The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication

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THE ROLE OF A JUDGE IN MODERN SOCIETY: SOME REFLECTIONS ON CURRENT PRACTICE IN FEDERAL APPELLATE ADJUDICATION

HARRY T. EDWARDS*

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Judge Edwards wishes to acknowledge the invaluable collaborative efforts of William F. Fisher, III, in the preparation of initial drafts of this article. Mr. Fisher graduated from the Harvard Law School in 1982 and is presently a Ph.D. candidate in the Harvard Joint Degree Program in Law and the History of American Civilization. He served as a law clerk for Judge Edwards during 1982-83 and for Supreme Court Justice Thurgood Marshall during 1983-84. Following his Supreme Court clerkship, Mr. Fisher will join the faculty of the Harvard Law School.

Judge Edwards also wishes to acknowledge the extremely helpful research and editing efforts of Kit George Pierson during the final stages of the preparation of this paper. Mr. Pierson graduated from the University of Michigan Law School in 1983 and is presently serving as a law clerk for Judge Edwards. During 1984-85, he will serve as a law clerk for Chief Judge John Feikens of the United States District Court for the Eastern District of Michigan.
INTRODUCTION

In the past three decades, the activities of the federal judiciary have become increasingly controversial. Changes in the kinds of issues that have come before the courts and in the ways that judges have handled those disputes have provoked both vigorous arguments in the legal and lay communities and considerable self-scrutiny on the part of judges. In the past few years, these inquiries have given rise to a series of proposals for changes in the structure and jurisdiction of the federal courts, and discussion of the merits of various proposals has begun to take on a life of its own.

Over the course of my own career, I have watched the development of these controversies from the perspectives, successively, of law student, practicing attorney, law professor, and, now, appellate judge. After only four years on the bench, I lack sufficient experience to make definitive or final judgments on any of the issues that currently command popular and professional attention. I have, however, practiced the crafts of lawyering and judging long enough to have some tentative views on certain of these topics. Because I have discovered that my ideas sometimes differ from any of the currently contending positions, I am prompted to publish at this juncture.

In undertaking to write about "The Role of a Judge in Modern Society," I started with great caution, lest self-indulgence replace what I perceived to be legitimate motives for authorship. I put pen to paper to address issues that I believe to be of great importance; to satisfy my own intellectual curiosity; to salve a restlessness that I have felt over the many unsolved problems now confronting the legal profession; and to offer cer-

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1 I date the beginning of this turmoil by reference to the Supreme Court's decision in Brown v. Board of Educ., 347 U.S. 483 (1954). Controversy over the behavior of the federal judiciary of course preceded Brown. Indeed, in at least three previous eras in American history—the period immediately preceding and following the decision in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); the years following the decision in Scott v. Sanford, 60 U.S. (19 How.) 393 (1857) (the Dred Scott case); and the 1930s—the conduct of the Supreme Court and of the federal judiciary in general was the topic of even more intense discussion. Nevertheless, Brown and the decisions that followed in its wake seem to have precipitated a new kind (if not a new level) of controversy. See G. McDowell, Curbing the Courts: Responses to Judicial Activism, 1857-1981, at 21-34 (Oct. 1, 1981) (unpublished manuscript) (presented at American Enterprise Institute Conference on Judicial Power in the U.S.).
tain of my own preliminary judgments in the hope that they may contribute to the ongoing debates regarding the legal system in the United States. It should be understood, however, that these considerations merely explain why I am writing and do not purport to promise any grand scheme for the reform of our judicial system.

With the foregoing thoughts in mind, I will make no pretensions to sage pronouncements in dealing with the subject of "the role of a judge in modern society." Nevertheless, I feel no timidity in wrestling with this subject because I believe that it warrants a continuous, full and candid airing. We must, for example, consider that the life of a federal judge has changed in dramatic ways since the days when the likes of Chief Justice John Marshall, Justice Holmes, Justice Brandeis, Justice Frankfurter, Justice Cardozo and Judge Learned Hand were the dominant forces in the federal judiciary. These changes have many potential sources: expanding law school curriculums (that have likely affected the thinking of many judges); the use by lawyers of highly sophisticated technological systems for communication, record keeping, research, and drafting; the presence of more judges, more law clerks, more secretaries, more central staff attorneys, and an Administrative Office of the Courts, producing a recognizable "bureaucracy" within the federal judicial system; an enormously expanding caseload, both in the quantity of cases heard and the mix of substantive issues; and, possibly, some significant changes in the backgrounds and personal philosophies of the persons now serving as judges. Because of these events, and the possible effects that they have had on our system of justice, it seems to me reasonable to focus on the role of a judge in modern society. I find persuasive the argument that, at least with respect to certain ethical matters, the role of a judge remains (or should remain) constant throughout history. But since judges no longer function in settings that resemble the environs of Justice Holmes or Judge Learned Hand, it would be foolhardy to ignore this reality. In reflecting on the role of a judge, therefore, I will principally have in mind the working circumstances of jurists sitting on the federal appellate bench today.

In a recent article, I addressed one aspect of the complex of issues facing federal judges—the problems allegedly attendant upon the "bureaucratization" of the decisionmaking process at the appellate level.² The present paper considers a different set of questions: taking as given the current organization, jurisdiction, and caseload of the federal courts,³

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³ Consequently, beyond the scope of this article are many of the "hottest" topics regarding the activities of the federal judiciary: the desirability of creating a new court designed either to filter cases going to the Supreme Court or to resolve intercircuit conflicts; whether certain controversial remedies should be declared beyond the power of federal
how might appellate judges alter their habits and attitudes so as to perform better their allotted tasks and how might Congress alter its own practices so as to facilitate the refinement and more effective utilization of appellate adjudication?

The ensuing discussion of those topics is divided into three sections. Part I identifies and explicates the postulates of the analysis; it also describes a few salient features of modern federal appellate adjudication that must be considered in any critique of our judicial system. Part II advances four modest proposals for improvement in the "judicial function." Part III examines ways in which Congress might enable the appellate courts to do their job better.

I. DECIDING APPEALS: HOW THE CRAFT IS PRACTICED NOW

A. "The Judge as a Legislator"*

Appellate judges sometimes make law. Both participants in and observers of the judicial process have recognized this fact for many years. One might expect that today, more than a half-century after the Legal Realist movement, the phenomenon of the exercise of "judicial discretion" would have been so exhaustively studied as to merit no more than a passing reference in preparation for the examination of more controversial matters. That turns out not to be true. Not only does the activity of judicial lawmaking remain mysterious, but a surprisingly large number of people, both within and without the legal community, question its legitimacy in any form.7

It is certainly not my intent, in this article, to speak the last word on "judicial legislation." However, many of the suggestions made below con-

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5 See, e.g., id. at 113, 115, 166; J. FRANK, LAW AND THE MODERN MIND 357 n.4 (Anchor Books ed. 1963) (Austin referred to the "childish fiction" that judges never make law); Dewey, Logical Method and Law, 10 CORNELL L.Q. 17, 24 (1924); Traynor, La Rude Vita, La Dolce Giustizia; or Hard Cases Can Make Good Law, 29 U. Chi. L. Rev. 223, 234 (1962).

6 For representative "legal realist" studies of the role of "discretion" in adjudication, see, e.g., J. FRANK, supra note 5; Cohen, Transcendental Nonsense and the Functional Approach, 35 COLUM. L. REV. 809 (1935); Llewellyn, Some Realism About Realism—Responding to Dean Pound, 44 HARV. L. REV. 1222 (1931). Insightful secondary studies of the movement and its legacy include E. Purcell, The Crisis of Democratic Theory 74-94, 159-78 (1973); Fuller, American Legal Realism, 82 U. PA. L. REV. 429 (1934); Schlegel, American Legal Realism and Empirical Social Science: From the Yale Experience, 28 BUFFALO L. REV. 459 (1979).

cern ways in which judges might profitably conduct themselves when, in "doubtful cases," they are called upon to exercise the "sovereign preroga-
tive of choice."9 Accordingly, it seems incumbent upon me at least to summarize my notions regarding when, how, and why judges exercise dis-
cretion or—in the words of Justice Cardozo—act "creatively."9

To avoid misunderstanding—and to enable me to skirt the most tan-
gled of the jurisprudential thickets in this field—I would make clear that
I mean to venture no opinion on two questions. First, I will offer no view
on the extent to which it is theoretically possible to eliminate discretion
in the adjudicatory process.10 Second, I will state no opinion as to the
degree of discretion that would be optimal if one were designing a judicial
system from scratch.11 Moreover, I wish to distance myself as much as
possible from the question of whether our legal system may be described
as "autonomous," i.e., distinct from the spheres of morals and of politics
in general.12 My concern, rather, is with a more mundane set of questions:
how often and to what extent do modern federal appellate judges feel
"constrained" to decide cases in particular ways (i.e. to eschew reliance
on ill-defined discretion), and in what senses are they in fact so bound?

1. A Descriptive Breakdown

Appellate cases are idiosyncratic; it is therefore difficult to generalize
meaningfully about their susceptibility to determinate resolution. Never-
theless, maintenance of some sense of proportion in the following discus-
sion necessitates identification of at least some crude categories.

During a twelve-month court term, I participate in the resolution of
approximately 175 to 200 cases.13 I would estimate that approximately

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9 See O.W. Holmes, Law in Science and Science in Law 239 (1920).
10 See B. Cardozo, supra note 4, at 115.
11 For several of the many works addressing this question, see Dworkin, Hard Cases,
supra note 7; Dworkin, No Right Answer?, 53 N.Y.U. L. Rev. 1 (1978) [hereinafter cited as
Dworkin, No Right Answer?]; Dworkin, Seven Critics, 11 Ga. L. Rev. 1201 (1977) [hereinafter
cited as Dworkin, Seven Critics]. But see, e.g., Raz, Legal Principles and the Limits of
Law, 81 Yale L.J. 823 (1972).
12 See generally Hazard, The Supreme Court as a Legislature, 64 Cornell L. Rev. 1
(1978).
13 For discussions of this issue, see H.L.A. Hart, The Concept of Law (1961); Dworkin,
Hard Cases, supra note 7; Dworkin, The Model of Rules, 35 U. Chi. L. Rev. 14 (1967)
[hereinafter cited as Dworkin, The Model of Rules]; Soper, Legal Theory and the Obliga-
tion of a Judge: The Hart/Dworkin Dispute, 75 Mich. L. Rev. 473 (1977); Weinreb, Law as
Order, 91 Harv. L. Rev. 909 (1978). Insofar as any of the following discussion implicates
this longstanding tussle between the advocates of positivism and the advocates of natural
law (or "nonpositivism"), those implications are either unintended or incidental.
14 I include in this number cases heard on the merits by three-judge panels, cases
reheard en banc, and numerous motions dispositions. At least 65 to 75% of the cases heard
are dispositions on the merits. In addition, judges routinely consider miscellaneous matters
such as petitions for rehearing en banc, tentative decisions by colleagues, remand orders
from the Supreme Court, petitions for costs and fees, etc.
one-half of the cases decided are "easy"; the pertinent legal rules seem to me unambiguous and their application to the facts appears clear. Stated differently, assuming that I hear 200 cases per year, I feel strictly bound when deciding 100 of those cases. A dispute falling into this category, I believe, admits of only one "right answer"; were I to vote to decide it in any other way, I would expect to be accused of having made an error, not merely of having voted or ruled unwisely.

In the remaining 100 cases, the answers are not so clear. In only a relatively small subset of these, however, do I feel I may and must exercise what I will call "discretion." Using rough numbers, I would say that in only five to fifteen percent of the disputes that come before me do I conclude, after reviewing the record and all the pertinent legal materials, that the competing arguments drawn from those sources are equally strong. Put differently, only in those few cases do I feel that fair application of the law to the facts leaves me in equipoise, and that to dispose of the appeal I must rely on some significant measure of discretion.

That leaves roughly thirty-five to forty-five percent of the cases per year that are neither "easy" nor "very hard" in the senses just described. In appeals falling into this middle category, each party is able to make at least one legal argument that I find colorable, but, after research, reflection, and discussion, the argument(s) advanced by one party seem to me demonstrably stronger than the argument(s) advanced by the other.

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14 The word "discretion" takes on different coloring as it is placed in different jurisprudential theories. For a good summary and analysis of its various usages, see Greenawalt, Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges, 75 Colum. L. Rev. 359 (1975). For my own purposes, I find Greenawalt's own approach the most sensible and will rely upon it in this article. The essence of his view is as follows:

I believe . . . that when a judge is left to decide among controversial and complex theories of moral and social philosophy, each of which can find some support in our structure of government, all the legal profession demands and all the framers of statutes and constitutional provisions could reasonably expect is that a judge act reasonably and conscientiously choose the theories he thinks soundest. If these two requisites are met, we do not think the judge's actions merit blame, a typical consequence of a perceived failure to perform a duty, even though we would have acted differently. It is in this sense at least that we can say that a judge has discretion when faced with very difficult cases.

