, under Bork's theory, the criteria for legitimacy among principles for adjudication would clearly limit a court's capacity to recognize constitutionally protected rights. Judge Easterbrook would seemingly employ an exceptionally particularistic search for the domain of constitutional provisions which, given conventional understanding of most rights-protecting clauses, would likewise limit a court's license to protect individual or minority interests against the decisions of politically accountable bodies.¹⁹ It is, therefore, likely that a court conscientiously hewing to the Bork or Easterbrook theories will find fewer occasions to undermine de-

17. On statutes, see Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983) [hereinafter Easterbrook, *Statutes' Domains*]; on the Constitution, see Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87 (1984). In view of Judge Easterbrook's public choice analysis of judicial opinions produced by collegial bodies, Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982), it is not clear how he would apply rights-creating common law opinions by multi-headed courts.

18. Easterbrook, *Statutes' Domains*, *supra* note 17, at 544-52.

19. Judge Easterbrook, of course, might embrace a view of some rights-creating constitutional provisions—most notably, those that protect rights of property—that would attribute to the framers a more robust conception of individual rights than is reflected in current doctrine. In such a case, his theory could sanction more occasions for reversing political decisionmaking. See, e.g., *Chicago Bd. of Realtors v. Chicago*, 819 F.2d 732, 741 (7th Cir. 1987) (Posner & Easterbrook, JJ., concurring) (bemoaning current doctrine that has "defanged" the contract clause, U.S. CONST. art. I, § 10, but

cisions made by the political branches of government. They would be, in the political sense, judicially restrained.

Does it follow, however, that courts adhering to these approaches would be fulfilling a conventional institutional ideal of judicial self-discipline? That assessment is more complex. To the extent each of these theories appeals to craft—that is, each asks judges to limit the materials available for cognizable argument and to interpret them conscientiously in light of reason—they are, in that sense, conducive to self-discipline. What judges eat for breakfast would not be relevant to the decision of cases under either theory, just as it would not be relevant under any defensible theory of the judicial role that would sanction politically more activist courts.

In some ways, however, these theories should be troubling to those who prize judicial self-discipline as an institutional virtue. Two of the objections that might be made to the Bork and Easterbrook theories are essentially the same as objections that are routinely made to theories of judicial activism—and, therefore, cannot be used to determine a preference between restraint and activism in their political senses. A third objection, however, I believe is uniquely applicable to the Bork and Easterbrook theories.

First, although the Bork and Easterbrook theories might exclude certain arguments from the range of plausibility in particular cases, they are nonetheless susceptible to widely varying implementation. A frequently voiced objection to one version of judicial activism—adjudication based on “fundamental rights”—is that the location of rights in the Constitution that are fundamental, even if not explicit, depends on judgments that run the risk of being arbitrary and highly contestable. As much could be said about the Bork and Easterbrook theories. Searching behind the text, as Judge Bork apparently would have done in 1971, for rules that can differentiate objectively between justified and unjustified claims of right is no more mechanical a process than searching for fundamental rights. Neither is there any less interpretive discretion to be found in the task Judge Easterbrook posits of construing the bargain struck by Congress or by the Constitutional Convention or by a Supreme Court majority in the elaboration of what looks like a rule of law. All these forms of adjudication are discretion laden.

Second, the Bork and Easterbrook theories run the risk of yielding results untamed by conventional public understandings of the Constitu-

suggesting landlords had “promising” eminent domain challenges to city landlord-tenant ordinance).

tion, either at its writing or later. Judge Bork's Indiana article amply proves the point, which perhaps helps to explain his repudiation of much of it.²⁰ Bork considers in that article how courts should enforce the first amendment. First, he rejects an absolutist reading of the first amendment—"Congress shall make no law . . . abridging the freedom of speech . . ."²¹—on the grounds that no one would be prepared to live with it.²² Courts need, therefore, to constrain the first amendment within the bounds of some "neutral principle," that is, in Bork's terms, a principle that would permit courts to distinguish between protected and unprotected speech wholly on the basis of values clearly signaled in the Constitution.

The rub, as Bork recognizes, is that "[t]he framers seem to have had no coherent theory of free speech and appear not to have been overly concerned with the subject."²³ One possible inference to be drawn from this observation is that the first amendment should be read as a delegation to the courts to develop, over time, appropriate principles for the regulation of speech. (Judge Easterbrook would presumably have to help us decide whether to read the text this way.) This reading, however, would not confine courts to the circumscribed role Bork initially posits as the sole legitimate judicial role. Hence, "[w]e are . . . forced to construct our own theory of the constitutional protection of speech."²⁴ Bork's effort in this respect leads him to ask what it is about speech that might differentiate it from other activities the Constitution does not protect. His answer is, it facilitates the "discovery and spread of political truth."²⁵ Hence, Bork's neutral principle: explicitly political speech is protected; other speech is not.²⁶

I will not rehearse here the many debatable steps that yield Bork's conclusion. My point here is that this principle, to which Bork believed his view of restraint pushed him, turns out to be a rule different from what the Constitution says or what the framers thought²⁷ or, I would guess, what most people believe of the Constitution. Since Judge Bork first ventured his view, I do not know of any court or of any other serious

20. SENATE COMM. REP., *supra* note 4, at 55-56.

21. U.S. CONST. amend. I.

22. Bork, *supra* note 5, at 21.

23. *Id.* at 22.

24. *Id.*

25. *Id.* at 26 (quoting *Whitney v. California*, 274 U.S. 357, 375 (1926) (Brandeis & Holmes, JJ., concurring)).

26. *Id.* at 26-27.

27. Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U.L. REV. 1212, 1232-39 (1983).

constitutional scholar who has embraced it. Bork has since forsaken it.²⁸

The reality that the Bork and Easterbrook theories pose discretion laden interpretive tasks and may yield rules for adjudication that are not supported by a consensual understanding of the legal documents from which those rules arise does not mean that a judge following either theory is less self-disciplined than a politically more activist judge. Assuming equal levels of craft, I am arguing so far only that the politically restrained judge is no more disciplined.

But there is another sense in which a conscientious follower of the Bork or Easterbrook theories could be attacked as undisciplined, and this criticism, I believe, cannot be leveled at the more activist approach I will advance. Both the Bork and Easterbrook theories are based on an allegiance to majoritarianism that itself cannot be squared with any sound view of the historical Constitution. Bork's statement that "society" has consented "to be ruled undemocratically [only] within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach of majorities by, the Constitution"²⁹ is misleading to the extent it suggests either of two things: first, that the role of courts in disciplining political institutions was perceived as being of constitutionally lesser importance than the role of Congress in legislating or the role of the President in executing the laws; and second, that courts were not expected to have any role in elaborating constitutional principles beyond the naked text.

The very existence of the Bill of Rights belies the former claim. It had been the conviction of the Philadelphia framers that the structure of the federal government and of the federal system were sufficient, by themselves, to protect individual liberties. Had their handiwork gone unamended it might have been possible to argue with more seriousness that courts should hesitate before imposing constraints on Congress or the Executive beyond those constraints already embodied in the legislative process and in the structure of the electoral system.³⁰ The basis for the Bill of Rights, however, was five states' insistence that the carefully crafted distribution of constitutional powers was not enough to keep government within its proper sphere.³¹ The Bill of Rights was intended as

28. SENATE COMM. REP., *supra* note 4, at 55-56.

29. Bork, *supra* note 5, at 3.

30. Of course, a case for judicial review to protect individual rights could have been made even without the Bill of Rights. The unamended Constitution might have been read as embodying natural law protections of individual rights that could have been viewed as judicially enforceable on essentially the same structural grounds as are now frequently asserted in defense of judicial review.

31. Levy, *Bill of Rights (United States)*, in 1 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 113, 114 (L. Levy, K. Karst, & D. Mahoney eds. 1986).

an enforceable set of individual rights precisely because the majority could be expected to be inventive in its threats to liberty. It is, therefore, not surprising that the text of the amendments does not give priority to the choices made by political processes over the constitutional rights guaranteed in broad language to individual persons. Neither does it dictate that those rights be narrowly construed. To interpret them under contrary premises seems a rebellion by judges against their constitutionally assigned role.

History likewise does not support the claim that the language of the Constitution was intended to signify protection solely against a particular set of legislative or administrative abuses known to the framers.³² In this respect, Judge Easterbrook's bargain theory is vulnerable on its own terms. Part of the framers' understanding—part of their "bargain," if you will—was that they had put rules protecting individual liberty into a constitution. They thus assented to the cultural significance of that act, namely, that their rules were to be viewed as statements in broad outline of lofty aspirations by which government authorities would be bound and that courts should seek to implement those aspirations through ordinary processes of legal reasoning. If I am wrong about that, the Constitution is a truly strange document. For example, had the framers truly "bargained" solely for the protection of political speech critical of the government, their mode of expressing that limited bargain—"Congress shall make no law . . . abridging the freedom of speech . . ."³³—would have been exceptionally perverse. Similarly, it is sometimes argued that the drafters and ratifiers of the fourteenth amendment intended to bargain solely for state recognition of the capacity of black people to make contracts and of the rights of black people to give evidence, to sue and be sued, and to receive police protection.³⁴ If so, their language—"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws"³⁵—is an oddly capacious way of putting their thought.

In sum, judges adhering to the Bork or Easterbrook versions of judicial restraint through ratification, that is, by their political theories of judicial restraint, may be self-disciplined in some senses. They may apply their theories with a high degree of craft, and they may adhere to them faithfully. On the other hand, they will enjoy a degree of discretion

32. Jaffa, *What Were the "Original Intentions" of the Framers of the Constitution of the United States?*, 10 U. PUGET SOUND L. REV. 351, 377-79 (1987).

