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JUDICIAL RESTRAINT REAPPRAISED*

Charles M. Lamb**

Judicial restraint on the United States Supreme Court is no ephemeral development. Indeed, it is practically as old as the nation itself. Principles and maxims of restraint have historically played a momentous role not only in judicial decision-making but in national politics generally. Dissension existed among early American political leaders over the proper role of the Court and its interpretations of the law.1 Similar conflicts have persisted to the present. As an example, the Burger Court majority purportedly reflects the view that justices should exercise restraint. With the rare opportunity to appoint four members to the Court, President Nixon stacked that institution with men who disagreed with the Warren Court's liberal activist policy-making.2 Therefore, within the recent past, the nation has witnessed a modern analogue to judicial and political disagreements over whether the Court should exercise restraint or activism.

Many leading scholars in the field of public law seem to believe strongly in the restraint orthodoxy. When a majority of the Supreme Court reads new meanings into the Constitution and statutes, those justices have been attacked for what Wallace Mendelson, among others, has termed "judicial fiat."3 Increased activism on the part of federal courts has spawned several major publications in recent years urging greater restraint.4 Archibald

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1. For examples from the 18th and 19th centuries, see A. Kelly & W. Harbison, The American Constitution: Its Origins and Development chs. 5, 7, 8, 9, 10, 11, 13 passim (5th ed. 1976).


4. For prominent examples, see R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (1977); A. Cox, The Role of the Supreme Court in American Government (1976); L. Graglia, Disaster by Decree: The Supreme Court's Decisions on Race and the Schools (1976); D. Horowitz, The
Cox, for example, has suggested that an “excessive price” has been paid for the “over-expanded” and “over-politicized” role that the judiciary now plays in the political process.\(^5\) Raoul Berger, Nathan Glazer, and Donald Horowitz have gone much farther. They have observed that instead of exercising proper restraint, increasingly courts are roaming far and wide into policy areas where they do not belong.\(^6\) These commentators view activism as unjustified, atypical behavior for judges. As Henry Abraham has commented, traditionally Supreme Court justices have felt an “overriding need for judicial self-restraint. Its acceptance plays an omnipresent and omnipotent part in the attitude of the nine members of the highest Court in the United States.”\(^7\)

For the most part, these are simply old ideas restated by contemporary scholars. This article presents contrasting arguments and viewpoints regarding Supreme Court decision-making and its proper role in the political system. Without accepting at face value either the legitimacy of restraint or the view that it has generally guided judicial behavior in the past, the first two sections critique the premises underlying restraint and some of its related maxims. The purpose is to underscore common myths and inconsistencies concerning the notion of restraint. The third and fourth sections address the question whether the term judicial restraint, and its maxims, should be completely scrapped because of the uncertainties and ambiguities associated with their usage.

**I. Basic Premises Underlying Restraint**

To understand judicial restraint, one is most likely to turn to the opinions of either Justice Oliver Wendell Holmes or Justice Felix Frankfurter. Although Holmes was a shining spokesman for restraint, Frankfurter’s opinions are focused upon here because they are more contemporary, and seem to spell out more frequently and elaborately the view that restraint is the proper function of the Court in American government. Following in the doctrinal footsteps of Holmes\(^8\) three decades later, the principle of restraint was Frankfurter’s professional heart and soul. Frankfurter repeat-
edly claimed that, regardless of his own personal views on an issue, he
relied on his conception of the Court as an arbitrator of questions of law—
not questions of political or economic or social reform—in making deci-
sions. In so doing, Frankfurter pushed the doctrine of restraint to its outer
limits, even beyond that which Holmes had enunciated as a dissenting
member of the activist, laissez-faire Court. Accordingly, Frankfurter’s
opinions more clearly state the two fundamental premises of the restrain-
tist’s insistence on a limited role for the courts.

The first premise is the assertion that judicial policy-making conflicts
with the very essence of a “democratic society,” a phrase never clearly
defined. As will be explained in detail below, judicial policy-making is said
to defeat the purposes intended by the people’s elected representatives and
therefore to run counter to popular sentiment. Proponents of restraint ar-
Igue that courts should endeavor to stand aloof from political controversy.
Some restraintists would even let social problems fester until the “politi-
cal” branches of government set them straight. In other words, advocates
of restraint believe in a quiescent role for courts. They are reluctant to read
their own attitudes into the law or to judge the wisdom of legislation. They
hold dear “democratic decision-making,” the concept of federalism, and
the doctrine of separation of powers. They loathe interference—even if jus-
tice is not forthcoming from the political process. Legislative representa-
tives must initiate changes designed to protect individual rights, not the
courts. It is primarily the give-and-take of the legislative process that al-
Iows the people’s will to be known.