Id. at 377.

For the purposes of the present experiential account, I will describe appeals in which I feel obliged and entitled to exercise "discretion," in the foregoing sense, as "very hard" cases—as distinguished from appeals which are difficult to resolve but in which I believe I can discern a "right" answer by reference to extant legal materials, which I will describe (in deference to contemporary usage, see Dworkin, Hard Cases, supra note 7) as simply "hard." For a discussion of the latter category, see infra text accompanying note 16.

15 Indeed, were I to break down my docket into segregable legal questions presented for resolution on appeal, the percentage falling into the category of "very hard" would be even lower. In other words, my sense is that in only about 5 to 15% of the cases heard per year am I confronted with an issue that requires me to exercise discretion; usually such cases also present one or more other issues that can be resolved without much difficulty.
Under such circumstances, I feel constrained to render judgment in favor of the party who can make the more compelling claims. The legal arguments to which I have been referring can take any of a variety of forms. Among the more common are: a statutory or constitutional provision should (in view of its underlying purpose and/or legislative history) be read in a particular manner; the facts found by the agency or court below, when viewed through the lens of the pertinent standard of review, and when compared to the facts of similar cases that have been decided in the past, demonstrably do or do not satisfy the applicable substantive norm; 18 a particular prior decision was either so manifestly erroneous when decided, or has been so undermined by subsequent doctrinal development, as to be susceptible of reconsideration and overruling. The sense in which claims of these kinds can or must be described as "legal" turns out to be very difficult to define. For now, I confine myself to a simple experiential observation: when constructing and assessing arguments like these, I do not feel as though I am drawing upon any personal values or that I am exercising any real measure of discretion or free choice.

Most of my colleagues would, I think, concur in the foregoing breakdown of the kinds of cases that appear before us. Some would, of course, place slightly different numbers of cases in each of the three categories, but most would find accurate the overall description of the experience of deciding various kinds of appeals.

Trouble would arise, however, were I to ask myself and my colleagues which cases should be placed in each of the categories. Our opinions regarding which cases are "easy" would probably be reassuringly consistent. Presented with a random batch of appeals, almost all judges of the court on which I sit would likely identify about fifty percent as "clearcut"; more importantly, they would pick the same fifty percent and vote to

18 Cardozo described cases in which (only) arguments of this kind are presented as follows:

In another and considerable percentage [of cases], the rule of law is certain, and the application alone doubtful. A complicated record must be dissected, the narratives of witnesses, more or less incoherent and unintelligible, must be analyzed, to determine whether a given situation comes within one district or another upon the chart of rights and wrongs. The traveler who knows that a railroad crosses his path must look for approaching trains. That is at least the general rule. In numberless litigations the description of the landscape must be studied to see whether vision has been obstructed, whether something has been done or omitted to put the traveler off his guard. Often these cases and others like them provoke difference of opinion among judges. Jurisprudence remains untouched, however, regardless of the outcome.

B. CARDozo, supra note 4, at 164-65. Cardozo's concluding observation seems to me clearly incorrect. Whether one views the decision in a case of this sort as establishing another precedent in the field or as refining the substantive norm itself through its application, it certainly will affect future cases implicating the same legal rule. "Jurisprudence," in other words, is most certainly "touched," however lightly.
decide them the same way.\textsuperscript{17} With regard to which of the cases were "very hard" (\textit{i.e.}, requiring the exercise of discretion) or merely "hard," however, there would be prominent divergences of opinion. Even more serious is the fact that, in a number of these cases, we would probably disagree not only over how the cases should be classified, but over the proper outcome. Given these realities, one might legitimately ask whether any judge is ever truly constrained in his or her decisionmaking in cases outside of the "easy" category. That question I defer for the moment.\textsuperscript{18} To prepare for eventual consideration of it, I return to examination of the underpinnings of my individual responses to the cases that come before me.

2. A First-Level Explanation

I find it helpful to analyze in two stages the questions of when, how, and why I (and my colleagues) do in fact exercise discretion when deciding appeals. The first level of the analysis proceeds on the assumption that the foregoing description of my (and their) sense of what we are doing is accurate, and attempts to account for the varying degrees of constraint to which we are subject in different kinds of cases. The second level begins with a recognition that the explanation elaborated on the first level is vulnerable to several powerful objections, and then tries to develop a more refined theory that takes those objections into account. Bifurcating the inquiry in this way is of course somewhat artificial (and requires some patience on the part of the reader), but it has the advantage of illuminating the way my own thinking on these questions has evolved and the way I think the attitudes of many other judges have developed.

I indicated above that about half of the cases that come before me I find "easy" because the governing legal rules are unambiguous and clearly apply to the facts of the disputes.\textsuperscript{19} If pressed, I would qualify that expla-

\textsuperscript{17} This unanimity, in practice, makes possible summary disposition of a substantial percentage of the cases that come before the D.C. Circuit.

\textsuperscript{18} It, along with other sources of doubt concerning the determinacy of our decisionmaking, is discussed \textit{infra} in Part I.A.3.


I have decided, in this discussion, to make use of some of the terminology current in contemporary Anglo-American jurisprudence for two reasons. First, it enables me to condense my argument somewhat—relaying on the reader’s familiarity with (or ability to find out) the glosses these terms have acquired. Second, it enables me to comment (without straying too much from my proper path) on the descriptive features of some of the currently popular theories. Cf. Soper, \textit{supra} note 12, at 473 (classifying legal theories as "conceptual, descriptive, or normative"). My occasional use of a term that figures prominently in the work of one or another theorist should not, however, be read to imply adherence to any of the normative or conceptual assertions he builds upon it. (For a revealing demonstration of

\url{https://engagedscholarship.csuohio.edu/clevstlrev/vol32/iss3/4}
nation in two respects. First, I would admit that underlying my casual description of those rules as governing lies an implicit assessment of the relevance of a competing set of principles. Thus, for example, my sense that a doctrine promulgated in a prior decision by another panel of the court is well-established and controlling derives from a (usually subconscious) determination that the principle favoring adherence to that doctrine (stare decisis) is powerful, and that the considerations that might be advanced for limiting or overruling it (e.g., that it has proven unworkable in practice or that several other circuits have persuasively rejected it) are either inapposite or weak in the appeal before me.\textsuperscript{20} Second, I would acknowledge that my sense that a rule clearly covers the facts of a case, even though it has never before been applied in precisely those circumstances, rests upon a determination (also usually subconscious) that application of the rule to the case would further the purpose underlying the norm.\textsuperscript{21}

Once the account of the activity of deciding "easy" cases has been qualified in the foregoing manner, it becomes applicable, with only slight modification, to the activity of deciding "hard" cases—\textit{i.e.}, those in which a judge must weigh competing, colorable legal arguments but in which he or she is not free to exercise any significant measure of discretion. The only difference between the two contexts is that, in "hard" cases, identification and evaluation of the principles and policies that lie behind or beneath the simple rules is conscious and crucial. Thus, for example, to determine the meaning of an ambiguous phrase used in a statute, I make a deliberate effort to identify the objectives the enactment is designed to promote and then select the interpretation that would most effectively advance those ends.\textsuperscript{22} Alternatively (or in addition), I look for guidance to some principle of statutory interpretation such as the tenet that criminal statutes should be construed narrowly\textsuperscript{23} or the doctrine that the provisions exempting federal governmental agencies from their duty of disclosure under the Freedom of Information Act\textsuperscript{24} should be construed restrictively.\textsuperscript{25} Another example: To determine whether a judicially-created

\begin{footnotes}
\item[23] See Soper, supra note 12, at 492-95.
\item[25] See, \textit{e.g.}, Sims v. CIA, 642 F.2d 562, 566-68 (D.C. Cir. 1980).
\end{footnotes}
cause of action (or immunity from liability) is fairly applicable to a borderline case, I develop a theory that accounts for as many as possible of the prior judicial decisions interpreting the doctrine in question, and then use the resultant construct to make sense of the dispute before me.26

Note that none of the foregoing approaches (used subconsciously in "easy" cases and consciously in "hard" ones) should entail a departure from the law. All of the principles, policies, and theories to which I turn for assistance are embodied in or can be extracted from extant legal materials. The objectives underlying a statute are inferred from the structure of the enactment and its legislative history.27 The existence, character, and strength of a maxim of statutory interpretation are determined by examining prior decisions in which it was (or might have been but was not) applied.28 The shape of a doctrinal theory is strongly influenced by the pattern of precedents it is designed to explain and synthesize.29 In other words, when employing these techniques for the resolution of "hard" cases, an appellate judge need not—and should not—advert to his personal values.

There are, however, occasional cases in which even the foregoing approaches prove ineffectual. Some statutes are so internally inconsistent, or are designed to promote so many cross-cutting purposes, that it is extremely difficult for a mortal judge to determine what interpretation of a particular provision would best advance the act's underlying objectives.30 Sometimes two or more inconsistent maxims of statutory interpretations apply to the same case, and comparison of the facts of the decisions in which each has been invoked in the past with the facts of the case at bar fails to make clear which maxim is entitled to greater weight.31 And, on occasion, the set of decisions interpreting a judicially-created doctrine is

26 See Dworkin, Hard Cases, supra note 7, at 1087-1101. For a recent example of overt reliance on this approach, see Gray v. Bell, 712 F.2d 490, 497-502 (D.C. Cir. 1983).

27 See Frankfurter, supra note 22, at 543-44.

28 See Raz, supra note 10, at 848. As my phrasing of this point suggests, I adhere to the view, espoused by Raz (among others), that a principle becomes embodied in the law and acquires a particular weight (i.e., an ability to override or offset competing principles) by "convention"—acceptance by the judiciary over a period of time. I do not pause to consider whether such a view is compatible with a conceptual theory founded on the notion that the question of whether a particular norm qualifies as "legal" must always be determined with reference (direct or indirect) to some "master rule." See H.L.A. Hart, supra note 12; H. Kelsen, Pure Theory of Law (1967).

29 See Dworkin, Hard Cases, supra note 7, at 1087-1101; Dworkin, Seven Critics, supra note 10, at 1252-53; Sartorius, Social Policy and Judicial Legislation, 8 Am. Phil. Q. 151 (1971).

30 A notorious example of a statute of this sort is the Civil Service Reform Act. See, e.g., Devine v. White, 697 F.2d 421, 433-40 (D.C. Cir. 1983). The issue of how the problems generated by enactments of this sort might be alleviated is taken up infra in Part III.A.

31 See, e.g., Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051 (D.C. Cir. 1981) (en banc) (considering whether an agency law enforcement manual should be exempt from disclosure under the Freedom of Information Act).
so incoherent that no one theory is capable of making sense of even a fair proportion of them, and there exists no “metatheory” fairly inferable from extant legal materials capable of indicating which theory, among the various candidates, best accounts for and integrates a reasonable portion of the case law.\textsuperscript{32} Cases of these sorts constitute the category I have described as “very hard.” Under these circumstances, an appellate judge has no choice but to exercise discretion in deciding an appeal. But, it should be emphasized, the instances in which such reliance on discretion is necessary are rare.

3. A Second-Level Explanation

Unfortunately, when the foregoing explanatory edifice is exposed to critical scrutiny, cracks become evident. The most obvious of the problems has already been noted: the fact that appellate judges sometimes disagree on the result in “hard” cases casts doubt on the proposition that, except in rare instances, they are constrained by the extant materials of the law. To explain the phenomenon of divided opinions, one seemingly must assume that either 1) judges occasionally make mistakes when assessing the bearing of established law on cases, 2) judges refuse in some instances to abide by established law, or 3) the cases in which judges are exercising discretion are far more frequent than has been suggested up to this point.

The problems arising out of the fact that judges disagree are intensified by three related theoretical objections that might be made to the explanatory model sketched above. First, as any law student knows, it is very often possible to argue equally persuasively that a novel situation is or is not governed by a particular prior decision. This can be achieved by focusing on alternative formulations of the “holding” of the original case, by stressing similarities or differences in the facts, or by highlighting either those concerns that are common to the two controversies or those that are not.\textsuperscript{33} Is it not, then, misleading to suggest that, in a sizable percentage of the cases that come before the federal appellate courts, a well-established rule may be extracted from the case law and confidently applied to the problem presented? Second, if the interpretation of a statute is frequently controlled by a determination of what result would best effectuate the statute’s purposes, how is it that those purposes do not alto-


\textsuperscript{33} For provocative (but, in each instance, somewhat overstated) discussions of how and why it is possible to show that any one case is or is not related to any other, see Deutsch, Precedent and Adjudication, 83 Yale L.J. 1553 (1974); Leff, Law and, 87 Yale L.J. 989 (1978); Tushnet, Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies, 57 Tex. L. Rev. 1307 (1979). For an understated discussion of the same theme, see H.L.A. Hart, supra note 12, at 121-50.
gether overthrow the edict founded on them?\textsuperscript{34} And how is it that the judge, in deciding what reading of a phrase would advance the statute's ends, avoids injection of his personal views? Third, if Legal Realism teaches anything, it is that deriving from general rules answers to specific questions in real cases, using nothing more than ordinary canons of rationality, is often difficult and sometimes impossible.\textsuperscript{35} Is not one of the implications of that lesson that reference to some complex of underlying policies or principles is unavoidable when interpreting and applying almost any rule, and, if so, will not the aforementioned corrosion of the rule by its purposes (and by the judge's opinion of those purposes) occur in a large number of cases?