33. U.S. CONST. amend. I.

34. R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 16-36 (1977).

35. U.S. CONST. amend. XIV, § 1.

in legal interpretation that is troubling, and their interpretations of particular rules may lead them to adjudication via understandings of those rules that are not based on any consensual interpretation. But these latter observations apply equally to all judges, restrained or activist. It is only in one particular sense that judges following Bork or Easterbrook are susceptible to an accusation of being uniquely undisciplined. If one believes that part of judicial self-discipline is faithfulness to a concept of judicial role consistent with some historically ratified political theory of the Constitution, then these judges are undisciplined. They have persuaded themselves of the merits of a theory of majoritarianism on which the Constitution does not rest.

2. Judge Posner

Judge Posner, like Judges Bork and Easterbrook, has advocated a result-oriented political theory of judicial restraint, but, unlike theirs, his conclusions are not based on an attempted grand theory either of politics generally or of adjudication. Indeed, to the extent Judge Posner's theory of adjudication is articulated in his writings on judicial restraint, his views echo conventional wisdom about judicial self-discipline. Judicial decisions, he argues, should be based on grounds that "can be stated truthfully in a form the judge could publicly avow without inviting virtually universal condemnation by professional opinion,"³⁶ and which the judge must be prepared to apply consistently among the grounds of decision stated in other cases.³⁷ Thus: "The element of will, of personal policy preference, is inescapable in the American judicial process; but the willful judge, the judge who makes will the dominant element of his decisionmaking, is properly reprobated."³⁸ To avoid reprobation: "Even in the open area [for discretionary decisionmaking,] 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."³⁹ As one might expect from the tone of these observations, the weightier parts of Judge Posner's case for restraint as nonintervention are more pragmatic and functionalist, and less sweeping than the arguments of Judges Bork and Easterbrook.

The version of judicial restraint Judge Posner advocates may be simply defined. He writes: "[T]here is an area in which a judge cannot decide cases simply by reference to the will of others—legislators, or the

36. R. POSNER, *supra* note 6, at 205.

37. *Id.*

38. *Id.* at 222.

39. *Id.*

judges who decided previous cases, or the authors of the Constitution.”⁴⁰ For that area, Judge Posner argues in favor of a rule that judges should decide cases in a way that reduces the power of courts vis-à-vis other sources of governmental power, legislative or executive. That is his preferred meaning of “judicial restraint.”⁴¹

Not counting the observation that judicial restraint of the kind he advocates would help to ease the federal workload, Judge Posner offers five other arguments in favor of this version of judicial restraint through ratification. I do not count the workload argument because, in order for such an argument to be persuasive, Posner’s principle of judicial restraint would have to be attractive on other grounds. One could as easily reduce the judicial workload by failing to enforce the antitrust laws or deciding cases by coin toss. The fact that any rule or practice eases the workload may be an appealing feature, but not one that could justify an otherwise unjustifiable rule or practice.

One of Judge Posner’s remaining arguments is a passing reference to the “democratic principle,”⁴² which, as I have argued above, does not prove anything. That politically accountable bodies enjoy primacy when making decisions within their constitutionally designated spheres does not at all undermine the primacy that courts enjoy within their constitutionally designated sphere. The contest is over the delineation of those spheres, and that contest cannot be resolved by any “democratic principle” that the Constitution embodies.

A second argument is a tautology and likewise proves nothing. Judge Posner argues that “judicial restraint,” as he defines it, is a preferable rule to “judicial activism” because no judge would openly avow judicial activism as a principle for deciding cases.⁴³ The trick with this argument is that Judge Posner never defines judicial activism. The only meaning that plausibly fits Judge Posner’s sentence is that no judge would openly avow one particularly silly philosophy of judicial activism, namely, courts should overturn decisions of nonjudicial authorities on the ground that judicial decisions are categorically better than nonjudicial decisions.⁴⁴ I suspect Judge Posner is right about what judges would avow, but his argument has nothing to do with the actual reasoning of any activist judge. The reason no one would avow the activist principle I

40. *Id.* at 206-07.

41. *Id.* at 207-10.

42. *Id.* at 274.

43. *Id.* at 215.

44. The activist judge tries “to enlarge the power of his court at the expense of other institutions of government.” *Id.* at 218.

believe Judge Posner is conjuring up is that I doubt whether any judge has ever consciously thought such a thing, much less based a decision on it. Activist judges do, however, defend rules that result in judicial intervention in nonjudicial policymaking for reasons other than a categorical preference for judicial over nonjudicial decisionmaking, and, within my observation, they seem as prepared as their politically more acquiescent colleagues to state their reasons publicly and to apply them consistently.⁴⁵ That no judge would say aloud that court decisions are categorically better than noncourt decisions does not prove it is sensible to think the reverse.

A third argument tries to make a utilitarian case for judicial restraint. Judge Posner states that, because of the age of the Constitution, in addition to the ordinary difficulties of interpretation, it is likely there will be some errors in deciding constitutional cases. He writes:

[W]e must decide which kind of error is more costly—the erroneous denial of the legislative will expressed in a statute (or in administrative or executive action thereunder) invalidated on constitutional grounds, or the erroneous denial of a constitutional right. I suggest the former—especially if interest-group legislation is only a fraction of all legislation. *It must be better* in general to thwart the desires of a small group seeking to get from the courts what, by definition, it was unable to get from the political branches than to thwart the will of the majority, even if not every statute embodies the will of the majority.⁴⁶

I am at a loss to know by what calculus Judge Posner justifies his italicized conclusion. At the very least, I would argue that Judge Posner's calculus is debatable; there is nothing about the calculus to suggest that a self-disciplined judge would or would not believe it. For example, at the respective times the Supreme Court decided *Plessy v. Ferguson*⁴⁷ and *Brown v. Board of Education*,⁴⁸ the precise meaning of the fourteenth amendment to black civil rights was uncertain. Assuming arguendo either decision might be mistaken, I think it patent that *Plessy* would constitute a more costly mistake than *Brown*. Similarly, when the Supreme Court decided *Goesaert v. Cleary*⁴⁹ and *Frontiero v. Richard-*

45. Judge Posner asserts that restrained judges, because they seek to limit personal value choice as a source of decisionmaking authority, tend to be more candid about the occasions when personal value choice is inexorable than activist judges, who, he asserts, seek to mask their personal value choices as the impersonal commands of the law. *Id.* at 218-20. He cites no evidence for this proposition, which is both a non sequitur as a matter of logic and dubious—to put it mildly—as an empirical proposition.

46. *Id.* at 273 (emphasis added).

47. 163 U.S. 537 (1896).

48. 347 U.S. 483 (1954).

49. 335 U.S. 464 (1948).

son,⁵⁰ the precise meaning of the fourteenth amendment for women's rights was uncertain. Again, assuming either decision might be mistaken, the costs of *Goesaert* strike me as notably greater than those of *Frontiero*. Such differing assessments suggest that either the utilitarian rhetoric in which Judge Posner speaks masks a calculus that cannot be performed at all, or that it can be performed, but the costs of rights denial are sometimes greater than the costs of rights recognition. In any event, the costs are highly contestable, and I see no reason why a self-disciplined judge would entertain a predisposition to any particular view of the relevant calculus.⁵¹

This leaves two arguments of Judge Posner's that should be of more concern to a judge who wants to be self-disciplined. One asserts—I think wrongly—a direct link between self-discipline and judicial restraint in its political sense. The other, in my judgment, threatens any such link.

Judge Posner tries to link the political sense of judicial restraint and the institutional sense of judicial restraint as self-discipline by arguing that judges who oppose the political choices of nonjudicial bodies frequently do so on the basis of personal conviction. He worries that "as the courts move deeper into subjects on which there is no ethical consensus, judicial activism in [this] form . . . [will become] ever more partisan and parochial, lawless, and finally reckless."⁵² In Posner's view, judges should discipline themselves to decide cases according to widely shared values, and such self-discipline should lead to deference to nonjudicial decisionmaking.

This argument, however, is unpersuasive. Judge Posner presumes that the values embodied in those nonjudicial acts that courts will review, whether legislative or executive, will be widely shared. He further assumes that the values embodied in judicial opinions overturning those acts will more likely be partisan and parochial than the values embodied in such disputed nonjudicial acts. These are, however, patent overgeneralizations. Public opinion seems more closely aligned, for example, with *Roe v. Wade*⁵³ than with anti-abortion legislation,⁵⁴ and more with the Supreme Court's reapportionment decisions⁵⁵ than with the legislative

50. 411 U.S. 677 (1973).

51. Among close cases that could arguably be decided for or against the claim of right at stake, the recent dispute that, to my intuition, best illustrates that the costs of "erroneous" rights denial may exceed the costs of "erroneous" rights recognition is *Bowers v. Hardwick*, 478 U.S. 186 (1986).

52. R. POSNER, *supra* note 6, at 215.

53. 410 U.S. 113 (1973).

54. Sussman, *Attitudes on Legalized Abortion Have Changed with the Times*, Wash. Post, Jan. 13, 1986, at 37 (nat'l weekly ed.).

55. *Wesberry v. Sanders*, 376 U.S. 1 (1964) (requiring one person, one vote apportionment in

apportionment schemes that the Court has overturned.⁵⁶ It is well known that legislation may embody the parochial views of a relatively few persons with enough at stake to campaign for their views, rather than the views of many more persons who each may have less at stake in the particular legislative act under review.⁵⁷ In such cases, the legislation is more partisan or parochial than the court that overturns it.

There is, moreover, another reason why the personal convictions by which a judge justifies a decision are unlikely to be parochial or idiosyncratic. The values at stake in adjudication do not typically present themselves in neatly opposed forms: the value of women's reproductive choice opposed to the value of fetal life, or the value of state aid to parochial education versus the value of religious neutrality in public funding. Cases typically involve a host of values, some long-term and some short-term, that all relevant parties acknowledge. What is disputed is not which value should "count," but which should be regarded as weightier in a particular factual context. A judicial invalidation of a nonjudicial decision will frequently be framed not in terms of some value stance that the judge, but not the legislature, respects, but rather in terms of values both agencies respect but weigh differently. And, typically, the judge will argue in favor of discounting the short-term values embodied in a political act on the basis of long-term political values that, in fact, may enjoy a broader consensus, and which are signaled by the Constitution.⁵⁸ For this reason, a judge's willingness to review the decisions of nonjudicial decisionmakers is not going to serve as an index of whether the judge is self-disciplined in the sense of deciding cases according to widely shared values. There is simply no necessary relationship between the two things.