In contrast, according to the argument, Supreme Court members have
the luxury of lifetime appointments and are thus not accountable to the
public. To a supporter of restraint, this suggests that it is possible for the
Court to act as an undemocratic, counter-majoritarian, politically irre-
sponsible, oligarchic body. Frankfurter counseled that “[t]he Court is not
saved from being oligarchic because it professes to act in the service of
humane ends. . . . Judges appointed for life whose decisions run counter
to prevailing opinion cannot be voted out of office and supplanted by men

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9. See, e.g., Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 466-72 (1947) (Frank-
furter, J., concurring); Colegrove v. Green, 328 U.S. 549 (1946).

10. The laissez-faire Court, which existed from the 1880s into the mid-1930s, is perhaps
best known for its activist decisions which overturned state and federal economic regulation
legislation during the New Deal Administration. See, e.g., Carter v. Carter Coal Co., 298
U.S. 238 (1936); United States v. Butler, 297 U.S. 1 (1936); Schechter Poultry Corp. v.
United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). For
discussions of the Court and relevant cases, see, e.g., L. Beth, Politics, the Constitution
and the Supreme Court 111-30 (1962); A. Kelly & W. Harbison, supra note 1, at chs.
26-27; R. McCloskey, The American Supreme Court chs. 5-6 (1960).
of views more consonant with it." He added that judges "are even farther removed from democratic pressures by the fact that their deliberations are in secret and remain beyond disclosure." A related theme was elaborated upon by Frankfurter in *West Virginia State Board of Education v. Barnett*, where he noted in a dissenting opinion that "[a]s a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard." This outlook led Frankfurter to believe that the Court's revered position in the political system is chiefly based on public confidence which, he contended in *Baker v. Carr*, "must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements."

Regardless of assertions by Frankfurter and more recent scholarly spokesmen for restraint, their arguments are by no means self-evident propositions. Indeed, they may be rebutted quite persuasively. For one thing, activism on the part of the Court may be "democratic" if it alerts the remainder of the political system to legitimate problems that elected officials have failed to handle adequately. This was undoubtedly the case with Warren Court decisions on civil rights. Only after such decisions did

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12. Id. at 556. For a similar version of this position, see R. Berger, supra note 4, at 408; A. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16-17 (1962); L. Graglia, supra note 4, at 14; L. Hand, The Bill of Rights 11-12 (1958); Glazer, supra note 4, at 110-11.
13. 319 U.S. 624 (1943) (Frankfurter, J., dissenting).
14. Id. at 647.
15. 369 U.S. 186 (1962) (Frankfurter, J., dissenting).
16. Id. at 267 (Frankfurter, J., dissenting). This statement is, in essence, the premise of the rather amorphous political question doctrine. In *Baker*, Justice Frankfurter provided a detailed critique of this doctrine and its function in the federal judiciary. See id. at 280-97. See also *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 470-71 (1947) (Frankfurter, J., dissenting).

The major exception to the observation that the Supreme Court has rarely been out of step with public opinion or federal executive or legislative branch policies is the series of decisions in the 1930s wherein the Court invalidated various New Deal laws. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *United States v. Butler*, 297 U.S. 1 (1936); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). These decisions persuaded the Roosevelt Administration that strong measures were needed to save the New Deal. The result was Roosevelt's famous Court-packing plan. While the plan was not passed by Congress, it was apparently a contributing factor in the Court's subsequent decisions upholding various aspects of the New Deal. See, e.g., *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).
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presidents and Congress begin to act forcefully on those civil rights issues. Moreover, Frankfurter’s premise that the Supreme Court is an undemocratic, oligarchic body does not, in fact, distinguish it from the federal bureaucracy. The bureaucracy, of course, is far from an elected, responsive force in American government. Additionally, when Supreme Court decisions are contrasted with congressional behavior, it is apparent that some aspects of the legislative process are not purely democratic. Legislative seats may not be equally apportioned, and members of Congress, especially senators who do not have to face the electorate for a number of years, may cast votes which are contrary to their constituents’ wishes. The Congress itself also has a number of undemocratic features, including filibusters and the committee system. Finally, many deliberations of the executive and legislative branches are also characterized by secrecy and are never publicly disclosed.