In short, the sources of indeterminacy are manifold. Viewed in this light, the account of appellate adjudication sketched in Parts I.A.1. and I.A.2. seems less clear than indicated. Nevertheless, I believe that there is a recognizable and reasonable coherence to our judicial system when the various elements are re-examined in terms somewhat different from those stated above.

I start by recognizing that, at least with respect to what I call "easy" and "hard" (as opposed to "very hard") cases, I and most of my colleagues sincerely feel constrained in the degrees and in the circumstances described in Part I.A.1. That conviction could, of course, be the product of self-deception, but it seems unlikely that so many judges could have been so deluded for so long. Accordingly, we proceed on the assumption that our common sentiment has some basis in reality.

Clues as to the depth and character of those roots may be derived from some of the ways in which my predecessors have described the judicial condition. I find the following passages most evocative:

[W]hen [Mr. Justice Holmes] said that "the meaning of a sentence is to be felt rather than to be proved," he expressed the wholesome truth that the final rendering of the meaning of a statute is an act of judgment. He would shudder at the thought that by such a statement he was giving comfort to the school of vis-

\textsuperscript{34} The classic explication of this problem is Professor Fuller's:
One can imagine a course of reasoning that might run as follows: This statute says absinthe shall not be sold. What is its purpose? To promote health. Now, as everyone knows, absinthe is a sound, wholesome, and beneficial beverage. Therefore, interpreting the statute in the light of its purpose, I construe it to direct a general sale and consumption of that most healthful of beverages, absinthe.
Fuller, supra note 21, at 670.

\textsuperscript{35} See, e.g., Cohen, supra note 6; O.W. Holmes, Privilege, Malice and Intent, in COLLECTED LEGAL PAPERS 120 (1920); Note, 'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship, 95 HARV. L. REV. 1669, 1673-74 (1982). For contemporary reiterations of the argument (in terms at least as sweeping as those in which the Realists originally made it), see, e.g., Kennedy, Legal Formality, 2 J. LEGAL STUD. 351 (1973); Tushnet, Legal Scholarship: Its Causes and Cure, 90 YALE L.J. 1205 (1981).
cereal jurisprudence. Judgment is not drawn out of the void but is based on the correlation of imponderables all of which need not, because they cannot, be made explicit. He was expressing the humility of the intellectual that he was, whose standards of exactitude distrusted pretensions of certainty, believing that legal controversies that are not frivolous almost always involve matters of degree, and often degree of the nicest sort. Statutory construction implied the exercise of choice, but precluded the notion of capricious choice as much as choice based on private notions of policy. One gets the impression that in interpreting statutes Mr. Justice Holmes reached meaning easily, as was true of most of his results, with emphasis on the language in the totality of the enactment and the felt reasonableness of the chosen construction. He had a lively awareness that a statute was expressive of purpose and policy, but in his reading of it he tended to hug the shores of the statute itself, without much re-enforcement from without.96

[A judge] legislates only between gaps. He fills the open spaces in the law. How far he may go without traveling beyond the walls of the interstices cannot be staked out for him upon a chart. He must learn it for himself as he gains the sense of fitness and proportion that comes with years of habitude in the practice of an art. Even within the gaps, restrictions not easy to define, but felt, however impalpable they may be, by every judge and lawyer, hedge and circumscribe his action. They are established by the traditions of the centuries, by the example of other judges, his predecessors and his colleagues, by the collective judgment of the profession, and by the duty of adherence to the pervading spirit of the law.97

Many of the foregoing lines echo the phrases of the analysis set forth in Part I.A.2.: sensitivity to underlying purposes; identification and weighing of principles embedded in the body of precedent; construction of doctrinal theories that can then be brought to bear on recalcitrant cases, etc. But there is something more in these passages—something crucial, something necessary and almost sufficient to respond to the serious objections noted at the outset of this section. Frankfurter may be right that it is impossible to describe this extra factor with any precision, but identification of its principal sources and components is feasible—and facilitates both self-understanding and the development of proposals for reforming the adjudicatory process.

It seems to me that there are at least three critical factors, apart from basic legal materials and traditional canons of construction, that affect

96 Frankfurter, supra note 22, at 531-32 (footnote omitted) (quoting United States v. Johnson, 221 U.S. 488, 496 (1911)) (emphasis added).
97 B. Cardozo, supra note 4, at 113-14.
appellate judges when they decide cases. The first two factors, which I will refer to as sets of "conventions," implicate the process of appellate advocacy and decisionmaking. These conventions ensure common approaches to lawyering and judging and, consequently, compel a certain consistency in behavior among members of the legal profession. Adherence to the conventions thus tends to promote a legal system that is comprehensible to its participants, in large measure because "extreme" behavior is not tolerated. I do not mean to suggest that the conventions are all good; indeed, in many instances they may stifle effective advocacy and decisionmaking. Nevertheless, I do believe that the existence of these conventions facilitates a high level of consistency in the decisions rendered in "easy" cases and a significant level of consistency in the "hard" cases. 38

The first set of conventions that I have in mind pertains to permissible forms of reasoning, sensed and observed by almost all members of the American legal profession. Precisely because we take these habits of mind so for granted, it is difficult to identify the ways and occasions in which they constrain us. The context in which their role and importance is perhaps most evident is analogical reasoning; lawyers gradually acquire a feel (from law school, from everyday discussions with their colleagues, from the responses to their briefs and oral arguments) for what kinds of efforts to link concepts, rules, and cases from distinct spheres of the law are credible and what kinds are not. The net result is that lawyers have a sense, different from and more consistent than laypersons' comparable sense, of what constitutes a plausible or forceful reference or comparison and what constitutes a weak or strained one. 39

The second set of conventions to which I am referring pertains to various codes of conduct affecting relations among judges. Certain of these conventions relate to the internal business of a court: for example, seniority systems to determine who presides on a given judicial panel; procedures for the assignment of cases; and routines governing the circulation of and comment on proposed opinions. Others relate to codes of behavior that seek to avoid harmful disruptions in relations among judges: for example, an implicit rule forbidding ad hominem attacks in situations where a case produces concurring or dissenting opinions, and strict adherence to a rule of confidentiality with respect to the process of decision-making in any given case. Still others relate to common standards of judgment in case handling: for example, general agreements among the judges as to what types of cases require oral argument and/or written

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38 I do not believe that the conventions significantly affect a judge's view as to whether a particular case is "very hard." However, the conventions may affect a judge's final decision in what is perceived to be a "very hard" case (albeit to a lesser degree than in other cases).

39 For an interesting account of the nature and role of conventions of this sort, see Abraham, Three Fallacies of Interpretation: A Comment on Precedent and Judicial Decision, 23 Ariz. L. Rev. 771, 777-78 (1981).
opinions; a willingness among judges to adhere to existing precedent; and a commonly shared disinclination among the judges on a circuit to rehear cases en banc except in the most compelling circumstances. This last category of conventions may have more to do with ends than means. It consists of a collection of intertwined sensitivities: a feel for what sorts of decisions can fairly be described as "clarifications," "reforms," or "adjustments" of the body of law and what sorts must be described as "departures" from it; a suspicion of the latter; and a distrust for all lines of argument that would lead toward the latter. It is this last-mentioned group of attitudes—which collectively might be called a feel for the limits of the possible—"that I think Cardozo was referring to when he spoke of "the duty of adherence to the pervading spirit of the law."" Put more bluntly, it is an awareness of where the trodden path lies and a sense, not only of the danger, but of the impropriety of straying too far from it. In addition to the foregoing conventions, I think that there is a third factor that affects judicial decisionmaking. This factor relates to the personal makeup of a judge, including individual characteristics and experiences such as educational background, family history, family wealth, prior employment, places of birth, growth and current residence, friends and associates, travel, age and, possibly, even sex, race and nationality. Justice Cardozo best described what I mean when he discussed the effect of the elusive human factor in judging: "Deep below consciousness are other forces, the likes, and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions which make the man, whether he be litigant or judge." Although this human factor is difficult to describe and complex in operation, there can be no doubt that it has an important influence at certain levels of judicial decisionmaking. In particular, I believe that, while most judges strive mightily to diffuse the impact of the human factor, its influence is felt in three areas: first, it may explain certain differences of opinion that I argue should not occur in the disposition of "hard cases"; second, it may meaningfully affect judges' views as to whether particular cases are "very hard" (and thus admit of the exercise of discretion); and finally, it may explain differences of opinion in the disposition of "very hard" cases.

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40 For an insightful sketch of the ways in which such a vague sense of the limits on the range of permissible conclusions is likely to affect the decisionmaking process, see Dewey, supra note 5, at 23.

41 See supra text accompanying note 37.

42 It takes some time for a judge to acquire this "feel"—specifically, to learn to recognize an impermissible "departure" from established law (however impeccable the reasoning that leads to it). The result is that judges in their early years on the bench may make "mistakes" of a sort they would never make later.

43 B. Cardozo, supra note 4, at 167.

From one vantage point, it may be argued that the influence of the human factor is at best minimal because 1) judges strive so hard to limit its influence, and 2) many federal appellate judges are drawn from a small subset of persons, often in the upper middle class of the American population. Because of this second consideration, it has been suggested that judges share a world-view. It would serve little purpose, here, to describe that world-view in any detail, but a few salient features may be recorded with little difficulty. Most judges value hard work and individual achievement. Of the myriad ways in which government may act to invade individual liberties, judges are most sensitive to and suspicious of invasions of privacy and interference with intellectual freedom. Most judges are hostile toward overt forms of racial or religious discrimination, but many have ambivalent feelings regarding egalitarianism. These attitudes, no doubt, affect our reading of and responses to the arguments presented to us and, consequently, influence our decisionmaking.

In the context of cases involving disputes over the proper interpretation of federal statutes and challenges to administrative action pursuant to statute, the similarities in the world-views of the occupants of the bench have two related, beneficial effects: they increase the consistency with which different judges and panels perceive and decide disputes and they make their decisions more predictable. Those effects are beneficial for two reasons: they increase the ability of potential litigants to ascertain in advance their legal rights and to adjust their conduct accordingly and they enable Congress to draft statutory provisions that, when seen through the ideological spectacles worn by many of the judiciary, will give rise to the kinds of entitlements and regulations Congress wishes to create.

Up to now, I have assumed a strong similarity in the backgrounds of federal appellate judges. I do not wish to overstate this point, however, because there is another vantage point from which to consider the issue. In recent years, due to the broader integration of student populations in law schools and an increasing diversity among the judges appointed to the federal bench, the pool of judges has changed. As a consequence, we now recognize that, at some point, the correspondence between the back-

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44 Cf. Cohen, supra note 6, at 845 ("judges usually reflect the attitudes of their own income class on social questions").

46 The last point merits brief elaboration. I am not suggesting that the members of congressional committees, when considering alternative formulations of statutory provisions, say to themselves or to one another: Version X is better because, after it has been considered by the meritocratic, mildly egalitarian judges who currently staff the courts of appeals, it will yield the results we want. The calculus is both less conscious and more subtle. I am suggesting that members of Congress (particularly experienced ones) probably have a sense—a sense refined by their awareness of the similarity of the judges' backgrounds—of what the courts are likely to do with their language, and that sense renders their draftsmanship more precise and effectual.
grounds and values of different histories varies considerably, and our convictions diverge at many points relevant to the cases that come before us.