The final argument to which Judge Posner alludes may be weightier than the others, but, in my view, it directly threatens to undermine the value of judicial self-discipline. Posner writes:

[I]t is the counsel of prudence for courts to yield to the dominant power when to do so does not deny a clear constitutional right. When in doubt, the democratic principle, reinforced by concern for maintaining the courts' political capital, should lead the courts to interpret governmental powers broadly, and rights against government narrowly.⁵⁹

congressional elections); *Reynolds v. Sims*, 377 U.S. 533 (1964) (requiring one person, one vote apportionment in state legislative elections).

56. G. GALLUP, *THE GALLUP POLL: PUBLIC OPINION 1935-1971*, at 1897-98, 2205-06 (1972).

57. The theses of the relevant public choice literature are encapsulated in W. ESKRIDGE, JR. & P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 46-56 (1988).

58. A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 24 (1975).

59. R. POSNER, *supra* note 6, at 273-74.

This argument, I believe, may be wrong empirically and is dangerous philosophically. On the empirical side, Peter Schuck has correctly observed, in a thoughtful recent article on the Supreme Court's review of partisan gerrymandering, that the Supreme Court's "capital" seems only to have gone up because of its willingness to intervene, on grounds however questionable, in a wide range of state and federal legislative decisions concerning the structure of political processes:

By almost any standard, especially a pragmatic political one, the Court has been extraordinarily successful as a governing institution in the public mind. It has managed to turn even the most parlous undertakings to good institutional account and to earn a high return on its precious endowment of moral capital.⁶⁰

It may thus be that, *contra* Posner, the Court enhances its political power by deciding at least some doubtful cases against "the politicians and the bureaucrats."⁶¹

What is at least as troubling, however, is the suggestion that a calculus of political acceptability—especially when that calculus is likely to be uncertain and subjective—should guide a judge in the elaboration of rights. There are, to be sure, hypothetical bad decisions that might incur political retribution, but these will frequently be objectionable on other grounds. A self-disciplined judge need worry more about sound, intellectually attractive decisions that might not get written because of a judge's fear of, say, losing the court's appropriations for computers, or even of being ignored. To cite classic examples, the Court's decision in *Korematsu*⁶² now seems ignominious, no matter how much political capital was conserved, and its decision in *United States v. Nixon*⁶³ seems laudable, no matter how risky.

B. Restraint by the Rule of Law

I have elaborated three political theories of judicial restraint, all of which counsel restraint in terms of ratifying political decisionmaking. I have argued that two are undisciplined in the sense that they are rooted in a normative theory of majoritarianism that cannot be persuasively traced to the authoritative law of the Constitution. A third, I argued, is based on institutional considerations that are either ill-founded or condu-

60. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1383 (1987) (footnote omitted).

61. *Id.* at 1380. On public confidence in the Court, see Barnum, *The Supreme Court and Public Opinion: Judicial Decision-Making in the Post-New Deal Period*, 47 J. POL. 652 (1985); Clymer, *Opinion Narrows Over High Court*, N.Y. Times, July 13, 1986, at A15, col. 1.

62. *Korematsu v. United States*, 323 U.S. 214 (1944).

63. 418 U.S. 683 (1974).

cive to a lack of discipline in the decision of cases. Can another theory do better?

Judge Posner points the way, I believe, in what he takes, no doubt, to be a wry passage. He writes:

Candor requires admitting that the judge's personal policy preferences or values play a role in the judicial process. This admission . . . [exposes] judges as people who exercise political power 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, the defender often adds, the fearless—carrying out of the commands of the Constitution, or the legislature, or a higher or a prior court.⁶⁴

This is a strange passage, in several respects. First, Judge Posner attributes to activist judges a claim that they are both “passive” and “fearless,” an odd rhetorical combination in this context.⁶⁵ Second, Judge Posner writes as if activist judges would deny, more often than would restrained judges, that judges exercise political power. That, I believe, is fanciful. Activist judges and scholars typically insist it is precisely because all judgments are exercises of political power that judges cannot be viewed as noninterventionist when they ratify constitutionally challenged governmental acts. Judgments that ratify, just like judgments that invalidate, change the situation being adjudicated, except they change the situation by legitimating the challenged act, rather than by tempering it.⁶⁶

What Judge Posner presumably has in mind is a frequent claim by judges (or by scholars writing about judges) that judges should feel constrained by a sound application of principle to make decisions that invalidate nonjudicial decisionmaking. This is, however, not a self-contradictory claim that judicial activism is its opposite. It is a perfectly coherent claim that a judge who is institutionally self-disciplined by a theory of principle in adjudication should accept a judicial role that is activist in the political sense. Such a theory does not categorically embrace the extension of judicial power as a good for its own sake, but accepts judicial invalidation of nonjudicial action when such a judgment is consistent with the best principled interpretation of the Constitution.

The legal philosopher who has gone farthest in articulating a politically activist theory of principled adjudication is Ronald Dworkin. A

64. R. POSNER, *supra* note 6, at 218.

65. One more readily associates the idea of “fearless passivity” with nonviolent resistance to the state—Gandhi and King spring most obviously to mind—rather than with any exercise of government power, and even civil disobedients would be unlikely to call themselves passive, except in an ironic sense.

66. See generally C. BLACK, JR., *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* (1960).

few sentences cannot do justice to the complexity of his thought, but at least the core of his theory is as follows: Constitutional cases require judges to adjudicate claims based on the best possible interpretation of the Constitution. The best interpretation is the one that shows the Constitution in its best light by offering the most morally appealing account of the applicable rules that succeeds in interpreting the Constitution as a coherent and integrated whole.⁶⁷

The possible tension between "restraint as ratification" and "rule of law" restraint appears dramatically in cases challenging the constitutionality of patronage—a practice of no small concern in the federal circuit that includes Chicago. In *Elrod v. Burns*,⁶⁸ the Supreme Court held that the discharge of an employee based on partisan affiliation violates the first amendment unless partisan affiliation is, in essence, a qualification for the likely sound performance of the job at issue. This decision is doubly distressing to the politically restrained judge. Not only does *Elrod* overrule the political decision to permit patronage to be a principle of civil service management, at least in the firing context, but the political decision at stake is itself the decision that government should be organized on a more partisan basis.

In response, the "rule of law" judge, of course, would assert that the justification for depriving a civil servant of a job, solely for reasons of partisan affiliation unconnected to job performance, is no weightier than justifications for other forms of politically motivated disadvantage that the Court had previously invalidated. But a comprehensive response might also include an originalist argument. The text (and presumably the history) of the first amendment gives no unambiguous signal that the threat of government job loss was an abuse the framers recognized expressly as within the purview of that amendment. Nonetheless, it seems incontrovertible that the practice of patronage discharge is at odds with the meritocratic view of politics that the founding generation shared⁶⁹ and which is signaled, for example, in the structure of the electoral college.⁷⁰ The institution of patronage in the federal government by Andrew Jackson was, in effect, a revolt against the original vision of government.⁷¹ Thus, on grounds of both history and precedent, defend-

67. See generally R. DWORKIN, *LAW'S EMPIRE* (1986).

68. 427 U.S. 347 (1976).

69. R. VETTERLI & G. BRYNER, *IN SEARCH OF THE REPUBLIC: PUBLIC VIRTUE AND THE ROOTS OF AMERICAN GOVERNMENT* 162-94 (1987).

70. U.S. CONST. art. II, § 1, cls. 2-3.

71. A. SCHLESINGER, *THE AGE OF JACKSON* 45-47 (1945).

ers of *Elrod* may lay claim to a more disciplined and, in that sense, a more restrained view of the Constitution.

Although it may not be as evident as with the Bork and Easterbrook theories, the "rule of law" approach is oriented not only to process, but also to results. The call to principle might be answered with principles that result in few occasions to second-guess the judgments of nonjudicial government decisionmakers. The likelihood of this result, however, is narrow. Just as Tocqueville divined the inexorable progress of equality,⁷² claims to fair and equal treatment must inevitably continue to expand the category of claimants entitled to protection. Over time, the exclusion of groups from successful claims will seem less defensible in principle, and more simply the by-product of inertia—an unacceptable decisional criterion.⁷³

As I noted earlier, theories like Dworkin's are frequently attacked on the grounds that they promote adjudication pursuant to values as to which social consensus may not yet exist and license significant discretion in the interpretive enterprise. It is doubtful, however, that any other theory of adjudication avoids these difficulties. Further, in some cases—*Baker v. Carr*,⁷⁴ for example—adjudication under the Dworkin model may well be premised on consensus values; and in others—such as *Brown v. Board of Education*⁷⁵—a Dworkinian Court may promote a consensus that does not yet exist, but should.

Whether a judge follows Bork or Dworkin, the appeal the judge makes in arguing that his or her role is disciplined is typically an appeal to reason and to craft. The judge admits the exercise of discretion, but asserts care in the identification of relevant interpretive materials, open-mindedness in the consideration of arguments concerning inferences to be drawn from those materials, and a willingness to defend the final decision in a written form that is subject to the professional scrutiny of scholars, lawyers, and fellow judges.⁷⁶ Standards of craft can serve equally well to discipline good Dworkinian judges or faithful Borkian judges. In their allegiance to craft, all good judges are "restrained."

There is a sense, however, in which I believe a principled "rule of law" judge can claim to be self-disciplined which does not apply to a judge who, on the ground of majoritarianism, adopts a political theory of

72. 1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 6-7 (P. Bradley ed. 1945).

73. This theme is part of a work-in-progress on the ideology of the Burger Court, tentatively called P. Shane, *Social Integration and the Ideology of the Supreme Court* (unpublished manuscript).

74. 369 U.S. 186 (1962).

75. 347 U.S. 483 (1954).