The existence of the Bill of Rights itself is evidence that government in the United States was never intended to be an “absolute democracy” based solely on the majority will. Moreover, as long as the intent and effect of Supreme Court decisions is to protect rights guaranteed by the Constitution, the fact that the justices are appointed for life and the manner in which they make decisions matters little. It is difficult to assert that most Warren Court activism was “undemocratic,” or that an “excessive price was paid,” when its decisions extended civil rights, protected rights of those accused of crime, upheld first amendment rights, and required the reapportionment of federal, state, and local legislative districts. In the final analysis, the Supreme Court is usually not out of step with public opinion or federal executive and legislative branch policies. The Court should

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20. Id. at 175.

21. Justice Jackson has written that “[t]he very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and establish them as legal principles to be applied by courts.” West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1942). See also The Federalist No. 78, at 521 (A. Hamilton) (J. Cooke ed. 1961), where Alexander Hamilton stated:

By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.

therefore not be viewed as a "deviant," "undemocratic" institution of government. Nor is it all powerful. It is, as Alexander Hamilton said, the least dangerous branch.\footnote{3}

The second premise in support of restraint is that courts simply are not equipped to make "wise policy," and therefore judicial policy-making can never effectively meet pressing societal needs. Specifically, a court, unlike a legislature, lacks the staff and power to hold hearings with expert witnesses presenting myriad facts and points of view. Once more stating the case for restraint, Frankfurter argued that "[c]ourts are not equipped to pursue the paths for discovering wise policy. . . . Only fragments of the social problem," he contended, "are seen through the narrow windows of a litigation. Had we innate or acquired understanding of a social problem in its entirety, we would not have at our disposal adequate means for constructive solution."\footnote{24} The assumption here, and it is a considerable one, is that even the best educated and intelligent justices, the most superbly prepared amicus and Brandeis briefs, with the availability of highly qualified law clerks to assist the justices, and the use of "masters" and experts would never approach the point whereby a justice could make "wise decisions" based on an adequate amount of facts and data. A related argument was proffered by Frankfurter in \textit{Dennis v. United States}.\footnote{25} In a concurring opinion, he admonished that "[c]ourts . . . are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits."\footnote{26}

But myth must be separated from reality. While federal and state legislatures typically have larger staffs than the justices, legislators nevertheless cast votes on hundreds of bills each session upon which they have little or no personal knowledge. They frequently depend on the views of other legislators with whom they usually agree, or colleagues previously assigned to the committee that framed the legislation.\footnote{27} Hence, a legislator is fre-
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quently less informed on pending statutes than a justice is on pending cases. Furthermore, lawyers appearing before the Court have the responsibility of bringing all relevant information to the attention of the justices as it supports their arguments. If the justices are uninformed in a case, the blame lies as much on the lawyer as on the Court.

More importantly, while the Frankfurter premise that the Court is ill-equipped to make "wise policy" may apply to complicated economic, tax, medical, antitrust, or technological questions, questions of general social policy—such as desegregation, criminal justice, reapportionment, and school prayers—are quite another matter. These questions are not unfit for adjudication. They require that policymakers—whether judicial, executive, or legislative—make value judgments about the resolution of seemingly intransigent social problems. Unlike more technical subjects, social policies touch all our lives, and judges, like legislators, are not blind to extratransitional sources of information.28 Since these policy questions must be resolved based upon personal judgment, value judgments by members of the Supreme Court may be equally as sound as those of elected officials.

This reasoning becomes exceedingly critical when elected officials will not resolve a policy problem because of its political sensitivity. When a political stalemate occurs, members of the Supreme Court must act as participants in the political process, not as the apolitical arbitrators of purely legal issues as is required by the philosophy of restraint.29 This is especially true where individual rights and liberties are at stake.30 Unlike legislators and executive branch officials, the justices are particularly well situated to perform this function. They operate in a largely insulated environment in which they may dispassionately resolve issues where individual rights, often of unpopular groups or minorities, have been violated. In


29. Numerous authorities have expressed the belief that the Supreme Court is often justified in making policy where the other two branches of the federal government reach a stalemate. See, e.g., A. COX, THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM 117-18 (1968); R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS 284-85 (1941); Mason, The Burger Court in Historical Perspective, 89 POL. SCI. Q. 27, 34 (1974); Wright, The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint? 54 CORNELL L. REV. 1, 6 (1968).