A few examples may indicate both the kinds of disagreements that most often matter when we decide appeals and their importance. Some judges read exemption 1 of the Freedom of Information Act\(^7\) in the light of their concern for the protection of national security; others read it in the light of their fear of governmental inefficiency and mismanagement, which they believe is fostered by agencies’ ability to keep their activities secret. Some judges view class actions brought under Title VII of the Civil Rights Act,\(^8\) relying principally on statistical evidence of sexual discrimination,\(^9\) as valuable efforts to dig deep in the social and economic systems and root out the sources of bigotry; others see them as yet another mechanism for harassing beleaguered American businesses, already trapped in webs of governmental regulation. Some judges view intercity busing both as the only effectual means (absent legislative intervention) of achieving racial equality and as a morally desirable form of collective penitence; others see it as a crude response to an intractable problem, a superficial “solution” that, in practice, does little good and seriously threatens the autonomy and integrity of our urban neighborhoods.\(^60\)

When a “very hard” case comes before us that implicates an issue of the sort just described, in which both parties are able to advance strong legal arguments,\(^61\) our analyses, votes, and opinions often diverge. It is crucial to recognize, however, that, when we analyze, discuss, and write about cases of this kind, we usually not only feel constrained, but, in one limited but still meaningful sense, we are constrained. Our personal convictions often are so deep-seated that, without our being aware of it, they mostly affect the weight that we assign to each of the various principles and policies marshalled by the parties. Consequently, we still feel as though we are fairly and dispassionately assessing the legal issues presented, even in the “very hard” cases that admit of no right answer. Our personal beliefs are, usually, too general or subconscious to have a direct impact on a decision in a “hard” or “very hard” case. And, except in cases involving “very hard” constitutional adjudications, judges rarely (if ever) make reference to personal belief or ideology as justification for a decision.

\(^{9}\) See, e.g., Trout v. Lehman, 702 F.2d 1094 (D.C. Cir. 1983).
\(^{60}\) For a discussion of the way evolving attitudes of this order may affect a judge’s decisionmaking and writing, see Note, The Changing Social Vision of Justice Blackmun, 96 HARV. L. REV. 717 (1983) [hereinafter cited as Note, The Changing Social Vision].
\(^{61}\) By “strong legal arguments,” I mean the kinds of claims, extractable from extant legal materials, described supra in the text accompanying notes 22-29. When one of the parties to an appeal is unable to present an argument of this order, the kinds of differences in outlook under discussion are irrelevant to the decisionmaking process.
Notwithstanding the foregoing comments, it remains clear to me that an undefined number of judges are influenced by what I have called the human factor in a not insignificant number of "hard" and "very hard" cases. This may be explained on the basis of four factors (operating separately or in combination). First, in some cases (that I have called "very hard") there simply is no right answer. No (non-Herculean) judge is able to identify a single solution that best promotes the pertinent statutory purposes or that is required by a doctrinal theory that best fits the relevant extant norms. The judges, consequently, must exercise discretion in "very hard" cases, and they frequently exercise it in different ways. Second, some matters (in the "hard" and "very hard" categories of cases) both present close legal questions and implicate important social issues over which some judges may deeply disagree. The result is that, though they feel and, in one narrow sense, are in fact constrained, they cast their votes differently for the reasons described above. Third, some few judges occasionally may be unwilling to abide by established law because of personal disagreements with it. It other words, some judges are prone to be result-oriented. My experience suggests that the number of judges and cases affected by this affliction is small. Fourth, judges sometimes make mistakes. Momentary lapses of attention when reading pertinent statutes and cases, inadequate guidance from counsel, and pressure generated by a heavy, diverse caseload lead every judge, on occasion, to weigh the competing considerations differently than he would if he had more time and help. Although I am inclined to believe (or at least hope) that the effects of these four factors are minor, I do not think that they can be ignored as inconsequential.

Aside from the "hard" and "very hard" cases, it is encouraging to realize that approximately fifty percent of our docket is disposed of with little difficulty. The fact that we are able to dispose summarily of roughly fifty percent of the cases we hear derives from the gross imbalance of the competing legal arguments presented, when placed on a scale structured by 1) a set of conventions peculiar to the American bar, 2) a set of conventions peculiar to the federal judiciary, and 3) the world-view shared (more or less) by a number of judges now sitting on the federal bench.

4. A Concluding Observation

Pursuant to the re-examination of judicial decisionmaking in Part I.A.3., I believe that we can see an identifiable and coherent system

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8 The proposition that I lack discretion in such circumstances because, even though I am incapable of discerning it, there exists a single right answer to the question presented, see Dworkin, No Right Answer?, supra note 10, I find both highly implausible, see supra note 32, and unhelpful. For the purposes of this article, I will continue to describe as "discretionary" all decisions in which a mortal judge would be unable to identify a correct solution if his attention were confined to extant legal material. See supra note 14.
of appellate adjudication. Despite the fact that not all judges agree on the breakdown of "hard" versus "very hard" cases, and not all judges will agree on the dispositions of these cases, the divergences of opinion among judges are subject to explanation. I do not mean to endorse fully the present system as infallible (or as unaffected by ideological influences). Rather, I mean to argue that the appellate process does reflect a system that is susceptible of analysis; and, most importantly, careful analysis yields a conclusion that judges are significantly constrained in their decisionmaking.

B. Some Contingent Factors

The scheme of things just described is not ineluctable. Several of the factors discussed might be altered relatively easily. Four merit special attention:

(a) The Selection Process. Were judges more diverse, their decision-making might be less consistent—and, arguably, would have a less predictable ideological twist.

(b) Statutory Incoherence. The more fragmentary and internally inconsistent the enactments the courts have to interpret, the less constrained is their decisionmaking.

(c) Codification. Many of the bodies of doctrine that currently are most chaotic—and consequently yield the most unpredictable decisions—are tangled primarily because they have evolved solely through judicial construction and elaboration. The chaos arguably could be much reduced by legislative intervention.

(d) Caseloads. The bigger the dockets, the less time we spend on the difficult cases and the more mistakes we make.

II. "The Ways of a Judge": Some Proposals For Improvement in the Judicial Function

Set forth below are four proposals regarding ways in which I think an appellate judge should think and act if he is to do his job as well as he can. When referring to an individual judge in the subsequent discussion I frequently use male pronouns such as "he," "his," etc. This language is employed simply to avoid the awkwardness of repeated references to "he or she," and because I am often alluding to my own perceptions and experiences as a judge. Each suggestion is founded in some way on one or more of the premises described in Part I. Many of the issues I touch

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63 A good example is the body of doctrine pertaining to official and governmental immunity for tort liability. See Schuck, Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages, 1980 SUP. CT. REV. 281.

upon have been topics of discussion among judges (and their critics) for many years. My purpose is neither to summarize nor to settle those debates; my goal, rather, is to add something distinctive to them.

A. The Judge as Monk

Many of the most articulate and influential descriptions of the ideal judicial temperament conjoin two traits: aloofness or isolation from social and political strife, and humility and self-abnegation in decisionmaking. These two postures are not logically linked, but, in practice, they are almost always associated with one another.

The first of these attitudes has been eloquently stated by one of my colleagues:

One given the power to render decisions in formal adjudicatory proceedings is accorded the highest of honors and dealt the gravest of responsibilities; those who take on this judicial role may no longer participate in the daily intercourse of life as freely as do others. They have a duty to the judicial system in which they have accepted membership fastidiously to safeguard their integrity—at the expense, if need be, of "neighbors, friends and acquaintances, business and social relations." This is their "part" in their "day and generation," and one who is unwilling to make the sacrifice is unsuited to the office.55

As the foregoing passage suggests, the duty of a judge to remove himself from the fray is most frequently—and most powerfully—justified on the basis of his obligation to avoid, not only ex parte contacts with persons interested in the disputes he must resolve, but even the "appearance of impropriety."56 But most judges who practice and preach this doctrine are also attracted to the Olympian stance for deeper, personal reasons—impulses reflected in their tendency to disapprove of their colleagues' worldly ways even when such extrajudicial activities pose no risk of exposure to undue influence.57

57 For an insightful (albeit probably unique) illustration of the way in which a judge's aloof posture can proceed more from character than from conviction, see Rogat, The Judge as a Spectator, 31 U. Chi. L. Rev. 213, 227-30, 243-48 (1964) (discussing Justice Holmes). A quite different intertwining of overt fear of undue influence and deeper instincts and fears is evident in Professor Jaffe's astute account of the foundation of Justice Frankfurter's jurisprudence:

The administration of justice should embody conclusions rationally derived from previously stated propositions. Why? Because the reach of the law must have predictable limits giving assurance that beyond those limits there is freedom to act, to plan, to choose, without consequences dictated by fear of the imponderable
An inspiring statement of the second of the two principles—the virtue of self-abnegation—appears in Justice Frankfurter's letter to his brethren on the occasion of his retirement:

My years on the Court have only deepened my conviction that its existence and functioning according to its best historic traditions are indispensable for the well-being of the nation. The nature of the issues which are involved in the legal controversies that are inevitable under our constitutional system does not warrant the nation to expect identity of views among the members of the Court regarding such issues, nor even agreement on the routes of thought by which decisions are reached. The nation is merely warranted in expecting harmony of aims among those who have been called to the Court. This means pertinacious pursuit of the processes of Reason in the disposition of the controversies that come before the Court. This presupposes intellectual disinterestedness in the analysis of the factors involved in the issues that call for decision. This in turn requires rigorous self-scrutiny to discover, with a view to curbing, every influence that may deflect from such disinterestedness.56

As Frankfurter's language suggests, the most common and compelling justification for the proposition that a judge should strive to suppress his emotions and convictions is that his professional obligation is to decide cases in accordance with the law, not his personal views, and that only by constantly maintaining and cultivating a stance of intellectual humility will he be capable of making fine, unbiased discriminations between closely balanced legal arguments. As Frankfurter put the point in another context:

[T]he only sure safeguard against crossing the line between adjudication and legislation is an alert recognition of the necessity not to cross it and instinctive, as well as trained, reluctance to do so. . . .

. . .

pressures of the moment. In such freedom the sense of security—so precarious, so precious—can spread its wing. Underlying this and much else in the Justice's record is an intense concern to be free from pressures—pressures so multiplied, so rankly thriving in the boundless demands for power of our time. We are presented here with a profound temperamental response. . . .

Once we sense this emphasis on the balefulness of pressure, we have a clue to many of Frankfurter's intensities.


56 Letter from Justice Frankfurter to his Brethren (Sept. 28, 1962), reprinted in 371 U.S. ix, x (emphasis added).
We cannot avoid what Mr. Justice Cardozo deemed inherent in the problem of construction, making "a choice between uncertainties. We must be content to choose the lesser." But to the careful and disinterested eye, the scales will hardly escape appearing to tip slightly on the side of a more probable meaning.69

Here again, however, temperament often is as important as principled conviction. Belief in the moral value of such humility, as much as belief in its utility in facilitating responsible adjudication, explains its large and estimable following in the appellate judiciary.80

My own view is that, if kept in perspective and confined to the contexts in which they serve demonstrable functions, each of the foregoing two principles is unexceptionable. But, if allowed to dominate a judge's lifestyle and personality, they are not only unnecessarily inhibitory, but destructive of his capacity for responsible decisionmaking. I am surely not suggesting that a judge should put himself in a position where he is suspected of being susceptible to influence or that he should feel free, in hard cases, to advert to his personal values rather than conscientiously strive to weigh the competing legal arguments. What I am suggesting is that, if he allows his healthy wariness of "the appearance of impropriety" and "judicial legislation" to become phobias, an appellate judge reduces rather than develops his capacity fairly and thoughtfully to resolve the cases that come before him.

The destructive effect develops and is manifested as follows. When a person is appointed to the bench, he inevitably has a distinctive worldview—a conception of the nature of American society and of his own place within it, molded partly by his class background, partly by his individual history, partly by his reading and reflection. That worldview is not static; throughout his life it has been evolving as he has learned more about himself and his environment and as he has tested his ideas on

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69 Frankfurter, supra note 22, at 535, 544 (footnote omitted) (quoting Burnet v. Guggenheim, 288 U.S. 280, 288 (1933)).

80 Cardozo's views on this subject were complex. At times he defended even more forcefully than Frankfurter the need for a judge to identify his personal predilections only in order to rise above them. See, e.g., B. Cardozo, supra note 4, at 172 ("Something of Pascal's spirit of self-search and self-reproach must come at moments to the man who finds himself summoned to the duty of shaping the progress of the law."). However, his sense of the impossibility of ever freeing oneself from one's heritage, personal background, sympathies, and loyalties, see id. at 166-67, of "transcend[ing] the limitations of the ego and see[ing] anything as it really is," id. at 106, led him to be much less sanguine than the Justice who succeeded him regarding the benefits to be gained from the pursuit of "objectivity."

Holmes' renowned refusal to allow his personal convictions to affect his adjudication seems to have derived, not from any belief in the moral value of self-abnegation, but from the combination of his philosophical skepticism and his sense of the futility of resisting (or even trying to channel) the will of the "masses." See Rogat, supra note 57, at 235-38, 249-56.
other people and concrete problems.

When he becomes a judge, the development of some aspects of that world-view accelerate and intensify. Few lawyers, for example, have even a moderately well-developed vision of the nature of our political system—and specifically of the scope of the power and duty of the judiciary to oversee the activities of the other branches of government. A judge on a federal court of appeals must have such a vision. The result is that a new arrival on the bench commonly undergoes an intense period of reading and thinking when he confronts his first few constitutional cases.