76. See generally Fiss, *Objectivity and Interpretation*, 34 *STAN. L. REV.* 739 (1982).

restraint through ratification. That is, the principled judge can make a more persuasive claim to be adhering to a view of the constitutional law enterprise that is embodied in the Constitution itself and embraced by the historically dominant tradition of constitutional interpretation.

There is no one way to describe the view of constitutional law I have in mind, but the word I use for it is "aspirationalism"—viewing the Constitution as a signal of the kind of government under which we would like to live, and interpreting that Constitution over time to reach better approximations of that aspiration.⁷⁷ This vision treats as essential to constitutional understanding the broad normative purposes that the Constitution invokes: "to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."⁷⁸ To use John Marshall's words, those purposes are vindicated by remembering "it is *a constitution* we are expounding,"⁷⁹ that in a constitution, "only its great outlines should be marked,"⁸⁰ and that our constitution was "intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."⁸¹ The qualification to Marshall's words that commentators sometimes add—that he was being expansive in the inference of congressional powers, not in the definition of individual rights⁸²—is ahistorical. To Marshall's generation, the allocation of governmental powers was as essential as any other feature of the Constitution to the preservation of liberty. His words apply appropriately to the entire Constitution.

Aspirationalism is not tantamount to regarding the Constitution as perfect, or perfectible through ingenious reading. Conventional understandings of the document's language, history, and structure make it extremely unlikely, for example, that the text, unless amended, will be treated by courts as commanding a major degree of redistribution of wealth.⁸³ Aspirationalism does insist, however, that new or evolving understandings of the Constitution may not require formal amendment for

77. Although I believe the "alism" in aspirationalism may be original, my focus on aspiration as a key to interpretation is largely influenced by having read in draft part of a newly published work by Professor Michael Perry. M. PERRY, *MORALITY, POLITICS, AND LAW* (1988). I would like to credit this source of inspiration without suggesting that our analyses of constitutional interpretation are necessarily congruent or that Professor Perry deserves blame for any misuse I have made of his insights.

78. U.S. CONST. preamble.

79. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

80. *Id.*

81. *Id.* at 415 (emphasis original).

82. *E.g.*, M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 33-34 (1982).

83. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917, 924-27 (1986).

their implementation. Cultural change, that is change in social understanding, may make certain reasoned arguments compelling to later generations that earlier generations did not foresee.

Aspirationalism provides a way of viewing the Constitution that is morally more appealing than the lens of majoritarianism or any hard version of pragmatism. Yet, judges who agree with this premise would not be entitled on that account to regard themselves as more disciplined than adherents of the theories of Judges Bork, Easterbrook, or Posner. The claim of *discipline* stems from the argument that aspirationalism is not merely the better constitutional view, but rather that it has been ratified by history, that it is the dominant and conventional constitutional tradition. It is because aspirationalists show a greater respect for convention in this particular way that they can plausibly insist that they are truly "restrained."

I assert that aspirationalism is the dominant tradition for two reasons. First, to the degree it is possible to ascribe any ideology to a huge body of work performed over two centuries by a collegial court with changing membership, aspirationalism of some sort is among the most readily perceptible recurring themes. This is so, although the Court's aspirations for itself and for the nation have, of course, varied.⁸⁴

Second, the prevalence of aspirationalism as an underlying set of assumptions for constitutional interpretation helps notably to explain the Constitution's enduring strength. If we assess the impact of the Constitution on our national development, we could hardly assert that the Constitution has limited the role of politics or struggles for power in our governance. The Constitution has succeeded, however, in dramatically transforming our politics so as to encourage the political avowal of principle, and to discourage the open pursuit of "an older politics based on the pursuit of glory, honor, conquest, and . . . religious truth."⁸⁵ It insists that ephemeral compromises must not be allowed to compromise longer-term values. It is precisely because the Constitution is general, and often vague, in setting forth enduring values and principles that it has successfully provided a binding and unifying ground for political argument for so long. Aspirationalism renders comprehensible both unsuccessful movements, such as radical antislavery constitutionalism

84. I regard the Marshall Court's aspirational nationalism, the Taney Court's aspirational industrialism, and the Warren Court's aspirational egalitarianism as all threads of the common tradition. I do not mean to suggest that all aspirational constitutional visions are, based on their aspirational character alone, equally laudatory.

85. Belz, *Constitutionalism and the American Founding*, in 2 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 480, 489 (L. Levy, K. Karst & D. Mahoney eds. 1986).

before the Civil War or (as yet) the movement to "discover" constitutional welfare rights, as well as successful drives such as the effort to delegitimize racial discrimination in the public schools or to locate in the fourteenth amendment a fairly robust antidiscrimination protection for women. Only rarely has any group felt compelled to repudiate the Constitution as an appropriate framework for political action and discourse.⁸⁶ This can only be because so many individuals and movements have regarded arguments for changed understandings of an unchanged Constitution to be both legitimate and potentially successful.

I also believe, for two reasons, that aspirationalism, not majoritarianism, will continue to be the dominant starting point for most conventional constitutional interpretation. First, it more effectively implements a robust conception of what it means to be governed by the rule of law. To a simple majoritarian, the rule of law is chiefly law by rules, namely, the rules made by the majority, typically as the majority would interpret them. Such a conception, however, provides little solace to a citizenry that is subjected daily to thousands of discretionary government decisions that cannot plausibly be described as tightly rule-bound. It seems a singularly unambitious view of what law can contribute to government accountability.

A richer "rule of law" tradition was beautifully expressed in a speech by Felix Frankfurter, commemorating John Marshall:

Law is not set above the government. It defines its orbit. But government is not law except insofar as law infuses government. This is not wordplaying. Also indispensable to government is ample scope for individual insight and imaginative origination by those entrusted with the public interest. If society is not to remain stagnant, there is need of action beyond uniformities found recurring in instances which sustain a generalization and demand its application. But law is not a code of fettering restraints, a litany of prohibitions and permissions. It is an enveloping and permeating habituation of behavior, reflecting the counsels of reason on the part of those entrusted with power in reconciling the pressures of conflicting interests. Once we conceive of "the rule of law" as embracing the whole range of presuppositions on which government is conducted . . . the relevant question is not, has it been achieved, but, is it conscientiously and systematically pursued.⁸⁷

Ironically, Frankfurter might have been reluctant, given his own version of judicial restraint, to group judges among those for whom "individual insight and imaginative origination by those entrusted with the public interest" was "indispensable." Any such reluctance, however, would

86. *Id.* at 488.

87. Frankfurter, *Address: John Marshall and the Judicial Function*, in *GOVERNMENT UNDER LAW* 6, 28 (A. Sutherland ed. 1956).

have been misplaced. Judges, too, help govern, and can contribute to governance most importantly by pursuing the rule of law through the "counsels of reason."⁸⁸

Finally, aspirationalism gives a better account of the complexity of the Constitution than does majoritarianism or any kind of pure formalism. It is plain that the Constitution is not a purely majoritarian document, even though elite control over the elected branches of government has been greatly eroded. Thus, majoritarians are typically forced to argue either that majoritarianism is still the Constitution's "core" concept, and that departures from majoritarianism are the exception, or that "popular control" is the core concept, and that such control has become increasingly majoritarian.

In fact, however, nothing in the Constitution signals that the way in which the House of Representatives represents our political will is more central, in any respect, than the way in which the Senate represents our political will, or the Presidency, or, for that matter, the courts. If the Constitution makes a core statement about representation, it would seem most clearly to be that the protection of liberty requires a balance among different structures that represent our interests differently. Only the truth of this conviction could justify rendering the structure of the Constitution invulnerable to mere majority disapproval.

Seen in this light, the courts represent the interests of the people, as do the other branches, but in a different way. They represent our interests by giving voice to long-term values, and by policing the boundaries of individual right and collective authority in a principled fashion. Relative independence from electoral pressure suits them best to this task, just as the structure of the Senate suits it best to give voice to state interests. This independence is not an exception to a general principle, but a critical illustration of that principle.

Judge Posner, in light of the passage from his book that I quoted earlier, would surely view this analysis as unpersuasive, and perhaps also as disingenuous. I have described a version of judicial restraint in the sense of self-discipline that "constrains" judges to favor principle over deference to nonjudicial bodies, and which binds them to fidelity to a tradition in which the meaning of the Constitution is never fixed. A "rule of law" conception of judicial restraint is anomalous, however, only if one insists—as do Posner and Bork—that the only meaningful judicial

88. For a fuller exploration of the relationship between a robust conception of the rule of law and interpretive practice among government lawyers, see Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461, 484-501 (1987).

restraint is one that seeks, in doubtful cases, to reduce the power of courts. My argument is that neither abnegation nor the pursuit of power for its own sake follows logically from the self-discipline ideal. What follows most logically is that courts should adhere to a rule of law ideal that sanctions, where principle so dictates, judicial displacement of non-judicial decisions.

II. REMEDIES AND RESTRAINT

A. *The Inadequacy of Principle to Link Right and Remedy*

Rights interpretation, of course, has hardly provided the exclusive terrain for debates over appropriate judicial role. The rhetoric of restraint versus activism has also loomed large in discussions of remedial process. One might expect the debates over rights and remedies to be redundant, as they would be if there were some formulaic or conventional relationship between right and remedy so that a pronouncement of the right would produce wholly predictable results for remedial design. Such, however, has not been the case. Over the last several decades, the principled interpretation of rights has led to an expansion of their scope so that rights are not always neatly translatable into conventionally defined remedies. This is most notably the case in so-called "institutional suits," the core of what has been called the "new public law litigation."⁸⁹

Numerous commentators have identified and discussed various features of the new public law litigation that differentiate such litigation from more traditional adjudication in which "right and remedy are linked in a close, mutually defining logical relationship." As Professor Chayes wrote, the newer litigation is characterized by a relatively amorphous structure with respect to both the parties involved and the matters in dispute.⁹⁰ The predominant concern of plaintiffs is to shape the future conduct of a challenged institution.⁹¹ Typically, the relief involved is intended to be corrective, not strictly compensatory.⁹² The process of remedial implementation may entail prolonged administrative involvement by a court.⁹³ These factors, in turn, raise a host of issues profoundly important to courts and scholars, including concerns about adjudication as a suitable forum for exposing all interests at stake in the remedial pro-

89. The now-classic exposition of the new litigation is Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

90. *Id.* at 1284.