30. See, e.g., S. WASBY, THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM 22 (1978); Miller, For Judicial Activism, N.Y. Times, Nov. 11, 1979, § 4, at 21, col. 5.
short, activism is an appropriate stance for the Court to assume in some instances, and advocates of restraint, whether they be judges or academics, have failed to consider thoroughly the consequences of their position.

II. MAXIMS OF RESTRAINT

Despite the questionable validity of these two theoretical premises supporting restraint, Supreme Court justices have felt it necessary to establish specific ground rules concerning the exercise of restraint. Few of these rules are required by Article III. Rather, they have been imposed on the Court by its own members and are commonly referred to as maxims of restraint. These maxims, in turn, provide a convenient framework for reconsidering details of the doctrine of restraint that go beyond its two basic premises.

The most elementary maxims are so widely understood that they need be only briefly mentioned. Two of the most basic rules are that a "case or controversy" must be present before the Supreme Court will accept an appeal, and the parties must have standing. A "substantial federal question" also must be involved, and the Court, in the words of Justice Robert Jackson, "has no self-starting capacity and must await the action of some litigant so aggrieved as to have a justiciable case." The Court, too, answers only "live" rather than moot questions, and all other possible legal remedies must be exhausted before the Court will accept a case for decision.

Other maxims of restraint demand greater attention, though, for they are more susceptible to reconsideration and criticism. Perhaps the foremost maxim is that the justices must abide by the intentions of the framers of the law. This concept is derived from fundamental notions that the American political system is based on "government of laws, not of men," that there shall be "justice under law," not "justice" as Court members happen to perceive it, and that there should be little room for broad judicial construction of constitutional and statutory pronouncements. Countless examples could be provided regarding this maxim as stated by advocates of restraint. But it is more revealing to note how activist justices pay lip

31. See H. Abraham, supra note 7, at 372-400.
32. For details, see id.
34. Massachusetts Declaration of Rights, quoted in Cooper v. Aaron, 358 U.S. 20, 23 (1958) (Frankfurter, J., concurring).
36. See, e.g., Antieau, Constitutional Construction: A Guide to the Principles and Their
service to it, although they customarily observe the maxim only when it fits their purposes. For instance, Justice George Sutherland, one of the foremost conservative activists on the laissez-faire Court between 1922 and 1938, warned in his dissent in *Home Building & Loan Association v. Blaisdell* that "[t]he whole aim of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent, of its framers and the people who adopted it." Three decades later, Justice Arthur Goldberg, a leading member of the activist Warren Court majority, stressed the same point in *Bell v. Maryland*. Goldberg commented that "[o]ur sworn duty to construe the Constitution requires . . . that we read it to effectuate the intent and purposes of the Framers."

What is usually glossed over is the question of how a Supreme Court justice can determine precisely what the framers intended in a document nearly two centuries old. Professor Raoul Berger and other legal commentators notwithstanding, there are no easy answers. Moreover, who were "the framers"? The thirty-nine men who signed the Constitution? The state legislators who ratified it? And even if there is a group of identifiable persons who can be labeled "the framers," still their intentions cannot always be determined. Additionally, even where their intentions can be ascertained, they are still of little consequence if constitutional construction falls short of meeting societal needs that the legislative or executive branches do not satisfactorily address. Therefore, the Supreme Court must interpret the Constitution to help keep it in tune with the times, but the justices cannot always do so given this maxim. John P. Roche has added that "the intention of the Framers is essentially irrelevant except to antiquarians and polemicists." But if "correct construction" is what a justice ideally seeks, such construction is still influenced by the times, the issues in a case, and the particular justices who are interpreting the Constitution. If the justices are to contribute to the growth of the law in an increasingly complex society, they must at times put aside the maxim that the framers' intentions must prevail. As even Justice Holmes wrote in *Missouri v. Holland*, the Constitution "must be considered in light of our whole experience, not