The development of many other aspects of his world-view, however, slows. Exactly why that happens remains something of a mystery to me, but two factors seem most important. First, the channels through which information about the world flows to a judge are fewer and narrower than those that feed most people. A judge depends for his contemporary knowledge principally on books, newspapers, television, and on conversations with his colleagues on the bench and with his law clerks. Above all, a judge relies on the data churned up by the cases that come before him. Compared to the more diverse sorts of contacts he was likely to have maintained before coming on the bench, these modes of access to information are restricted and skewed.

Second, a judge has fewer opportunities than most people to test his ideas against others. Excluding family and close friends, to almost everyone with whom he comes into daily contact—lawyers, clerks, and staff—the judge is in a superior position. All too easily he comfortably assumes the role of seer—or, worse yet, overseer. Very rarely is he obliged to face the kinds of negative responses to his thoughts that people in other professional positions confront constantly: skepticism, open hostility, disinterest, scorn. Speaking almost exclusively to receptive (and frequently captive) audiences, he is likely to acquire a complacent confidence in the accuracy of his view of things.

Devotion to the ideals of aloofness and self-abnegation exacerbates these problems. The judge who senses danger—or impropriety—in extrajudicial meetings and activities naturally avoids such affairs. He declines invitations to give speeches, teach seminars, participate in conferences, and even to write articles. His world shrinks. Home and office, family and cases bound his life. The vessels carrying to him vital information about his changing environment become fewer and smaller. Unless he is diligent about reading broadly to compensate for this effect, he is likely increasingly to conceive of his society as composed of persons of the sort who figure in the background portions of his briefs and opinions. If, at the same time, he sincerely devotes himself to cultivation of an instinctive

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61 Cf. Note, The Changing Social Vision, supra note 50, at 722-25, 734-36 (accounting for the evolution of Blackmun's world-view in part on the basis of the kinds of cases he has seen and decided since he arrived at the Supreme Court).
disinterestedness, his intellectual and emotional development will slow even more. The judge whose life is his work at least has the opportunity to use his cases as catalysts for reflection on the nature of his society and polity—on the social problems that give rise to such controversies and on the ways they might be alleviated. But to the judge who celebrates the ideal of intellectual humility, such ruminations are to be avoided. Convictions and feeling on the issues implicated by cases only cloud one’s vision, reduce one’s capacity to see which way the scales tip. They are to be curbed, not developed.

The net effect of these two constraints will not only be unfortunate, from a personal standpoint, but will hamper his decisionmaking. A stunted, anachronistic, or warped world-view will hobble an appellate judge in his work. Most importantly, it will reduce his ability responsibly to decide “very hard” cases, of the sort described in Part I. Consider the following perceptive account by Justice Traynor of a judge’s duty when confronted with a controversy of this order:

In . . . cases [of this kind] competing considerations are of such closely matched strength as to create a dilemma. How can a judge arrive at a decision one way or the other and yet avoid being arbitrary? If he has a high sense of judicial responsibility, he is loath to make an arbitrary choice even of acceptably rational alternatives, for he would thus abdicate the responsibility of judgment when it proved most difficult. He rejects coin-tossing, though it would make a great show of neutrality. Then what?

He is painfully aware that a decision will not be saved from being arbitrary merely because he is disinterested. He knows well enough that one entrusted with decision, traditionally above base prejudices, must also rise above the vanity of stubborn preconceptions, sometimes euphemistically called the courage of one’s convictions. He knows well enough that he must severely discount his own predilections, of however high grade he regards them, which is to say he must bring to his intellectual labors a cleansing doubt of his omniscience, indeed even of his perception. Disinterest, however, even disinterest envisaged on a higher plane than the emotional, is only the minimum qualification of a judge for his job. Then what more?

He comes to realize how essential it is also that he be intellectually interested in a rational outcome. He cannot remain disoriented forever, his mind suspended between alternative passable solutions. Rather than taking the easy way out via one or the other, he can strive to deepen his inquiry and his reflection enough to arrive at last at a value judgment as to what the law ought to be and to spell out why. In the course of doing so he channels his interest in a rational outcome into an interest in a particular result. In that limited sense he becomes result oriented.
Would we want it otherwise? Would we give up the value judgment for the non-commitment of the two-faced coin?  

The "restrained" judge, in the senses described above, will be at a severe disadvantage when he is compelled to make the necessary value judgment in the "very hard" cases described by Judge Traynor. His general knowledge of human affairs and his systems of morals will often be so limited as to be inadequate to the task. No judge is omniscient under these circumstances, but the aloof, truly "disinterested" judge will be especially near-sighted.

I once suggested, with tongue in cheek, in a speech to the National Academy of Arbitrators, that the life of a judge sometimes approaches monasticism. I painted the celibate existence as follows:

As a judge, I am the beneficiary of life tenure and a guaranteed pension, in return for which I am required to perform in a hot robe, write long opinions with numerous footnotes, speak to no one about my work (save my judicial colleagues and my law clerks), avoid political issues, and make routine public disclosures of all of my associations and earnings. In a sense, being a judge is like being imprisoned in a cage with steel bars in the middle of Times Square in New York City. You can see and hear all that is happening around you, but your participation in those events is seriously circumscribed.

Although my remarks were given in jest, the portrayal is an all-too-familiar stereotype of a judge.

My real view on these matters, as should by now be obvious, is that an appellate judge has not only the right, but the duty to involve himself in the world. If he is to continue developing as a person after he comes on the bench—and if he is to decide cases as well as he is able—he should maintain a diverse group of friends, travel widely, give speeches (that do not engage political disputes or improperly pertain to matters before the court), and seek out opportunities for exchanges of ideas. I believe that these things can be done easily without a judge infringing his responsibility to insure honest, fair and thorough treatment of the cases before the court, and also without any "appearances of impropriety."

While a judge typically will not need to resort to personal beliefs in deciding cases, some consideration of these beliefs may be unavoidable in the occasional "very hard" case where the legal arguments are indeterminate. In such a case, a judge's informed and critical development of his beliefs is a prerequisite to intelligent resolution of the dispute. Further, in all cases, the nature of one's personal beliefs should be consciously, rather

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68 Traynor, supra note 5, at 234 (footnotes omitted).

than subconsciously, recognized. The likelihood of such recognition occurring will be heightened when a judge remains intellectually active and aware of the world around him. In other words, a judge who openly seeks legitimate exchanges of ideas, and thereby continues to cultivate personal beliefs, is in a good position to evaluate and minimize the influence of such beliefs in most cases. The real threat that a judge's personal ideologies may affect his decisions in an inappropriate case arises when the judge is not even consciously aware of the potential threat.

To summarize, if asked to capture in a phrase my sense of the posture a judge should assume vis-à-vis the worlds of politics, ideas, and affairs, I would look not to Henry James or Henry Adams, but to Walt Whitman: "Both in and out of the game, and watching and wondering at it."  

**B. “Focused” Versus “Wide-Angle” Adjudication**

1. Introduction

One of the most sacred tenets of appellate decisionmaking in the United States is that, in rendering an opinion, a court should reach only those issues essential to the resolution of the case before it and should discuss those issues only to the extent necessary to dispose of the matter. The principles on which the foregoing injunction is founded are basically sound, even constitutionally mandated. Federal courts may decide only "cases and controversies"; they lack the power to issue wholly advisory opinions. The advantages to well-informed decisionmaking gained by hearing the arguments of parties, each of whom has a significant stake in a live controversy, properly prompts courts to decline to pass upon disputes that have become moot or in which one of the disputants has only a tenuous interest. And similar considerations make courts reluctant to reach issues not briefed by the parties. The net result of these considerations is that we have a tradition of focused adjudication in the United States.

For the most part, I am a strong disciple of focused adjudication and see no good reasons to challenge its traditional application. Nevertheless, there is a highly naive and mythical quality to any suggestion that focused adjudication is or should be the sole method of appellate decision-

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64 Cf. Rogat, *supra* note 57, at 230-43 (drawing somewhat strained parallels among the sensibilities of James, Adams, and Holmes).
66 U.S. Const. art. III.
69 *But see H. Friendly, Benchmarks* 38-39 (1967) (discussing why, as a practical matter, consideration of issues that have been briefed inadequately if at all is often unavoidable).
making. It should, I believe, be the predominant method; however, in certain narrow categories of cases, this presumed tradition should give way to what I call "wide-angle adjudication."

Before proceeding with my thesis, I should stress that what I have to say does not reflect a novel idea. Indeed, I believe that appellate judges, for many years now, have indulged a practice of wide-angle adjudication on appropriate occasions, while simultaneously proclaiming the inviolate virtues of focused adjudication. My mission in this part of the article, therefore, will be to rationalize and justify an existing form of appellate decisionmaking that I find perfectly appropriate in certain limited circumstances.

2. The Tradition of "Focused Adjudication"

In an article published a year after Justice Cardozo's death, Professor Corbin described Cardozo's method of common law adjudication as follows:

It cannot be said that he made any extensive changes in the existing law of contract. To state the facts of the cases, the decision, and the reasoning of his opinion will not show the overthrow of old doctrine or the establishment of new. Instead, it will show the application of existing doctrines with wisdom and discretion; an application that does not leave those doctrines wholly unaffected, but one that carries on their evolution as is reasonably required by the new facts before the court. When Cardozo is through, the law is not exactly as it was before; but there has been no sudden shift or revolutionary change. . . . 70

Eighteen years earlier, Cardozo himself had described in similar terms the approach he thought proper: "[The] work of [judicial] modification [of the law] is gradual. It goes on inch by inch. Its effects must be measured by decades and even centuries. Thus measured, they are seen to have behind them the power and the pressure of the moving glacier." 71

Implicit in the foregoing passages is a conception of focused adjudication that continues to influence powerfully the habits of the federal judiciary. Corbin and Cardozo were referring specifically to common law adjudication, but the theory they invoke also strongly affects our conceptions of how statutory and constitutional interpretation should be conducted.

At the risk of oversimplification, I suggest that the focused adjudication model is founded on two tenets. First, when deciding an appeal, a judge should confine his attention, for the most part, to the case before

70 Corbin, Mr. Justice Cardozo and the Law of Contracts, 52 Harv. L. Rev. 408, 408-09 (1939).
71 B. Cardozo, supra note 4, at 25.
him and to the issues fairly presented. This is not to say that he should not consider the effect of his ruling on future litigants; of course he should. But his principal goal should not be enunciation of a standard to guide other parties; it should be to decide the questions actually raised by the appeal (not questions that he wishes were raised by the appeal). Moreover, to the extent that his answers depend on the potential long-run impact of alternative solutions, the judge's assessment of those effects should derive from reflection on and extrapolation of what he has learned from the behavior of the parties in the case before him, not from "legislative" inquiry into the field of social or economic life that is affected by the legal norm in question.

Second, if the judge decides that the applicable law should be modified or limited, he should alter it no more than is necessary to respond to the instant case. Change, in other words, should be incremental. An unwise doctrine should not be exploded but should gradually be eroded as a result of courts' refusals to adhere to or reaffirm particular facets of it when those facets are challenged in specific cases. A wise doctrine should flower through the accretion of extensions made by courts in recognition of the utility of applying the doctrine in novel situations.

Much wisdom underlies these two principles just described. The method founded on them—i.e., focused adjudication—has certainly proven its merits in the past. Some of our greatest judges have been eloquent defenders and successful practitioners of it.78 And we are frequently reminded of the dangers of unnecessary or unthinking departures from it.79

As I have already indicated, I do not doubt the wisdom of this tradition. Modern federal appellate adjudication, however, consisting of an enormously expanding caseload and broader applications of statutory and administrative rules, sometimes calls for different ways of doing business. One alternative approach, which I have called "wide-angle adjudication," is the principal topic of this section.

3. "Principled" Adjudication

Before turning to an analysis and defense of that method, I pause briefly to consider a related matter. A proposition with which even unyielding devotees of the focused method would agree is that an appellate judge should not think of himself as a "present-day Chancellor, whose job

78 In addition to Cardozo, I think particularly of Justice Harlan and Judge Learned Hand.

[is] to secure fairness and equity in individual cases." Rather, his duty is to decide cases on the basis of general principles—principles he would be willing to apply to all cases that come within their scope, regardless of the attractiveness or unattractiveness of the parties who benefit and lose thereby. That adjudication should be principled, in this minimal sense, rather than ad hoc, I take to be sufficiently clear as not to require demonstration here. I mention it only to note that I think it is beyond serious dispute and consequently may be taken for granted in the ensuing discussion.

4. "Wide-Angle Adjudication" and its Application

The issue that interests me is not whether cases should be decided on the basis of general principles, but how those principles should be developed and applied. In the vast majority of cases, I should reiterate, the focused approach suffices. In a few contexts, however, adherence to that method gives rise to a distorted vision of a legal problem, and ultimately leads to the creation or perpetuation of an incoherent or inadequate system of doctrine.