91. *Id.* at 1294-95.

92. *Id.* at 1292-96.

93. *Id.* at 1300-02.

cess,⁹⁴ the competence of courts to make the kinds of predictive and policy-laden judgments involved in institutional remedies, the appropriateness of extensive judicial supervision of the discretionary functions of nonjudicial institutions, and the impact of institutional remedies on resource allocation decisions by state and local legislative and administrative authorities.⁹⁵

The point I wish to emphasize here, however, is that the character of the remedial process in institutional lawsuits poses an extraordinary dilemma for the self-disciplined judge—especially perhaps, but not exclusively, for a judge who is faithful to the “rule of law” ideal of principled adjudication I have described above. The dilemma arises in seeking to identify a remedial goal that affords some discipline to the judge’s exercise of discretion that is at all comparable to the discipline that is imposed by the search for legal principle in the rights-interpretation process. I wish to describe that dilemma first in general terms for the “rule of law” judge, and then explain why it is shared to some degree by all judges, regardless of the political orientation of their theories of rights interpretation.

A judge who attempts to be self-disciplined by the “command” of principle will follow the logic of principle in determining a violation of constitutional right. Having found a rights violation, the judge must then proceed to translate that conclusion into some remedial prescription. For this task, the judge needs a theory of remedial design that links the understanding of rights to some measure of the remedy’s appropriate scope.

One such possible theory of remedial scope would describe the appropriate remedy as “the maximum vindication of the right.”⁹⁶ That is an intuitively appealing formulation of what faithfulness to principle means. That formula, however, poses several difficult questions. What the vindication of a right entails is not always clear. Vindication could mean compensation—restoring the victim as much as possible to the situation the plaintiff would have enjoyed absent the denial of right. This often, however, appears impossible. The denial of right may have been only one of a number of inseparable factors victimizing the plaintiff, the most critical of which the court cannot redress. The precise effects of a denial of right on a particular plaintiff may be unknowable. The factors involved in making the victim whole may be beyond the court’s control.

94. *Id.* at 1310-13.

95. See generally D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977).

96. Gewirtz, *Remedies and Resistance*, 92 *YALE L.J.* 585, 591 (1983), uses the term “rights maximizing” for this idea.

Moreover, in simply defining the compensatory agenda, there may be considerable controversy as to which negative impacts on the plaintiff should be judicially cognizable, precisely because the recognition of certain intangible or unmeasurable harms may leave the court without guidance as to the appropriate remedial tools.⁹⁷

I have elsewhere pursued these problems at length with respect to school desegregation remedies.⁹⁸ The Supreme Court has repeatedly held that the goal of school desegregation remedies is to restore victims of intentional segregation to the position they would have enjoyed had the intentional segregation not occurred. Great ambiguity, however, surrounds the delimitation of that "original position." Some opinions speak as if the relevant status quo ante is only the pattern of student assignments. Under this view, the remedial goal is simply to distribute students to schools according to some pattern of attendance that would have characterized the culpable district absent intentional segregation. To think this pattern is discernible or that courts have done no more than to try to approximate that pattern in unlawfully segregated districts would, however, be delusive. Having examined the attendance pattern theory of the "original position," as well as other theories conventionally associated with the school desegregation cases, my conclusion was that the Supreme Court's decisions could best be explained as follows: Courts should understand the goal of restoring the plaintiffs to an original position untainted by intentional segregation as the goal of restoring to the victims of segregation a justifiable confidence in the fair governance of their school systems.⁹⁹ Such an understanding of the measure of harm to be remedied in a school case would, I argued, both make sense of the actual results of most Supreme Court decisions and offer the most appealing account of what courts should be doing. My purpose in restating this thesis here is not again to defend it, but to highlight the uncertainty that this inquiry into remedial scope entails, and the unavoidability of the inquiry. It is also obvious that once a judge determines the kinds of harm that deserve to be remedied, difficult problems loom in deciding what remedial measures would actually relieve the identified harms, not to mention questions as to which would do so maximally.

Besides problems in identifying those aspects of a right that are to be vindicated and linking particular remedial measures instrumentally to the harms identified, courts face another profound problem with the

97. Shane, *School Desegregation Remedies and the Fair Governance of Schools*, 132 U. PA. L. REV. 1041, 1044-49 (1984).

98. See generally *id.*

99. *Id.* at 1049-62, 1077-87.

rights maximization approach. They are deeply aware that the maximum vindication of right may compete with other legitimate social interests.¹⁰⁰ Such interest balancing, whether implicit or explicit, is often criticized, as in the case of the Supreme Court's delay in ordering the actual integration of public schools by race.¹⁰¹ In some cases, a court may defend remedial delay (rightly or wrongly) as necessary for the maximum vindication of right—because the maximum vindication of right cannot be accomplished without remedial steps that require planning, review, and staged implementation. In some cases, however, such a justification for delay is not available. A pointed example occurs in prisoners' "conditions of confinement" suits. A violation of the constitutional right to freedom from cruel and unusual punishment may be maximally protected by immediate release. While the threat of release is often used to induce state authorities to correct unconstitutional conditions, release is never the remedy of first resort. This can only be because courts recognize a proper place in the remedial process for balancing remedial interests against other legitimate social concerns.¹⁰² Yet, what these concerns comprise and the weight they should enjoy are notably discretionary decisions.

If the "maximum vindication of right" does not serve as the principled judge's self-disciplining goal, the "rule of law" judge must seek an alternative approach that will afford some similarly objective stance to discipline the judge in remedial design. As an alternative, the principled judge might prefer to adopt "the most effective remedy that limits the court to a traditional adjudicative role." By a "traditional adjudicative role," I mean a role that limits the judge to assessing, through conventional legal reasoning, the degree to which a particular set of facts—for example, the elements of a proposed remedy—meets some preexisting legal standard. Such a stance, it is clear, has led to such routine practices as requiring defendants in institutional suits to propose the first remedial plans, in the hope that the reviewing court's role may be limited to adjudicating whether the defendant's plan would produce a constitutionally acceptable result.¹⁰³ This practice, however, is of notably little utility in two large categories of cases—cases involving uncooperative defendants, and cases involving defendants whose compliance depends on the behav-

100. Gewirtz, *supra* note 96, at 594-95.

101. *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

102. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 658-60, 683-88 (1982).

103. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

ior of recalcitrant government authorities, such as state legislatures, that may be largely beyond the court's control.

The uncooperative defendant frustrates the "rule of law" judge, first, by not supplying any remedial plan remotely approaching constitutional adequacy. This leaves the judge essentially three options other than outright surrender. The first is attempting to coerce cooperation through contempt, a process that may well prove unavailing and which may only exacerbate tensions that make meaningful relief for the plaintiff more difficult to achieve. The second is acquiescing in whatever the plaintiff suggests as a remedy, a move that may obviously compromise interests other than the plaintiff's rights that the judge regards as implicated in the case. The third is taking the initiative in remedial design with as much help from the parties as possible, perhaps with the assistance of a master. This most likely option, however, must inevitably plunge the judge into policy decisions ordinarily within the defendant's decisionmaking discretion and thus seemingly away from the traditional adjudicative role.

Similar problems may be posed by a defendant willing to cooperate, but unable to comply with its own remedial ambitions because of a lack of cooperation from some other critical party, for example, the state legislature that funds the defendant's operations. An impasse may be reached in which the judge's options, again, are surrender, contempt, or the taking of initiative with respect to the implementation of steps that can overcome the impasse. The identification of such steps is likely to involve judgments that are more conspicuously value-laden and predictive than traditionally adjudicative, an uncomfortable posture for the "rule of law" judge.

B. The Inevitability of an Activist Remedial Role

Although I have sketched these dilemmas through the eyes of a judge determined to be faithful to principle, the desire of a "rule of law" judge to confine a court's remedial role to a process most resembling traditional adjudication marks a common ground with the "restraint through ratification" judges. The effort to preserve a judicial role that is most traditionally adjudicative would lead any judge, whether politically activist or restrained in the interpretation of rights, away from the supervision of a defendant institution's ordinarily discretionary policymaking.

That is not all, however, that Dworkinian and Posnerian judges will have in common at the remedial stage of lawsuits. Preserving a traditionally adjudicative role in the remedial process is a goal no judge can pursue with routine success, no matter what the judge's original predis-

position in the interpretation of rights. Once *any* judge of *any* philosophy encounters what the judge takes to be a rights violation, that judge faces the problems described above in connection with uncooperative or incapacitated defendants. In any such case, a judge can only retreat from the remedial process (a lawless option); resort to merely prohibitory injunctions and the contempt power (an option often unwelcome and perhaps inappropriate, especially if the defendant's resistance is dictated by factors beyond the defendant's control); or enter into a process of remedial design that is not traditionally adjudicative, but more predictive, policy laden and administrative. Thus, because even Borkian or Posnerian judges will sometimes discover institutional violations of right, they will sometimes have to cope with the threat that uncooperative defendants and a court's desire for remedial efficacy pose for the traditional judicial role.

There is yet another clear reason, however, why even politically restrained judges cannot avoid the difficult issues of institutional remedies. As noted above, Judge Posner's preference in uncertain constitutional cases is to avoid the remedial task by acquiescing in the decisionmaking of the defendant institution, and invoking a theory of deference to nonjudicial institutions to justify not finding a rights violation. But elected institutions may themselves undermine the logic of this decisionmaking.

One profound dilemma for politically restrained judges occurs when an elected legislature, say, Congress, creates a statutory cause of action essentially identical to a claim Judge Posner would have rejected under the unadorned Constitution. Any such federal statute represents a legislative delegation to the courts of Congress' remedial authority, a step that deprives courts of any majoritarian excuse for denying the existence of individual rights. Such delegations, however, bequeath to courts precisely the same problems of discretion unchanneled by principle that exist in constitutionally based lawsuits.