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37. See supra note 10 and accompanying text.
38. 290 U.S. 398 (1934) (Sutherland, J., dissenting).
39. *Id.* at 453 (citing *Lake Country v. Rollins*, 130 U.S. 662, 770 (1888)).
40. 378 U.S. 226 (1964) (Goldberg, J., concurring).
41. *Id.* at 288-89 (Goldberg, J., concurring).
42. *See, e.g.*, R. BERGER, supra note 4, at 245; A. COX, supra note 4, at 100.
43. Miller, supra note 22, at 166.
merely in that of what was said a hundred years ago."45

Apostles of restraint have nevertheless gone out on a weak limb in their enthusiasm to construe the law as the framers intended. They have even argued that there can be no judicial discretion outside of simply applying the law as written. In 1824, Chief Justice John Marshall wrote, in Osborn v. Bank of the United States,46 that "[j]udicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing."47 The point is not that Marshall was a consistent practitioner of restraint;48 rather, the point is that even Marshall on occasion found it necessary to justify placing limitations on a judge's power and to support the maxim that the law be read strictly as written. Marshall thus noted that the judicial "department has no will, in any case . . . . Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law."49 No less an authority than Justice Benjamin Cardozo, however, has reminded us that Marshall's statements "can never be more than partly true,"50 observing that "Marshall's own career is a conspicuous illustration of the fact that the ideal [i.e., always giving effect to the will of the legislature] is beyond the reach of human faculties to attain."51

Equally as idealistic, yet praised as maxims of restraint, are statements contained in the opinions of Chief Justice Roger Taney. For example, in Dred Scott v. Sandford,52 Taney maintained that the Constitution "speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted

45. 252 U.S. 416, 433 (1922). Or, in the words of Justice Harlan F. Stone, "the great constitutional guarantees and immunities of personal liberty and of property, which give rise to the most perplexing questions of constitutional law and government, are but statements of standards to be applied by courts according to the circumstances and conditions which call for their application." Stone, The Common Law in the United States, 50 Harv. L. Rev. 23 (1936).

46. 22 U.S. (9 Wheat.) 738 (1824).

47. Id. at 866.

48. To the contrary, a number of his opinions epitomize judicial activism. See, e.g., Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).


51. Id. Cardozo commented that "[Marshall] gave to the constitution of the United States the impress of his own mind; and the form of our constitutional law is what it is, because he moulded it while it was still plastic and malleable in the fire of his own intense convictions." Id. at 169-70.

52. 60 U.S. (19 How.) 393 (1857).
on and adopted by the people of the United States." Since the framers had not intended to extend constitutional rights to slaves, blacks could not claim the rights and privileges automatically conferred on all other citizens. Although the effect of *Dred Scott* was reversed by the ratification of the fourteenth amendment, Taney's words still echo in the ears of proponents of restraint.

Cast in language propounding an even stricter interpretation than the positions of Marshall and Taney is the famous literalist interpretation of Justice Owen Roberts who wrote the majority opinion in *United States v. Butler*. Roberts observed that "[w]hen an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former." Roberts' support for a restrained interpretation is ironic since *Butler* is a prime example of the use of judicial review in upholding the conservative activism of the laissez-faire Court. Roberts twisted the idea of restraint to arrive at an activist conclusion. His statement also comes strikingly close to Blackstone's view that judges are "the depositories of the law; the living oracles who are bound by oath to decide according to the law of the land." Roberts' expression thus epitomizes what Roscoe Pound had earlier labelled "mechanical jurisprudence." Most modern day students of public law would reject Roberts' position as being totally contrary to a realistic model of judicial decision-making. Judicial decisions cannot, by any stretch of the imagination, be made as Roberts suggested. A number of constitutional provisions are simply not self-explanatory, including "due process of law," "the common defense and general welfare," "unreasonable searches and seizures," "cruel and unusual punishment," and "equal protection of the law." Therefore, judges often read their own personal attitudes into the law, regardless of the doctrine of restraint.