The argument in favor of this proposal is perhaps best begun by identifying some of the contexts I have in mind. Generally speaking, there are probably three major circumstances when a judge does, and properly should, consider wide-angle adjudication. First, there are cases involving specific types of recurring problems. In such cases, the court recognizes that, because there is the potential of a flood of litigation absent some general statements of principle to guide those who might be litigants in the future, it would be a waste of precious judicial resources to indulge a case-by-case method of adjudication fully.

Second, there are cases in which wide-angle adjudication may be fully dispositive of a potentially enormous problem that is not well-suited for resolution through further litigation. An example of such a situation is Franv United States, involving a challenge to the administration of

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78 The classic explication and defense of the proposition is Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959). For an interesting effort to apply the same general injunction to administrative decisionmaking, see Wright, Beyond Discretionary Justice, 81 Yale L.J. 575 (1972).

7a See, e.g., Spencer v. NLRB, 712 F.2d 539 (D.C. Cir. 1983) (attorneys' fees); National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319 (D.C. Cir. 1982) (attorneys' fees).


7c 707 F.2d 582 (D.C. Cir.), supplemented, 712 F.2d 1428 (D.C. Cir. 1983).
the federal Witness Protection Program. In Franz, federal officials relocated and changed the identities of a government informant, his wife, and her three children by a former marriage, in return for the informant's testimony against alleged leaders of organized crime. Unfortunately, the procedure had the effect of severing the ongoing relationship between the children and their natural father. The father sued and the opinion for the court resulted in an exhaustive treatment of a number of very difficult statutory and constitutional issues. The closing lines of the court's opinion, however, make clear the purpose of the wide-angle decisionmaking that had been employed:

As to the propriety and utility of pressing onward in litigation, we venture our opinion that ultimate resolution of this controversy by a court may not be the ideal solution for any of the parties. As the disputants conceded at the outset, this case involves a conflict between several powerful, legitimate interests. Guided by the foregoing clarification of their respective claims, the parties are likely to be better able than a judge to work out an arrangement for reconciling—or at least compromising between—their various needs and desires.

Third, there are cases that, by their nature and the timing of their presentation, allow for thorough clarifications of existing case law or detailed statements in anticipation of future case problems. Although this category has some inherent ambiguity, it includes cases that require reconciliation of existing precedent and other cases that alert a judge to prospective difficulties resulting from doctrinal uncertainties. In cases of this sort, judges often rely on what can best be described as an intuitive sense in writing an opinion more broadly than necessary to decide the particular case at hand in order to give guidance and fend off problems in future litigation. Such judicial reflections are hazardous business and there are as many cases in which the judges' efforts at wide-angle adjudication have been disastrous as helpful. Nonetheless, in appropriate cases, even this third approach has its place.

Responsible resolution of cases arising out of the foregoing contexts, I have found, requires departure from the usual focused mode of adjudication in three respects. First, a judge must cast his analytical net unusually wide. He must make an especially conscious effort to consider hypothetical situations that might be covered by the various possible solutions.

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80 707 F.2d at 610.
under review, and to assess the desirability of each option as applied to those situations as well as to cases more closely resembling the one before him. Second, to predict as best as he is able what would be the practical effect of each doctrinal option in the arena thus broadly defined, he must undertake a research effort much more expansive than that appropriate in the usual appeal. On the basis of these two inquiries, the judge must then strive to formulate, not just a rule capable of resolving the appeal at hand, but a set of general principles or standards that will guide both private parties when their activities bring them within one of these zones and lower courts when deciding novel cases.82

In some instances, the outcome of an investigation of this sort is drastic alteration of an area of the law.83 In others, it is merely a straightening of the doctrinal fabric.84 In still others, the hope is that future litigation will be foreclosed.85 Generally, however, judges employing wide-angle decisionmaking hope that it will make possible more consistent and predictable decisionmaking in future cases, along lines that more effectually promote the policies or principles that underlie the field.

The method just described is vulnerable to three kinds of criticism. To each objection there is at least a partial response, and the nature of those responses clarifies both the method itself and the kinds of circumstances to which it is fairly applicable.

The first criticism is that judges lack the information—and, more importantly, the means of access to the information—necessary to under-

82 See Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949), where the dissenting Justice Frankfurter stated:

Case-by-case adjudication gives to the judicial process the impact of actuality and thereby saves it from the hazards of generalizations insufficiently nourished by experience. There is, however, an attendant weakness to a system that purports to pass merely on what are deemed to be the particular circumstances of a case. Consciously or unconsciously the pronouncements in an opinion too often exceed the justification of the circumstances on which they are based, or, contrariwise, judicial preoccupation with the claims of the immediate leads to a succession of ad hoc determinations making for eventual confusion and conflict. There comes a time when the general considerations underlying each specific situation must be exposed in order to bring the too unruly instances into more fruitful harmony.

Id. at 705-06. For an implicit argument in favor of this approach, see Hazard, supra note 11, at 11.

83 A good example is the creation of the modern doctrine of products liability. See generally G. WHITE, THE AMERICAN JUDICIAL TRADITION 292-316 (1976).

84 See, e.g., P. Freund, Felix Frankfurter: Reminiscences and Reflections 11 (Nov. 19, 1982) (unpublished manuscript): "Some of Frankfurter's most memorable decisions were in the nature of rationalizing—re-examining and re-ordering—areas of the law that, in his view, could no longer be satisfactorily patched up, but needed to be reconsidered more fundamentally . . . ." (citing Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 149 (1951) (Frankfurter, J., concurring); Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 705 (1949) (Frankfurter, J., dissenting); Rochester Tel. Corp. v. United States, 307 U.S. 125 (1939)).

85 See, e.g., Franz, 707 F.2d at 610.
take expansive projects of this sort. Adjudication, as has often been observed, is episodic; a given case is likely to implicate, and therefore illuminate, only parts of a field of doctrine. Moreover, the nature of the judicial process restricts and frequently skews the flow to the court even of data directly relevant to the questions presented; as Frankfurter once observed, judges are dependent "upon evidence and information limited by the narrow rules of litigation, shaped and intellectually influenced by the fortuitous choice of particular counsel." When they attempt to fill the informational gaps left by the parties, to develop a data base necessary to support a thoroughgoing inquiry into the practicability of alternative doctrinal systems, courts run a high risk of error. Few judges are economists or sociologists; even fewer have the time or inclination to undertake extensive research efforts. Without the aid of expert advisors, guiding their research and testing their assumptions and conclusions, it may be argued that the courts are as likely to distort a field as to remap or revamp it. In view of all these handicaps and dangers, so it is argued, courts are better advised to confine themselves to their proper task: deciding the questions asked of them on the basis of the information the parties provide them.

This potent line of argument invites a variety of responses. First, to the extent that the objection contrasts wide-angle adjudication, which requires considerable independent research and analysis, with ordinary appellate adjudication, in which the courts can and should rely solely on the parties' submissions, it is clearly mistaken. In only a small proportion of the "hard" and "very hard" cases that come before us is the quality of the advocacy sufficiently high and the material submitted by the parties sufficiently comprehensive that we need go no further to decide the questions presented. In a large majority of cases raising significant, seriously disputed legal issues, judges must go beyond the briefs and appendices, explore secondary sources and statutory and case law in related fields, to educate themselves regarding the relevant competing considerations. In short, the first response to the institutional-competence argument is: We do it all the time.

I concede that this first-level answer is far from decisive; the kind of inquiry necessitated by wide-angle adjudication is at least quantitatively, if not qualitatively, different from that entailed by the usual appeal, and the risks of error attendant upon the former are significantly greater. Those risks can, however, be reduced in two ways. First, a judge should always start with a strong presumption in favor of focused decisionmak-

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86 Frankfurter, John Marshall and the Judicial Function, 69 Harv. L. Rev. 217, 234 (1955). Frankfurter was referring specifically to constitutional adjudication, but his comment is equally applicable to other kinds of complex appeals.


88 See H. Friendly, supra note 69, at 38-39; Traynor, supra note 5, at 233-36.
ing. This will serve to limit the number of cases in which wide-angle adjudication is used and guarantee that the alternative approach will be followed only after deliberate choice. Second, a court may be advised to hold off for some period of time before undertaking a wide-angle investigation. Thus, for example, it is frequently desirable for a court of appeals to refrain, for a few years, from trying to make sense of a new and complex statute—to confine its attention for that period to specific questions raised on appeal and to allow the lower courts to explore many separate facets of the act in question. By the time it undertakes to put the pieces together, the court of appeals will have the benefit, not only of a range of concrete illustrations of the ways in which the statute does or might operate, but also of a variety of views regarding the proper shape of the field as a whole.**

It must be admitted, however, that even the aforementioned devices will not eliminate the risks generated by the deficiencies in judges’ expertise and access to information. But the residual dangers inherent in wide-angle adjudication can be substantially alleviated simply by acknowledging them. By that I mean that, when a judge writes an opinion describing the outcome of a wide-ranging inquiry, he should explicitly indicate which conclusions are firm, which are tentative, and which are highly speculative.*** In so doing, he will encourage other courts, when confronting future cases arising on the outskirts of the terrain he has mapped, to reexamine a portion of the field and, if necessary, to rechart it.

The second objection that might be made to the method described above is that it is likely to generate intercircuit conflicts. Different courts of appeals are likely to see a field of doctrine somewhat differently, and

** See K. Llewellyn, The Common Law Tradition: Deciding Appeals (1960), where the author states:

What our study shows ... is (1) that a court ought always to be slow in uncharted territory, and, in such territory, ought to be narrow, again and again, in any ground for decision. Until the territory has been reasonably explored. But what our study shows is (2) that once there is clearish light, a court should make effort to state an ever broader line for guidance. And (3) so long as each line is promptly and overtly checked up and checked on and at need rephrased on each subsequent occasion of new illumination, such informed questing after broader lines is of the essence of good appellate judging.

Id. at 389.

For a recent effort to apply this approach, see Spencer v. NLRB, 712 F.2d 539 (D.C. Cir. 1983).

*** See, e.g., Franz v. United States, 707 F.2d 582, 603-10 (D.C. Cir.), supplemented, 712 F.2d 1428 (D.C. Cir. 1983); McGhee v. CIA, 697 F.2d 1095 (D.C. Cir.), modified on reh'g, 711 F.2d 1076 (D.C. Cir. 1983). Arguably, the judge need not say anything to achieve this effect because subsequent courts will discount as dictum all conclusions inessential to the original decision. Nevertheless, re-examination of his conclusions (particularly by lower courts) will be more likely (and will be more sensitive) if he expressly indicates the degree of confidence he has in each of his conclusions and prescriptions.
few will be eager to adopt, *in toto*, another's comprehensive scheme. Thus, if more than one circuit court subjects a given area of the law to the kind of comprehensive analysis I have described, the result is likely to be significant divergence in the doctrinal systems in force in different jurisdictions.91

The response to this familiar argument is: What would be so bad about that? The resultant tension in federal law is likely to be no more acute than the kind of interstitial incoherence that results from persistent application of the focused approach. And the long-term effects of such overt conflict between the doctrinal systems in force in different circuits is likely to be beneficial. If one system proves demonstrably superior in practice, the circuits using different approaches are likely eventually to come around.92 And, at a minimum, the resultant testing of alternative comprehensive schemes will provide the Supreme Court with valuable information if and when it ultimately decides to resolve the conflict.

The third objection is that wide-angle adjudication, particularly if it results in significant restructuring of a field of law, constitutes judicial legislation, and, as such, is undesirable for two reasons. First, it results in imposition on society of the distinctive ideology of the appellate judiciary. Second, by removing from the control of the legislature a significant portion of the legal order, it inhibits and, in the long run, stunts vigorous, participational, democratic political action.93

To this (also familiar) argument, there are three responses. First, as shown in Part I, in a small but significant category of cases, exercise of judicial discretion is inevitable; wide-angle judicial decisions are thus certainly not unique in resting, to some extent, on the values of the decisionmakers. Second, the percentage of cases, arising in a given field, that present “very hard” questions and thus that require exercises of discretion is almost always reduced by a wide-angle decision; institution of a comprehensive decision generally strengthens the “constraints” imposed on judges who decide cases that arise subsequently. The resultant advantages—particularly in terms of the consistency and predictability of decisionmaking in the field—substantially offset the disadvantages associated
with the fact that the ways in which those decisions are made are controlled, to some extent, by the values of the authors of the original decision. Finally, a wide-angle decision frequently stimulates, rather than aborts, democratic political action. As long as the decision is not founded on the Constitution, it is subject to revision by the legislature. Reduction of a chaotic field of the law to a comprehensible form often facilitates, rather than discourages, assessment and restructuring of the law by the representatives of the people.  