This is precisely the current situation in what are usually called "voting dilution" cases. In the wake of its early reapportionment cases, the Supreme Court faced a series of disputes over voting rights that involved, if anything, even more profound problems in the conceptualization of the rights at stake. These cases were challenges to electoral systems that respected the "one person, one vote" requirement of the reapportionment cases, but in which the plaintiffs asserted they had been unconstitutionally denied the opportunity of ever having an effective electoral voice. It is easy to see how this can occur. Imagine a 300-person town in which every voter, white or black, supports city council candidates only of his or her own race. Until now, the city has been

governed by a three-member city council, each member of which is elected from one of three one-hundred-person districts. As it happens, however, the black population of one district is about to reach majority level, and the white population of the city wants to keep the city council exclusively white. One obvious solution if the black population of the city as a whole is well under a majority is to abolish the districting scheme, and permit all three city councilors to be chosen at large by all of the city's voters. The resulting scheme respects the one person, one vote requirement, but, because of racial bloc voting, the black voting population has no voice in the electoral outcome.¹⁰⁴

The Supreme Court's first encounter with such a challenge, *Whitcomb v. Chavis*,¹⁰⁵ left the Court unpersuaded that any constitutional violation had occurred. Notably, however, the Court reached its result on the facts. The Court did not assert the nonjusticiability of such a claim. Soon thereafter, faced with facts the Court deemed more compelling in their portrayal of a system that victimized voters based on race, the Court upheld voting dilution challenges brought by black and Latino plaintiffs.¹⁰⁶ That decision, however, prompted considerable uncertainty among courts as to how to differentiate an unconstitutional vote dilution scheme from an "innocent" scheme in which it just happened that racial minorities always lost elections.¹⁰⁷

A plurality of the Court eventually tried to cabin the problem by proclaiming that election schemes had an unconstitutionally dilutive effect only if they were intentionally discriminatory¹⁰⁸—a formulation that, although not without obvious problems, seemed to fit the vote dilution cases to the general doctrine the Court had evolved for equal protection cases since *Washington v. Davis*.¹⁰⁹ The plurality held not only that the constitutional protection against voting discrimination operated exclusively against intentional discrimination, but also that Congress, in prohibiting racial discrimination in voting through section 2 of the Voting Rights Act,¹¹⁰ had gone no further.

104. For a thorough exposition of the multiple meanings of "one person, one vote," see Still, *Political Equality and Election Systems*, 91 ETHICS 375 (1981).

105. 403 U.S. 124 (1971).

106. *White v. Regester*, 412 U.S. 755 (1973).

107. The most notable lower court attempt to implement *White v. Regester* was *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd sub nom.* *East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1976).

108. *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

109. 426 U.S. 229 (1976).

110. 42 U.S.C. § 1973 (1976).

Congress responded by amending the Voting Rights Act.¹¹¹ It provided that any scheme that "results in" an abridgement of the right to vote based on race would be unlawful.¹¹² The revised section 2 offered some guidance as to how to recognize this unlawful result, but—and here's the Posnerian's problem—it did not prescribe what to do about a violation once found.

Chicagoans got a taste of this remedial dilemma in *Ketchum v. City Council of Chicago*.¹¹³ The litigation began with a challenge by black and Hispanic voters to a redrawing of Chicago's aldermanic districts that increased the number of districts with a majority of white, non-Hispanic voters. The district court found for plaintiffs under the Voting Rights Act, but limited its initial relief to ordering the map redrawn to give black and Hispanic voters the same number of districts in which they had previously enjoyed fifty percent or more of the voting population.¹¹⁴

The court of appeals found the remedy insufficient. The plan was deemed to fall short of the proper remedial objective, that is, to "provide minorities with 'a realistic opportunity to elect officials of their choice.'"¹¹⁵ It is clear, of course, that what it takes to achieve such a standard involves a fair amount of speculation. Among the issues the court considered was how great a majority the plaintiff group needed to have in any district to have its "realistic opportunity" of electoral success;¹¹⁶ whether it was permissible for the city to reduce the size of the voting majority a plaintiff group had held in a particular ward;¹¹⁷ and whether voting age population or total population provided the appropriate measure for districting.¹¹⁸ It is beside the point here to analyze the court's treatment of these issues. I wish to note only two things. First, these decisions plainly involve predictive and policy-laden judgments of a kind more commonly associated with politicians and political scientists than with judges. Second, these decisions seem plainly of the type Judge Posner would want to avoid at the threshold of the litigation through a narrow definition of the right against voting dilution. Congress, however, blocked that escape route. Its definition of the right at issue foreordained the court's policy-laden remedial role in this area.

111. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1982)).

112. *Id.* at § 3, 96 Stat. 131, 134 (codified as amended at 42 U.S.C. § 1973 (1982)).

113. 630 F. Supp. 551 (N.D. Ill. 1985), *on remand from Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984).

114. *Id.* at 553.

115. *Ketchum v. Byrne*, 740 F.2d 1398, 1410 (7th Cir. 1984) (citation omitted).

116. *Id.* at 1413-17.

117. *Id.* at 1417-18.

118. *Id.* at 1412-13.

There is a second, perhaps more subtle way in which a legislative body such as Congress may frustrate a politically restrained judge's desire to respect the discretion of nonjudicial institutions. Congress may, by creating a generous rule of standing, suggest a preference for the judicial decision of particular constitutional cases that, on prudential grounds, courts might otherwise prefer not to hear.

Chicagoans have had their taste of this dilemma as well. I noted above the Supreme Court's decision to protect many public employees from discharge based on political affiliation.¹¹⁹ That decision made inevitable the prospect that someone would challenge a public employer's refusal to hire persons based on political affiliation. That issue, in fact, was already percolating up in a case filed as *Shakman v. Democratic Organization of Cook County*.¹²⁰ *Shakman* was a challenge brought in 1969 by an independent candidate for the 1970 state constitutional convention and his supporters, alleging that the patronage practices of numerous defendants—that is, hiring and firing based on political affiliation, and coerced political activity on the job—burdened both the candidate's and the voters' rights to free association and to fair and equal participation in the political process.

The district court initially held *Shakman* nonjusticiable,¹²¹ a result that Judge Posner would presumably have endorsed given the then-uncertain state of all aspects of the law of patronage. The Seventh Circuit, however, reversed,¹²² prompting the negotiation of a consent decree in 1972 that resolved all but the hiring claims.¹²³ Seven more years of discovery led to extensive stipulations of fact on which cross-motions for summary judgment on the hiring issue were heard in 1979. The district court ruled in favor of the plaintiffs,¹²⁴ and four years later, in 1983, issued a permanent injunction against patronage hiring in most public jobs offered by the defendant agencies.¹²⁵

It is notable that the district court recognized that the result in

119. See *supra* notes 68-70 and accompanying text.

120. 310 F. Supp. 1398 (N.D. Ill. 1969), *rev'd*, 435 F.2d 267 (7th Cir. 1970) (standing upheld), *cert. denied*, 402 U.S. 909 (1971); 356 F. Supp. 1241 (N.D. Ill. 1972) (upholding consent decree entered relieving local employees of compulsory political service); 533 F.2d 344 (7th Cir. 1976) (unsuccessful appeal from finding of civil contempt for violation of consent decree); 481 F. Supp. 1315 (N.D. Ill. 1979) (plaintiffs' motions for summary judgment granted based on stipulations of fact for remaining issues not settled by consent decree, and defendants not bound by decree); 569 F. Supp. 177 (N.D. Ill. 1983) (order entered prohibiting patronage hiring), *vacated sub nom.* *Shakman v. Dunne*, 829 F.2d 1387 (7th Cir. 1987) (no standing to litigate hiring practice issues).

121. *Shakman*, 310 F. Supp. at 1398.

122. 435 F.2d 267 (7th Cir. 1970), *cert. denied*, 402 U.S. 909 (1971).

123. 356 F. Supp. 1241 (N.D. Ill. 1972).

124. 481 F. Supp. 1315 (N.D. Ill. 1979).

125. 569 F. Supp. 177 (N.D. Ill. 1983).

Elrod did not command the result it ordered in *Shakman*.¹²⁶ Although it found "no question that the rationale of the *Elrod* plurality opinion [was] applicable"¹²⁷ to *Shakman*, *Elrod* had been litigated by a discharged employee, while *Shakman* asserted a distinct interest of candidates and voters. It was just on this basis that the Seventh Circuit, in 1987, vacated the injunction reached after fourteen years of litigation.¹²⁸ It concluded that candidates and voters lacked standing to challenge the patronage hiring practices at issue in *Shakman*. The court concluded that plaintiffs had not shown a sufficiently direct connection between patronage hiring practices and any electoral burden or injury to permit them to litigate the constitutionality of those practices.¹²⁹

In Judge Posner's lexicon, this final chapter of *Shakman* would count as a judicially restrained decision. In an area of legal uncertainty, the court ruled in a way that limited judicial power over some nonjudicial institutions, that is, agencies of several Illinois county governments. But these institutions, it can be argued, were not the only nonjudicial institutions to have addressed the dispute at hand. Congress may legislate, not only with respect to the substance of individual rights cases, but also with respect to procedural issues, such as standing. In *Shakman*, it could be argued that legislation enacted by Congress indicated a political decision to recognize standing generously—a political decision that the Seventh Circuit ignored in an unrestrained fashion.¹³⁰

To see how this might be so, it is necessary to reflect on Supreme Court decisions demonstrating that judicial discretion exists in determining the degree of connectedness between a defendant's alleged acts and a plaintiff's alleged injury that is sufficient to confer standing. In *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*,¹³¹ the district court had denied the government's motion for summary judgment regarding standing on an obviously ambitious set of asserted causal connections between the challenged government conduct and the plaintiff students' asserted injury. Specifically, the students al-

126. 481 F. Supp. at 1327-29.