53. *Id.* at 426.
54. 297 U.S. 1 (1936).
55. *Id.* at 62.
59. *See*, e.g., G. Schubert, *The Judicial Mind Revisited: Psychometric Analysis*
Flowing logically from the positions of Marshall, Taney, and Frankfurter—but not that of Roberts—is the fundamental maxim dictating that justices should be reluctant to exercise judicial review (although no justice has argued that this power is beyond that of the Court). This is apparent in Frankfurter's opinion in *American Communications Association v. Douds*:

"No one could believe more strongly than I do that every rational indulgence should be made in favor of the constitutionality of an enactment by Congress." According to Frankfurter, rather than exercise judicial review, courts should allow legislatures to correct their own mistakes wherever possible. Again arguing that the Supreme Court is a counter-majoritarian body, Frankfurter advised that "even if a law is found wanting on trial, it is better that its defects should be demonstrated and removed than that the law should be aborted by judicial fiat." Frankfurter at times assumed a similar position involving the exercise of federal judicial review in state cases.

One final maxim deserves comment, namely, that the Court will not decide "political" questions. The Court has recognized that some issues are nonjusticiable because they are the responsibility of the other branches for final decision. Gerald Gunther has thus commented that "[t]he concept that some constitutional issues are nonjusticiable or 'political' is well established; but what the ingredients of that conception are has produced considerable uncertainty and controversy." Gunther contends that there are actually two strands to the political question doctrine. One strand emphasizes "the nature of the question and its aptness for judicial resolution in view of judicial competence . . . . [S]ome issues [are] nonjusticiable because they cannot be resolved by judicially manageable standards, or on the basis of data available to the courts." The other strand of the political question concept is "essentially a problem of judicial discretion, of prudential judgments that some issues ought not to be decided by the courts be-

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60. 339 U.S. 382 (1950).
61. Id. at 421.
63. See, e.g., Bridges v. California, 314 U.S. 252, 281 (1941) (Frankfurter, J., dissenting).
64. See, e.g., Roche, supra note 44, at 768.
66. This statement, of course, supports the view that the courts are not equipped to make "wise policy." See supra notes 24-30 and accompanying text.
cause they are too controversial or could produce enforcement problems or other institutional difficulties."

The issue of reapportionment illustrates the difficulties inherent in the political question doctrine. Until 1962, the Court refused to address the issue of unequally apportioned legislative districts and adhered to the principles laid down in *Colegrove v. Green*. There, the Court accepted Justice Frankfurter's admonition that it should not enter the "political thicket" in the reapportionment of congressional legislative districts. It was not until *Baker v. Carr* that the Court directly overruled *Colegrove* by announcing that federal courts have jurisdiction under the equal protection clause in cases involving state legislative reapportionment and that such cases are justiciable in federal courts. After *Baker*, the Warren Court continued to intervene consistently in what formerly had been considered a political question. By so doing, the Court acknowledged that some political questions may in fact be justiciable, and gave added support to the notion that the Court is indeed a "political" branch of government. In the words of Justice Holmes, the concept of political questions is "little more than play on words." This indeed may be the principal lesson of *Baker* and its

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68. 328 U.S. 549 (1946).
69. 369 U.S. 186 (1962). Again dwelling on his theme that the Court is an undemocratic, oligarchic body, Justice Frankfurter argued that "[i]n a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives." *Id.* at 270.
70. See *Avery v. Midland County*, 390 U.S. 474 (1968); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Gray v. Sanders*, 372 U.S. 368 (1963). Like Frankfurter, Justice John Marshall Harlan was a determined restraintist and critic of the Warren Court's reapportionment decisions. In *Reynolds*, Harlan deplored the fact that the Court's one person-one vote standard was simply "a piece of political ideology." He urged that the Court should never take upon itself the authority to answer political questions. 377 U.S. at 590. Similarly, in *Avery*, Harlan wrote:

I am frankly astonished at the ease with which the Court has proceeded to fasten upon the entire country at its lowest political levels the strong arm of the federal judiciary, let alone a particular political ideology which has been the subject of wide debate and differences from the beginning of our Nation.

71. *Nixon v. Herndon*, 273 U.S. 536, 540 (1927). As Justice Brennan noted in the majority opinion in *Baker v. Carr*, 369 U.S. 186 (1962), some, but not all, questions in the foreign affairs area also are nonjusticiable:

There are sweeping statements to the effect that all questions touching foreign relations are political questions. Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views. Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a dis-
III. SHOULD WE ABANDON THE CONCEPT OF RESTRAINT?

This article has so far critiqued the premises and maxims of judicial restraint. This leads next to the question whether judicial restraint should be totally abandoned because it is a questionable, problematic, and perplexing label for describing the outcomes of specific cases, the role conceptions of individual justices, and decisional tendencies of the Court during a given period.