One final observation on this general subject: To maximize the benefits of this method of appellate adjudication and to reduce as much as possible the residual force of the foregoing three objections, it is essential that a court explain its decision as fully, clearly, and precisely as it is able. This is not to say that the court should attempt to describe faithfully how it thought about and decided the case; as Dewey observed long ago, "[t]he logic of exposition is different from that of search and inquiry." What is required, rather, is an ordered, well-modulated assessment of all the competing considerations that undergird the court's prescriptions in their final form.

Such a full exposition of the basis of a decision serves two functions. First, it provides essential guidance to lower courts confronted with cases not covered by the explicit prescriptions in the opinion. Second, it compels judges employing the wide-angle method both to "think out" all the various implications of their actions as fully and as carefully as possible and to accept responsibility for their judgments and choices. A requirement of full exposition also has a practical effect of ensuring that wide-angle decisionmaking will be employed only infrequently. Judges simply

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64 In some cases, admittedly, this generalization does not hold. Particularly if there is a legislative or popular movement afoot to alter the doctrine in question, sensitivity to the need to defer to and cultivate participational political activity should prompt a court to refrain from attempting to synthesize the field. This complex of concerns is discussed more comprehensively infra in Part III.B.

66 Dewey, supra note 5, at 24. See also H. Friendly, supra note 69, at 37; K. Llewellyn, supra note 89, at 56:

Of course, only by happenstance will an opinion accurately report the process of deciding. Indeed, I urge flatly that such a report is not really a function of the opinion at all, though if the court so chooses there is no impropriety in recording such significant portions of the work as doubt, long pondering, independent research, any published source of illumination, division within the college, and the like.


do not have the time, given existing caseloads and their desire for expeditious case processing, to use a wide-angle approach very often. This is reassuring: our tradition of focused adjudication is salutary and it should, except in the narrow and compelling circumstances indicated above, continue to remain predominant.

C. Collegiality

Some persons who are not directly and intimately involved with the work of the judiciary have a badly distorted view of the courts of appeals. This view perceives a circuit court as consisting of a group of judges who are woefully lacking in collegiality, divided into distressingly stable "blocs" (sometimes defined in terms of political orientation), and encumbered by networks of personal animosities that are nurtured by incessant sniping and bickering. According to this view, the net result is that far too often, judges are reluctant openly to discuss cases with one another. The desire not to confer a tactical advantage on "the opposition" is seen to overbalance the desire to air and test out one's ideas.

This view is, as I first suggested, grossly distorted. Nonetheless, there are bits and pieces of the picture that will ring true in every circuit. Most appellate judges are seasoned, independent professionals. They have an office staff to oversee, an enormous amount of reading and writing to complete, large caseloads to manage, and various outside commitments (such as speeches, bar association meetings, judicial conferences and moot court competitions) to keep them occupied. In short, they suffer from incredibly busy schedules, and leisure time with colleagues thus comes at a premium. A difficult case, in the midst of busy schedules, may easily fray the nerves of even the most patient judges who are struggling to find the right answer.

Most of us wish it were not so. We wish we could speak more often and freely with our colleagues—try out tentative lines of thought, debate the relevance of analogous hypothetical situations, speculate on the way a doctrine would more sensibly be organized. But we often lack the time, and maybe even the collective will, to change the situation.

To determine if that will should be summoned, we need to examine more carefully the roots of our sentiments. To a large extent, our longing for greater collegiality derives simply from our desire to get along with the people with whom we work, to achieve a less tension-riddled atmosphere around the courthouse. But, to some extent, our attitude is also founded on a suspicion that we would all do our jobs better if we were more frank and cooperative in dealing with one another.

I share the aforementioned suspicion but have found that justifying it is more difficult than would first appear. The explanation that springs most quickly to mind is that, if we talked more and more openly about cases, we would somehow temper each other's more extreme ideas. Certainly that is the theory most frequently mentioned in the literature on
the subject. Cardozo, for example, speaks in terms of "averaging":

It has been said that "History, like mathematics, is obliged to assume that eccentricities more or less balance each other, so that something remains constant at last." The like is true of the work of courts. The eccentricities of judges balance one another. One judge looks at problems from the point of view of history, another from that of philosophy, another from that of social utility, one is a formalist, another a latitudinarian, one is timorous of change, another dissatisfied with the present; out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component elements.\(^8^8\)

Professor Hart seems to have had something similar in his mind when he coined the phrase "the maturing of collective thought."\(^9^9\) Hart and his followers appear to have believed that somehow, if judges talked openly and long enough about hard issues, they would not only come to agreement, but their consensus would match the prevailing values of the society at large.\(^1^0^0\)

All this seems to me highly implausible. Leaving aside the difficulty of ascertaining the values prevailing in American society at any given time and the unlikelihood that federal appellate judges could or would mold their beliefs to fit those values,\(^1^0^1\) it seems to me very doubtful that the diverse responses of a group of three (or more) judges to a hard case would ever meld in the fashion described, no matter how long they talked. The reason is not (or not usually) because we are stubborn and refuse to abandon positions once we have taken them.\(^1^0^2\) The reason, rather, is that most of our disagreements in "hard" and, especially, "very hard" cases derive from the fact that we hold very different views on the social, political or moral issues implicated by such cases, views that color the way we read the pertinent legal materials—views that are not likely to dissolve when exposed to the solvents of criticism and argument.

Of course, averaging of a sort occurs frequently in the decisionmaking

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\(^8^8\) B. Cardozo, supra note 4, at 176-77 (footnote omitted).
\(^9^9\) Hart, The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices, 73 Harv. L. Rev. 84, 100 (1959).
\(^1^0^1\) See supra text accompanying note 45.
\(^1^0^2\) This was Judge Arnold's theory. Referring to Hart's notion of "the maturing of collective thought," see supra text accompanying note 99, he argued: "There is no such process as this, and there never has been; men of positive views are only hardened in those views by such conferences." Arnold, Professor Hart's Theology, 73 Harv. L. Rev. 1298, 1312 (1960). For a not-altogether-persuasive rebuttal, see Griswold, The Supreme Court, 1959 Term—Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold, 74 Harv. L. Rev. 81, 85 (1960).
process. For one thing, we adhere to the conventions discussed in Part I.A.3. We also very often make compromises in order to achieve unanimity in cases and thereby to make possible issuance of opinions that will be of some use to private parties and lower courts in the future. But such compromises do not always reflect underlying agreement on all portions of an opinion. And, as far as I can tell, compromises are only occasionally facilitated significantly by full and frank discussion of the issues involved.

In short, if collegiality improves appellate adjudication, it must do so in some way other than promoting consensus. My view is that the most important advantage gained by thoroughly "talking out" cases with one's colleagues is that each judge is able, thereby, to refine his views. On rare occasions, such a discussion amongst the members of a three-judge panel prompts one of the judges to see the error of his ways and come around to a view held by one or both of the other two. Somewhat more often, a judge will be led significantly to shift his stance, but not to agree with the others. But by far the most common—and, in my opinion, beneficial—result is that each judge comes away with a more sophisticated and modulated sense of the case. This effect is most pronounced in cases that depend significantly on the practicability of alternative solutions; nothing is better than an argument with a skeptical colleague to hone one's understanding of what set of rules works best in practice in a given situation. But in almost any complex case the effect is noticeable.

The dynamic just described seems to me demonstrable and important enough to warrant making a concerted effort to improve our relations with one another. This is especially true when we anticipate engaging in what I have described as "wide-angle adjudication." The complexity of the issues raised in such cases and the large role typically played by considerations of practicability make us even more dependent than usual on free-wheeling exchanges with one another for the essential fine-tuning of our views.

D. Expeditiousness

My last proposal has to do with the speed of case processing. I firmly believe that judges must decide cases faster, and I am dismayed by the time delays that many litigants face in case processing in the courts of appeals. The problem is complex, however, because speed in case processing is only one of several equally important goals of the courts. No one would responsibly urge speed at the direct expense of quality adjudication and certain cases (because of their complexity and importance) take time to decide. Nonetheless, I have found that there are too many appeals that simply languish in the courts long after the time when an opinion

\footnote{See supra Part II.B.}
reasonably should have been issued. It is this reality that I find troublesome.

During the year ending June 1983, statistics on case dispositions in the District of Columbia Circuit indicated the following:

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<td>Median time from the date of</td>
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These figures are not patently unreasonable, but they are misleading. In order to appreciate the problem of delay to which I refer, it is important to recall that approximately fifty percent of all appeals are decided by order and without a full opinion.\(^{104}\) This means that a median figure of nearly two months as the time required to dispose of an appeal after oral argument is hardly impressive. Hidden beneath this statistic is the reality that too many case dispositions are delayed for over a year (and some for nearly two years!) before an opinion is issued after oral argument. Excluding en banc dispositions, I have yet to see or hear of a case that a court of appeals was justified in spending more than a year to resolve.

Expeditious case processing is especially important in criminal cases and in circumstances in which some important governmental action is under challenge. But even more “ordinary” appeals deserve prompt attention and resolution. Promoting repose, preserving (or restoring) citizens’ confidence in the courts, relieving the often acute financial distress an injured party must endure before receiving recompense—the considerations are familiar; we need to remind ourselves of their importance.\(^{105}\)

Note that I am not suggesting that we decide more appeals; the complex issue of the proper size of our caseload is in no way implicated by my proposal. I am simply suggesting that we decide cases as soon as possible after they come in. Admittedly, some extra work may be required to get ourselves in a position from which we are capable of implementing such a

\(^{104}\) Edwards, supra note 2, at 894.

\(^{105}\) Professor Tribe observes:

[I]f court backlogs grow at their present rate, our children may not be able to bring a lawsuit to a conclusion within their lifetime. Legal claims might then be willed on, generation to generation, like hillbilly feuds; and the burdens of pressing them would be contracted like a hereditary disease. Resort to law would be the nightmare described by Dickens in Bleak House—a dismal rite that “so exhausts finances, patience, courage, hope, so overthrows the brain and breaks the heart, that there is not an honorable [lawyer] who would not give—who does not often give—the warning, ‘Suffer any wrong that can be done you rather than come here!’ ”

Tribe, Too Much Law, Too Little Justice, ATLANTIC, July 1979, at 29. Such a state of affairs undoubtedly will never come to pass, but Tribe’s comment is illuminating insofar as it suggests the ways in which most non-lawyers already feel when faced with the prospect of federal litigation.
policy. But once a court is "caught up," it would need to do little more than what is being done at present to stay current. In my view, it is our duty to make the necessary effort—to reduce the degree to which justice is now being delayed.

At present, there are some serious obstacles to improvements in case processing. Certain obstacles, such as expanding caseloads, inadequate appropriations for judges' salaries, support staff appointments and purchases of necessary equipment (such as word processing machines), inadequate advocacy, excessive brief filings, and a proliferation in petitions for rehearing, are beyond the direct control of the judges. Other obstacles, however, such as excessively long opinions (with too many string citations), prolix concurring and dissenting opinions, and inefficient uses of available advanced technology, are subject to remedy. I have come to believe, for example, that judges sometimes misuse certain technological devices such as LEXIS and Westlaw (causing extended delays in research and opinion writing); I have also thought that, because of ignorance as to what is available and how it might be employed, we fail to make adequate use of advanced computer technologies that might expedite the work of the court.

It may be that the sheer press of business will force a resolution of the expeditiousness problem. This may happen in a number of ways, however. To the extent possible, I think that it would be preferable for judges to get their own houses in order so as to avoid the imposition of arbitrary solutions from without.

III. "FIT LEGISLATION": A Plea For Precision and Cooperation

My principal concern in this article has been what my colleagues and I do and how we might do it better. We are not, however, masters of our activities and destinies; the kinds of cases we confront, and how we are able to handle them, are substantially controlled by Congress. Accordingly, it seems appropriate to close with a few comments regarding how Congress might assist us to do our jobs better.