127. *Id.* at 1327.

128. *Shakman v. Dunne*, 829 F.2d 1387 (7th Cir. 1987).

129. *Id.* at 1397-98.

130. Professor Redish has forcefully argued against any necessary correlation between Judge Posner's view of judicial restraint and docket reduction, precisely because conscientious restraint of the kind Posner advocates might lead courts to defer to legislative intentions to treat plaintiffs generously. Redish states that the Supreme Court has reduced the federal docket in part by judge-made abstention doctrines that "directly contravene unambiguous congressional directives, contained in relevant jurisdictional statutes." Redish, Book Review, 85 COLUM. L. REV. 1378, 1399 (1985) (reviewing R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985)).

131. 412 U.S. 669 (1973).

leged that the disputed approval of increased rail freight rates by the Interstate Commerce Commission would render it more costly for beverage bottlers to use recyclable containers, with the consequence that more nonrecyclable containers would be used in the State of Washington, and the further consequence that areas frequented by the students would be subjected to increased litter. Three years later, however, the Court denied standing to a welfare rights group to challenge an IRS decision which removed the requirement that charitable hospitals serve the poor without payment on the ground that it was simply "speculative" whether the imposition of a more generous service requirement would prompt hospitals to serve the poor or to forego tax treatment as charities.¹³² However speculative the causal chain in the latter case might have been, surely the link between the IRS policy change and a decreasing availability of free health care for the poor could not be viewed as more dubious than the connection between ICC-approved freight rates and litter in Washington!¹³³

If I am correct that this causality judgment is discretionary, then Congress may legislate as to the proper use of such discretion pursuant to its remedial powers under the Constitution.¹³⁴ Specifically, Congress, in enacting the Civil Rights Act of 1871 and its accompanying jurisdictional provisions,¹³⁵ might be read as having expressed a legislative judgment in favor of granting standing in fourteenth amendment cases whenever a causal connection between act and injury is plausible, resolving threshold procedural doubts in favor of plaintiffs. If so, then the exercise of judicial discretion to deny standing in a federal case against state officials, based on a desire to restrain the court in its supervision of state political decisionmaking, would be an unrestrained circumvention of political decisionmaking in Congress.

I do not mean to argue here that my reading of the Civil Rights Act of 1871 is necessarily correct, or that the Seventh Circuit's final word on *Shakman* could not be squared with the language of the relevant procedural statutes or the precedents interpreting them. I am simply using this issue as it might have been posed in *Shakman* to point out that Con-

132. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976).

133. See also *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59 (1978) (standing granted to challenge statute providing limited liability for nuclear accidents on the ground that, without the act in force, financing would be unavailable for constructing a nuclear power plant, which, if built, would result in thermal pollution of nearby lakes, with resulting environmental and aesthetic damage).

134. See *Sierra Club v. Morton*, 405 U.S. 727, 731 n.3 (1972) (Congress may eliminate judge-created prudential limitations on standing); *Control Data Corp. v. Baldrige*, 655 F.2d 283, 291 n.13 (D.C. Cir. 1981), cert. denied, 454 U.S. 881 (1981) (same).

135. 42 U.S.C. §§ 1983, 1985, 1986 (1982); 28 U.S.C. § 1343 (1982).

gress has the capacity to make a political choice as to the appropriate role of courts, which may be embodied in procedural, as well as substantive statutes. When Congress does so, the judge who avoids the remedial exercise by invoking prudential—that is, judge-made—rules of standing is substituting judicial policymaking for the decisionmaking of Congress. That is not restraint. Therefore, conscientious Posnerian judges who perceive this point are likely, in at least some cases, to see themselves as disabled from backing away from the adjudication of rights and from the subsequent problems of remedy.

C. What Should Judges Do?

If my assessment is correct, all self-disciplined judges are destined to face some substantial anxiety about the exercise of remedial power. Judges faithful to principle will find numerous questions implicated in the remedial process on which general principles provide only modest guidance. Determinations as to the scope of cognizable injuries and the appropriate measures for relieving those injuries involve decisions that are conspicuously policy-laden and speculative, but they cannot be avoided. Similarly, judges faithful to a model of political restraint will likewise face these dilemmas, even if on fewer occasions. On some occasions, a violation of rights will be clear even if the remedy is not. On other occasions, Congress will have created a statutory cause of action that disables the judge from concluding that no rights violation exists. On yet other occasions, Congress may, through procedural statutes, dictate the exercise of judicial power that a politically restrained judge would otherwise prefer not to exercise.

How, then, should a self-disciplined judge behave in the remedial stage of a lawsuit? We have already seen that declaring the “maximum vindication of right” as the judicial goal may be inappropriate. Moreover, uncooperative or politically incapacitated defendants may frustrate a judge’s efforts to limit his or her own role in remedial design. In cases such as these, is there available to the judge any stance, any understanding of role, that permits the judge to justify his or her policy-laden, speculative, administrative orders as consistent with more than personal political preference?

I believe the most plausible stance for a “rule of law” judge is this: the judge should feel obligated to intervene as much as, but no more than, is necessary to create a justifiable confidence that the defendant institution will, henceforth, be responsive to the plaintiff’s claims of right. That is, the judge should regard plaintiffs as entitled to a fair ex-

pectation that their interests will be seriously and sympathetically weighed by the defendant institution in the context of future decisions that may affect the plaintiff's interests as those interests were affected in the immediate dispute. In a school desegregation case, that means building for plaintiffs a reasonable expectation in future nondiscrimination in the distribution of educational services.¹³⁶ In a mental health case, it means creating confidence in a hospital's decent respect for a patient's interests in liberty and dignity. This is another way of saying that the remedies should be geared to instill in defendant institutions a more robust allegiance to the rule of law, a commitment to future decisionmaking that respects legal compliance as a way of making sure that competing interests are accounted for, deliberated upon, and respected.

In general terms, it is possible to identify at least six components that might characterize an injunction aimed at the goal just described:¹³⁷

1. This injunction, like any injunction, should prohibit future violations of right of the kind adjudicated (prescriptive component);
2. The injunction should contain measures intended to correct disabilities inflicted on the plaintiffs through past deprivations of right (affirmative action, or corrective component);
3. The injunction should seek, if possible, to implicate groups other than the plaintiff group in the fate of the plaintiff group. Such measures would try to insure that institutional decisionmaking favorable to groups other than the plaintiffs will help plaintiffs as well, and that other groups help bear the costs of decisions made that disfavor plaintiffs' interests (integration component);
4. The injunction should promote incentives for decisions that weigh plaintiff interests sympathetically (incentives component);
5. The injunction should affect the structure of institutional decisionmaking to help insure that the plaintiffs' interests are adequately represented in future policymaking (structural component); and
6. The injunction should command some pattern for the future distribution of the defendant institution's resources in a way that helps assure fairer outcomes in the future (policy reform component).

It is plainly steps two through six that move beyond the most traditional conception of the judge's role, and an exhaustive treatment of each would require volumes. It may suffice to demonstrate what I have in

136. Shane, *supra* note 97, at 1077-87; *Keyes v. School Dist. No. 1*, 413 U.S. 189, 225-26 (1973) (Powell, J., concurring in part and dissenting in part).

137. This catalogue generalizes from the discussion of school desegregation decrees in Shane, *supra* note 97, at 1104-27.

mind, however, to explore these remedial possibilities through another difficult Chicago-based suit, the *Gautreaux* public housing litigation.¹³⁸

Gautreaux was filed in 1966 by black plaintiffs who were tenants in or applicants for public housing operated by the Chicago Housing Authority (CHA).¹³⁹ They alleged that the CHA and its officials deliberately chose sites for and assigned tenants to family public housing in a way that maintained a pattern of racial segregation in housing. State law required the CHA to obtain the approval of the Chicago City Council before the acquisition of any public housing site. The essence of plaintiffs' claim was that the CHA excluded blacks from existing predominantly white public housing projects, and would not pursue City Council approval for any new public housing project informally vetoed by the alderman in whose ward the project would be located. Because council members from predominantly white wards would veto projects with a predominantly black waiting list, the result was that such projects would be located only in predominantly black residential areas.¹⁴⁰ Together with the lawsuit against the CHA, the *Gautreaux* plaintiffs sued the U.S. Department of Housing and Urban Development (HUD), alleging that HUD was providing financial assistance unconstitutionally to CHA's racially discriminatory housing development efforts.

In the CHA suit, the district court awarded summary judgment to plaintiffs¹⁴¹ and, in 1969, it ordered the CHA to build its next 700 family units in predominantly white areas, and thereafter, to locate at least three-fourths of its projects in predominantly white areas of Cook County. CHA was likewise ordered to modify its site selection and tenant assignment procedures and to use its best efforts towards the rapid completion of new dwelling units.¹⁴² CHA did not appeal.

In the fifteen months following the district court's injunction against CHA, CHA submitted no new site proposals to the City Council. After a series of conferences with the parties, the district court ordered, on July

138. See generally Polikoff, *Gautreaux and Institutional Litigation*, 64 CHI.-KENT L. REV. 451 (1988) (Mr. Polikoff's article appears in this symposium issue). The reported decisions are: *Gautreaux v. Chicago Hous. Auth.*, 265 F. Supp. 582 (N.D. Ill. 1967); *Gautreaux v. Chicago Hous. Auth.*, 296 F. Supp. 907 (N.D. Ill. 1969); *Gautreaux v. Chicago Hous. Auth.*, 304 F. Supp. 736 (N.D. Ill. 1969); *Gautreaux v. Chicago Hous. Auth.*, 436 F.2d 306 (7th Cir. 1970), *cert. denied*, 402 U.S. 922 (1971); *Gautreaux v. Romney*, 448 F.2d 731 (7th Cir. 1971); *Gautreaux v. Romney*, 332 F. Supp. 366 (N.D. Ill. 1971), *rev'd*, 457 F.2d 124 (7th Cir. 1972); *Gautreaux v. Chicago Hous. Auth.*, 342 F. Supp. 827 (N.D. Ill. 1972), *aff'd sub nom. Gautreaux v. City of Chicago*, 480 F.2d 210 (7th Cir. 1973), *cert. denied*, 414 U.S. 1144 (1974); *Gautreaux v. Romney*, 363 F. Supp. 690 (N.D. Ill. 1973), *rev'd*, 503 F.2d 930 (7th Cir. 1974), *aff'd sub nom. Hills v. Gautreaux*, 425 U.S. 284 (1976).