One may argue for abandonment of the doctrine on the basis of a number of points raised earlier. First, the two major premises underlying judicial restraint are highly debatable. Justice Frankfurter and others notwithstanding, the Supreme Court is not unique in its "oligarchic" and "undemocratic" structure and decision-making procedures.\footnote{See supra notes 17-23 and accompanying text.} Congress and the federal bureaucracy have similar features, as do state governments. Nor is the Court so ill-equipped today in terms of information and staff that it cannot make "wise policy" in the vast majority of cases that it accepts for decision.\footnote{See supra notes 27-30 and accompanying text.}

Second, maxims of restraint are often disregarded.\footnote{See supra notes 37-41, 50-51, 55-59, 69-71 and accompanying text.} Despite disclaimers to the contrary, the justices do not adhere strictly to the intent of the framers of the Constitution and statutes because such intent is often indefinite or not discernible. Consequently, many justices have read their personal, subjective preferences into the law out of necessity, as well as out of choice. Moreover, in many cases there is no law until the decision is made. Choices often must be made between principles of equal persuasiveness. These maxims of restraint, therefore, do not unduly constrain the justices' decision-making.

One might ask, what is so unreasonable about all this? Among other things, repeated references to maxims of restraint which often are disregarded perpetuate the mysticism that surrounds Supreme Court decision-making. The myths associated with restraint leave the public with the false impression that the law is a fixed, objective phenomenon which the justices simply apply mechanically. The truth is almost always otherwise, particu-
larly at the Supreme Court level. The law is a fluid and open-ended process. It has changed in contradictory and unpredictable ways, depending on the needs of the times and the predilections of Court members. Demystification and demythification of the law and how it is made by the Court is a worthwhile quest, not only with respect to the well educated but also with respect to the public generally. We need not be concerned that the Court will lose some of its prestige as a result. In a nation that calls itself democratic, it is preferable that citizens understand the realities of Supreme Court policymaking. The Court, after all, has survived books like *The Brethren* without any apparent diminution of prestige or power.

Moreover, judicial restraint is a very relative, subjective concept. It is relative because it is one of degree which varies over time and from justice to justice. In some opinions, a particular justice may appear to be an advocate of restraint; in others he or she may not voice such concerns, may even be an activist, or may display in one opinion traits of both activism and restraint. Further, restraint is subjective because it cannot be satisfactorily defined. Hence, it is used in a variety of different contexts depending on who is applying it. If it is applied to the Burger Court, for example, it becomes plainly evident that the term is so subjective and relative that even the foremost students of the Court disagree over the extent to which it has exercised restraint. Richard Funston, Gerald Gunther, Philip Kurland, Alpheus Mason, Wallace Mendelson, Robert Steamer, and Stephen Wasby have all suggested at various times that the Burger Court is primarily one of restraint. On the other hand, Lucius Barker, Raoul Berger, Jonathan Casper, Jesse Choper, Archibald Cox, Arthur Goldberg, Donald Horowitz, and Leonard Levy have all noted various forms of activism in Burger Court decisions. If these authorities on law and the judiciary dif-

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fer so widely concerning the degree to which the Burger Court has exercised restraint, what useful purpose does the concept serve?

Beyond this, one may argue that the term judicial restraint should be renounced because it has never been followed uniformly by any Supreme Court justice. One may instead conclude that the decisions of all justices have involved *gradations of activism* from exceedingly weak to dogmatically strong in different substantive areas. In other words, the frequency and magnitude of activism has varied throughout the Court's history and among different justices, but there has never been a justice who has always exercised restraint. Even Justice Frankfurter joined in a number of activist decisions.79

79. One illustration is Frankfurter's voting with the majority in *Brown v. Board of Education*, 347 U.S. 483 (1954), which banned segregation in public schools. Alexander Bickel observed, for example, that the history of the fourteenth amendment demonstrates "that it was not expected in 1866 to apply to segregation" but that there was "an awareness on the part of [the framers of the fourteenth amendment] that it was a constitution they were writing, which led to a choice of language capable of growth." Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 63-64 (1955). From this, he said, 
"[T]he record of history, properly understood, left the way open to, in fact invited, a decision based on the moral and material state of the nation in 1954, not 1866." *Id.* at 65.