A. Facilitating Statutory Interpretation

The more precise and coherent a statute, the less it permits and requires creative judicial interpretation. That simple principle has been in the public domain for a long time, but never has the judiciary felt its force more than today. We are choking, not on statutes in general, but

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106 The language is borrowed from Frankfurter, supra note 22, at 545.
107 See, e.g., id. at 528-29.
108 This is Professor Calabresi's thesis. See G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1-7 (1982).
on ambiguous and internally inconsistent statutes.\(^{109}\) To cite an example, one of the deformities in the Civil Service Reform Act,\(^{110}\) resulting from the political struggle that attended the birth of the statute, is the incoherence of the provisions pertaining to standards of review. One possible reading of the Act would require reviewing courts to defer to the considered judgment of the Merit Systems Protection Board which, in turn, must defer to public employer judgments that are subject to challenge under the Act. The net result would be to allow federal employers virtually unlimited freedom of action in disciplining employees—a result patently inconsistent with the thrust of the Act as a whole.\(^{111}\) Another illustration: the Equal Access to Justice Act,\(^{112}\) passed in 1980, drastically alters the ability of civil litigants to recover attorneys’ fees against the United States. The statute was passed only after a long struggle between defenders of the interests of small businessmen (who wanted a generous statute), various public interest organizations (most of whom wanted a restrictive statute), and representatives of several federal agencies (who advocated a restrictive statute in order not to inhibit their legitimate enforcement efforts or financially overburden their departments). The result is that the Act is riddled with ambiguous phrases. For instance, the government’s liability for fees is made to depend, in most cases, on whether its “position” was “substantially justified,” but the Act fails to indicate whether that “position” means the governmental action that precipitated the suit or the stance taken by the United States in litigation, and it provides only meager guidance regarding what constitutes a “substantially justified” position.\(^{113}\)

Statutory incoherence and vagueness of this order impose enormous burdens on the courts when trying to give life to the legislature’s language. Sometimes we are able, by ascertaining the purposes underlying the statute in question, to make some reasonably educated guesses as to what Congress might have wanted to say had it considered a particular problem more carefully. In other cases, however, the statute is rooted in so many cross-cutting policies, the weight of each of which is virtually impossible to determine, that we have no choice but frankly to exercise our discretion and interpret a contested provision as we see fit. Adoption of either approach, however, inevitably gives rise to a disagreement among different judges and panels. The result is inconsistency and unpre-


\(^{111}\) See Devine v. White, 697 F.2d 421, 434-35 (D.C. Cir. 1983).


\(^{113}\) See Spencer v. NLRB, 712 F.2d 539, 546 (D.C. Cir. 1983).
dictability in the interpretation of the law. When difficulties of this sort are foreseeable—as they very often are—Congress abdicates its responsibility by not anticipating and, through more careful draftsmanship, avoiding them.

I concede that there are limits on the ability of the legislature to relieve the judiciary of the trials and tribulations attendant upon statutory interpretation. Obtaining agreement on clear and consistent statutory language among members of Congress prone to regard themselves as spokespeople for their constituencies (or for particular interest groups) is often impossible. More importantly, it must be acknowledged that even a perfectly unified Congress could not purge its products of all ambiguity and tension. The fields covered by many modern federal statutes are extraordinarily complex—too complicated, certainly, to be comprehensively mapped by even the most conscientious of legislators. More fundamentally, the words Congress must employ when putting together an enactment are inherently ambiguous to some extent. Finally, it is frequently inevitable that, when legislators set out to regulate a new area, they have only a tentative sense of the objectives they wish to achieve; refinement of their purposes only becomes possible after they have been able to watch, for some time, a regulatory scheme in action. Even admitting all this, however, it is incontrovertible that Congress could do much better than it usually does now.

In addition to exercising more care in drafting statutes, Congress could aid us a great deal by reviving a practice used by Parliament in its early years. An important component of an early English statute was an explicit recitation of the act's purposes. This was a boon to judicial interpretation. When trying to make sense of an ambiguous provision, the courts at least had a clear notion of what the legislature was aiming at. To be sure, many modern federal statutes contain preambles, but too often they consist of little more than collections of innocuous platitudes. Even when an introductory statement is more controversial and explicit, courts are loath to rely heavily on it, on the theory that few members of Congress anticipated that the language would significantly affect the operation of the statute and, consequently, that the preamble might well not reflect fairly the legislators' true intent. The problem is thus circular.

114 See generally Lowi, supra note 109.

115 As Frankfurter observed 35 years ago: "The imagination which can draw an income statute to cover the myriad transactions of a society like ours, capable of producing the necessary revenue without producing a flood of litigation, has not yet revealed itself." Frankfurter, supra note 22, at 528 (footnote omitted). Many fields of contemporary legislative action could be described in similar terms.

116 See Hart, supra note 19, at 607.

117 See Frankfurter, supra note 22, at 529-29; Hart, supra note 19, at 627.

118 Frankfurter, supra note 22, at 541-42.

119 Id. at 542.
Only Congress can break the loop. If it begins to elaborate and take more seriously its preambles, we will accord those introductory statements more weight in our interpretations. The net result will be both greater constraint on the activity of judicial construction and more effectual promotion of Congress' ends.

B. Responding to Judicial Invitations

In the course of deciding appeals, we very often come across areas of the law that cry out for kinds of minor reform or major change that the legislature is best able to make. Few sittings fail to expose one or more problems concerning outmoded statutes;\textsuperscript{120} questions the legislature evidently never considered;\textsuperscript{121} and areas in which two or more regulatory systems work, in practice, at cross-purposes.

The proper thing to do in all such cases, of course, is to call the legislature's attention to the difficulty. Unfortunately, the capacity of courts to get the legislature to look their way is sharply limited. On occasion, of course, court opinions are studied when a statute has been struck down, a conviction invalidated or an election blocked. But, even in such instances, courts frequently have difficulty prompting any meaningful legislative response. And, in the vast majority of cases, when neither a statute nor an executive action can responsibly be said to contravene a constitutional provision, we can do little more than include some language in our opinions pleading for assistance and hope those opinions happen to land on the desks of favorably inclined members of Congress.\textsuperscript{122}

The limitations on the ability of the judiciary to initiate and sustain conversations with the legislature make it all the more important that the legislature listen for our occasional requests for aid. When it does not, or when it hears but then turns a deaf ear on our pleas, one of two things happens. By far the more common effect is that no one makes an effort to reform the area of law in question. Any number of circumstances may prompt the courts to refuse to act on their own: the field may be too complex to be susceptible of judicial mapping;\textsuperscript{123} a rule may be too em-

\textsuperscript{120} See generally G. CALABRESI, \textit{supra} note 108.

\textsuperscript{121} See generally Wald, \textit{supra} note 109.

\textsuperscript{122} Professor Calabresi has proposed that we respond differently. Despairing of legislative responsiveness, he suggests that the courts constitute themselves, in effect, legislative reform commissions and proceed to modify or abrogate statutes that both no longer enjoy majoritarian support and do not "fit" with the current legal landscape. See G. CALABRESI, \textit{supra} note 108, at 163-66. I happen to think that adoption of such a strategy would be highly unwise for the reasons recently sketched by one of my colleagues. See Mikva, Book Review, 96 Harv. L. Rev. 534 (1982) (reviewing G. CALABRESI, \textit{supra} note 108). But, regardless of my sentiments on the matter, Calabresi's proposal is sufficiently radical as to have little chance of being adopted in the foreseeable future. As my concern, in this essay, is with feasible, incremental reforms, I will not pursue further Calabresi's interesting argument.

\textsuperscript{123} A good example is the set of doctrines governing the immunity of governmental offi-
bedded in the law to be excised without the sort of compensatory adjustments that only a legislature can make;\textsuperscript{124} the changes necessary to reconcile two regulatory schemes when they overlap at their margins may be likely to have feedback effects on the rest of the programs in question, effects too drastic for judicial control; etc. When any one of these conditions obtains, the court that discovers a problem will almost always decline to attempt to alter the law to solve it; the net effect is that the difficulty goes unremedied indefinitely.

The other, less common effect is that the court moves ahead on its own. In a few contexts, it has no choice but to do so; when a party has established a violation of constitutional rights, the court must devise a remedy to provide redress and sometimes is obliged to structure a sweeping set of constraints on executive action to curtail future similar violations.\textsuperscript{125} In

\begin{footnotesize}
\item[124] Judge Traynor provides the following illustration:

What considerations make it preferable to leave liquidation to the legislature? Sometimes it becomes quickly apparent that if liquidation is to do more good than harm, there must also be construction of new rules of such scope that only the legislature, with its freedom and resources for wholesale inquiry, can effectively formulate them. Professor Wolfgang Friedmann has given us an apt example in contributory negligence, about which judges remain deliberately passive. He notes that “the continuing predominance of contributory, as distinct from comparative, negligence in the great majority of American jurisdictions is assuredly out of tune with elementary principles of fault responsibility, as well as the trends of contemporary legislation.” In his view, however, “judicial reform in this field is impossible because a court cannot substitute comparative for contributory negligence without enunciating the principles of apportionment to be applied.” He adds that:

While this perhaps is not too convincing an argument in view of the old judge-made admiralty rules of comparative negligence, a more persuasive obstacle against judicial lawmaking in this field is the fact that the effective carriers of liability are, in the great majority of cases, the insurance companies, and not the nominal parties. Judicial reform would therefore affect the whole complicated—and partly regulated—structure of insurance rates. It would also be difficult for the courts to proceed to the other pole of limiting the imposition of complete liability in accident cases to those involving “gross” negligence—in this writer’s opinion a desirable reform—although some rough lawmaking of this kind may occur in jury verdicts.

Traynor, supra note 5, at 233 (footnote omitted) (quoting Friedmann, Legal Philosophy and Judicial Lawmaking, 61 Colum. L. Rev. 821, 841 (1961)). See also Kerr S.S. Co. v. Radio Corp. of America, 245 N.Y. 284, 288, 157 N.E. 140, 142 (1927) (since a sender better understands the risks of nondelivery, he is in a better position than a carrier to protect against the risk of loss).

\item[125] The classic example of the promulgation of a set of rules to protect constitutional rights—rules that might well be unnecessary if the legislature acted to set up an alternative means of deterring violations—is the doctrine preventing the use in a criminal trial of evidence obtained as a result of the defendant’s rights. For a sensible discussion of that doctrine and of other structurally similar remedial devices, see Monaghan, The Supreme Court, 1974 Term—Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1 (1975).
\end{footnotesize}
other instances, the court is not *obliged*, in the foregoing sense, to take the initiative in restructuring an area of the law, but decides to do so anyway. Impatient at the unresponsiveness of Congress or cynical about the utility of requesting (and waiting for) legislative assistance and unwilling to allow the problem to continue, the court does its best to alter or rearrange the pertinent doctrines.\(^\text{126}\)

Unilateral judicial action of the sort just described has two drawbacks. First, usually the legislature has the information, expertise, and tools to do a better job rebuilding the doctrinal structure than the judiciary is capable of doing. When the judiciary attempts to do the renovation on its own, consequently, it almost always creates a cruder (and shakier) edifice than the legislature could have produced. Second, and perhaps more importantly, by taking the problem out of the hands of the representatives of the people, the courts contribute incrementally to the stultification of participatory democracy in this country. Justice Harlan put this point sharply in his dissent in *Wesberry v. Sanders*:\(^\text{127}\) “What is done today saps the political process. The promise of judicial intervention in matters of this sort cannot but encourage popular inertia in efforts for political reform through the political process, with the inevitable result that the process is itself weakened.”\(^\text{128}\) There is much wisdom in this view. What is too often forgotten by its adherents, however, is that the virus that causes the aforementioned much-bewailed disease is not judicial activism, but failure on the part of the representatives of the people either to move to halt practices that result in violations of individual rights or to respond to efforts by the courts to involve them in the process of reform.

**Conclusion**

Since I have already reflected at length—possibly even too much—on the role of a judge in modern society, it would be tiresome (and probably presumptuous) of me to say more in conclusion. Indeed, the somewhat amorphous nature of my topic defies any final statement.

Any conclusions that I may have are surely tentative. And, to the extent that my views have taken shape, my tentative conclusions are easily

\(^\text{126}\) Something of this sort seems to be occurring now in the area of official immunity, see *supra* note 53; Harlow v. Fitzgerald, 457 U.S. 800 (1982) (significantly modifying the “qualified immunity” doctrine in order to make possible more expeditious processing of claims and to reduce the “chilling” effect on discretionary administrative action that the old doctrine seems to have created).

\(^\text{127}\) 376 U.S. 1 (1964) (Harlan, J., dissenting) (mandating equally populated congressional districts in all states).

extracted from the foregoing sections of this article. New ideas, broader conclusions and, conceivably, some bolder proposals for reform, will come only with more time and maturity on the bench. For now, I am content to end this reflective effort with a citation to the eminently sound and prophetic words of Professor G. Edward White:

[A] mode of minimally acceptable professional competence has followed the judiciary through time, despite changes in the types and forms of opinions. Oracular and mechanical jurisprudence have given way to various twentieth-century theories, but analytical soundness, intelligibility, and rationality have been continuously associated with competent judging. These minimum requirements have been transcended in the great appellate opinions of American history, opinions in which judging has resembled high art and statecraft; yet they have thus far not been abandoned. They will remain in the future unless the appellate judiciary adopts an approach in which institutional power utterly replaces rational analysis, the euphemism becomes the sole means of communication, and the tension between independence and accountability accordingly evaporates. At that point the American judicial tradition will have lost its meaning.¹⁹⁹

¹⁹⁹ G. White, supra note 83, at 375 (footnote omitted).