139. 265 F. Supp. 582.

140. 296 F. Supp. 907, 908-13.

141. *Id.* at 907.

142. 304 F. Supp. 736.

20, 1970, that the CHA submit proposals for no fewer than 1500 new dwelling units to the city council no later than August 20, 1970.¹⁴³ The court of appeals upheld this modification of the original injunction.¹⁴⁴

At roughly the same time it was conferring with the parties on the CHA's delay, the district court dismissed the suit against HUD, on one count for lack of jurisdiction and, on the others, for failure to state a claim against HUD. The Seventh Circuit reversed, concluding that HUD's knowing acquiescence in an admittedly discriminatory housing program was unconstitutional and a violation of the Civil Rights Act of 1964.¹⁴⁵

On remand in the HUD suit, the district court enjoined HUD from providing Chicago with \$26 million the city was scheduled to receive, not under its public housing program, but under a Model Cities Program administered under a different statute. Although the Model Cities Program had not itself been implicated in plaintiffs' suit, the district court hoped to pressure Chicago into prompt compliance with the court's orders in the CHA litigation.¹⁴⁶ On appeal, the Seventh Circuit determined that this remedy, extending beyond the program actually litigated in *Gautreaux*, represented an abuse of the trial court's remedial discretion.¹⁴⁷

In March, 1971, the CHA finally submitted its new site housing proposals to the Chicago City Council, which, for over a year, simply refused to act on them. In response, the district court, in 1972, suspended the state law requirement that the CHA obtain City Council approval for new site location.¹⁴⁸ The Seventh Circuit affirmed in 1973.¹⁴⁹

Trying still to find effective relief, the district court, which had consolidated the HUD and CHA suits, ordered the defendants to devise a plan to remedy the effects of CHA's past discriminatory site selection procedures. Plaintiffs asked for relief covering the entire Chicago metropolitan area, which the district court denied in September, 1973, on the ground that the proven constitutional violations were limited to the city of Chicago. It limited its relief against HUD to a best efforts requirement that HUD cooperate in facilitating CHA compliance with its legal obligations.¹⁵⁰ The Seventh Circuit reversed the denial of metropolitan re-

143. 436 F.2d 306, 310-11.

144. *Id.* at 306.

145. 448 F.2d 731.

146. 332 F. Supp. 366.

147. 457 F.2d 124.

148. 342 F. Supp. 827.

149. 480 F.2d 210.

150. 363 F. Supp. 690.

lief, concluding that the record supported findings of suburban discrimination that would sustain relief crossing Chicago's boundaries.¹⁵¹ The Supreme Court affirmed the Seventh Circuit because both defendants, HUD and the CHA, had jurisdiction throughout the Chicago metropolitan area, and it was within the district court's discretion to order relief throughout their jurisdiction if necessary to overcome the pattern of racially discriminatory housing that HUD and the CHA had created.¹⁵²

By the time of the Supreme Court's decision, the plaintiffs had waited ten years without obtaining relief. As recounted by Alexander Polikoff, however, the plaintiffs' wait was hardly over.¹⁵³ Even after being relieved of the requirement for City Council approval, the CHA proceeded to develop housing at a remarkably slow pace. Despite the district court's obvious irritation with the CHA, it twice declined petitions for receivership. Ironically, receivership was imposed only in 1987 when the CHA, apparently now intent under Mayor Harold Washington to provide desegregated housing, committed millions of dollars to housing rehabilitation without seeking necessary approval from HUD in order to obtain reimbursement. It remains to be seen whether the CHA in receivership will become more successful.

It is quite possible to read into this tale a message of considerable pessimism. The district court was faced with several critical obstacles. First, it was dealing with a good—public housing—that, unlike public schooling or prisons, those in charge of Chicago politics did not have to provide for the security or well-being of their more powerful constituents. Second, the court could not itself create resources for the development of new housing. Third, a nominally compliant defendant was dependent on other institutions, most notably the Chicago City Council, which had no direct interest in the success of the court's remedial mission. In this situation, one might argue that plaintiffs needed a political, not a judicial victory, and that the late Mayor Harold Washington's electoral success, not an injunction, was the critical first element in any progress.

On the other hand, one wonders whether a court determined to take the injunctive approach I outlined earlier might have done better. The court's injunctions in *Gautreaux* did incorporate both the prescriptive

151. 503 F.2d 930.

152. 425 U.S. 284.

153. Polikoff, *supra* note 138, at 459-60.

component and the corrective component one would always predict. What of the other approaches?

First, it would have been wise, if possible, to try to tie the fate of white Chicagoans more closely to the interests of the black public housing applicants. Such was the court's effort in forcing HUD to withhold Chicago's Model Cities funds. What made this effort, in my view, most problematic was not the absence of discrimination in the Model Cities Program, but that the impact of the injunction might have been shouldered more by poor blacks in Chicago than by the City Council or by white Chicagoans. One wonders whether the injunction could have been more finely tuned, however, to avoid that consequence.

Additionally, other measures might have been possible. For example, had plaintiffs been willing to file such a suit, the court might have heard a damages action against the Chicago City Council, requiring the City Council to pay damages to every black tenant and public housing applicant whose needs could not yet be met because of the council's intransigence. Second, the court might have considered the relocation of some existing tenants to accomplish the desegregation of existing public housing. Third, the court might have required that vacancies in existing units be filled on a remedially race-conscious basis.

Greater incentives might have been developed to encourage integrated housing. First, the metropolitanization of relief, finally upheld in 1976, should have been ordered immediately to block white "escape" from the impact of desegregated housing. Additionally, the court might have pointed out to HUD ways in which the building of integrated housing might have qualified Chicago for additional federal funds for services enjoyed by all Chicagoans, such as public education.

If steps like these seemed impracticable or insufficient, the court might have considered steps that could have changed the political framework within which the CHA operated. For example, relief from the requirement of City Council approval for new housing should have come within three months of council inaction. The court might immediately have established a community advisory board to oversee the CHA's compliance with its remedial obligations. After no more than eighteen months to two years of inaction, the court should have located a receiver—perhaps the governor, perhaps minority members of the City Council—who might have leverage and inclination sufficient to change the CHA agenda.

I am unsure whether any of these steps might have overcome the resistance to effective relief in *Gautreaux*. My suspicion, however, is that

greater immersion in the facts of the case would only yield a yet more substantial catalogue of measures that could have produced some hope of desegregated public housing at a better rate. The Chicago federal courts, in traditionally restrained form, worried at every stage about preserving the maximum policy discretion of the defendants consistent with the implementation of a remedy. The court in the alternative sketched above, would worry less about the defendants' discretion, and more about their behavior modification. The approach is avowedly activist in the sense that the tendency of the steps suggested would be to supplant in the short-run the ordinarily discretionary decisionmaking of the CHA with the court's remedial agenda. On the other hand, had the court succeeded more notably in instilling a pattern of responsible legal compliance by the CHA, a litigation now spanning two decades might have ended sooner, and the chances of future constitutional violations might well have been reduced. This should count as a more powerful version of judicial restraint.

III. CONCLUSION

The government created by the Constitution of the United States believes itself to be, advertises itself as, and often tries to behave as a "government of laws." I have tried to sketch a vision of a government of laws in which self-disciplined judges strive to vindicate that ideal through principled interpretation in the adjudication of rights.

Because conscientious judicial allegiance to such an ideal provides a defensible scheme for sorting out permissible from impermissible considerations in rendering constitutional judgments on the scope of rights, judges following that ideal are "restrained" in the institutional sense, even if their judgments intrude on the political judgments of legislators and administrators. An appeal to interpretive principle does not help much, however, in restraining a judge engaged in the process of remediation. Although principle may predispose judges generally towards some remedial choices over others, the precise design of remedies in particular cases is too context-specific, too laden with discretion, too necessarily fraught with independent value judgment to be thought closely tied to general principle alone.

In some cases, of course, the problem of remedial discretion will not loom very large. Defendants may be willing to comply with legal standards once pronounced, and may have the support, if they need it, of the relevant funding body, such as a state legislature. In any such case, the chances are greatest for injunctive relief negotiated between the parties,

to be reviewed by the district court only for sufficiency with the applicable legal standard. This scenario minimizes judicial supervision over ordinarily discretionary decisionmaking by the defendant, and maximizes for the court the utility of conventional legal reasoning—and of the court's traditional adjudicative stance—in playing its role adequately. In these cases, judges restrained either by fidelity to their ideal of the rule of law or by a theory of deference to nonjudicial decisionmaking will behave similarly. Neither is likely to perceive a crisis of legitimacy posed by the remedial process.

Harder cases, however, will persist. In those cases, I believe that courts disciplined by principle in the interpretation of rights should exercise remedial policy choice to help preserve the rule of law. That is, in cases calling for structural relief against political institutions, courts should adopt remedies most likely to enable the challenged institution to internalize legal norms more successfully in the future, and to operate more faithfully in accordance with a government of laws ideal. The conscientious pursuit of this task would also be a form of judicial self-discipline, although the consequences in many cases may be less acquiescent to the decisionmaking of nonjudicial institutions than politically restrained judges would prefer.

Of course, if I am right that my vision of remediation is a form of self-discipline, and, therefore, of "judicial restraint" in the institutional sense, it strongly suggests that attempts to usurp the "judicial restraint" label in politics solely for those who believe in "restraint through ratification" is misleading. The ideal of self-discipline does not itself justify any choice between restraint through ratification and rule of law restraint; that choice must rest on some other ideal. Noninterventionists argue typically that majoritarianism is the prior value. I argue, instead, for legality.