Another example is *Cooper v. Aaron*, 358 U.S. 1 (1958), in which Frankfurter joined in the majority opinion and also wrote a separate concurring opinion. Gerald Gunther noted that *Cooper* "provides the major judicial support for a view widely held by the public, that the Court is the ultimate or supreme interpreter of the Constitution." G. GUNther, CONSTITUTIONAL LAW 32 (1978). The controversy in *Cooper* arose when the governor and other Arkansas officials opposed segregation in the Little Rock public schools. The Arkansas officials insisted that they were not bound by the *Brown* ruling on desegregation. As Gunther observed,

*[T]he Supreme Court could have limited itself to its reminder that state officials lacked 'power to nullify a court order.' But the Court's response . . . went considerably beyond: instead of confining itself to implementing the desegregation order entered by the lower federal court in Arkansas, it spoke broadly about the impact of the 1954 ruling in *Brown* on the state officials.* *Id.* at 84. Gunther suggests that *Cooper* was a substantial expansion of the doctrine established in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). In *Marbury*, the Court said that "*[i]t is emphatically the province and duty of the judicial department to say what the law is," *id.* at 177, whereas in *Cooper*, the Court established "judicial exclusiveness" in the area of constitutional interpretation. G. GUNther, supra at 33 (quoting A. BICKEL, supra note 12).

One may also find fault with the use of a phrase consciously avoided in this article—that of judicial self-restraint. After a series of controversial activist decisions, the Court often has tended to assume a low profile. Its members have done so, one might suggest, not because they felt a renewed responsibility to demonstrate restraint, but because they have consciously sought to avoid political attacks, a loss of esteem within the political system, and other adverse impacts of their decisions. In the most extreme instances, it is not inconceivable that a nonactivist posture may be essentially imposed upon the justices because the president may refuse to enforce the Court's policies and Congress may reduce the Court's jurisdiction, pass legislation overruling the Court's statutory interpretations, or seek to initiate constitutional amendments or impeachment proceedings. As Sheldon Goldman and Thomas Jahnige have commented with regard to the activist Hughes and Warren Courts, because of the loss of support from outside the Court, it "had to adjust its output if it was to retain its integrity as a system. Something had to give if the federal judicial system was to persist." In these two historic periods, the Court changed directions because of vigorous political resistance to its policies, not because the justices believed it their personal duty to return to the tenets of restraint. Thus, judicial self-restraint appears in some cases to disguise why the Court's decisional trends rise and fall as they do. Maxims of restraint have undoubtedly been observed by many justices on many occasions. Yet when the Court as a whole exercises restraint, individual support for those maxims does not totally account for the justices' behavior. Externally-imposed political pressures must be recognized, and perhaps in many instances they explain the resumption of restraint equally as well as do the maxims themselves. Indeed, it is possible that some of the Court's maxims are judicial expressions flowing directly from the application of political pressures from its environment.

Finally, a case for abandonment might be based on the simple notion that the Constitution's majestic generalities, such as the due process and equal protection clauses, should not and cannot be restrictively construed. With respect to this point, Arthur Miller has written that the Constitution's undefined constructs provide "outstanding example[s] of the purposive use of ambiguity which, in our governmental system, gives power to the judiciary to set national policy." If this is an acceptable assumption, and I believe it is, then a true restraintist interpretation of the Constitution's

greatest generalities is not only impossible but highly undesirable, regardless of whether the justices ought to practice restraint. When the Court considers it appropriate to make needed policy changes that the other branches refuse to make, the flexibility of these constitutional concepts is essential for governmental adaptation and transition. As Marshall put it in the famous words of *McCulloch v. Maryland*, the Constitution is “intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.” So it has been in the past, and so it should remain in the future. The difficult questions, of course, are: How are we to know what changes are needed and when? What are the limits on the Court to mandate such changes? And what criteria, if any, govern those determinations?

IV. CONCLUSION

Judicial restraint is a belief system, a role conception, a philosophy of how judges ought to function in a democratic society. Yet ideas such as restraint—thought to be widely understood—are often exceedingly difficult to define, analyze, and apply precisely. Among those who have seriously embraced restraint, there apparently exists a consensus that judicial interpretation should not take on the stark character of “legislation.” But, beyond that point, agreement seems to decrease, for the meaning of restraint invariably depends on the context in which it is being used, the time period in which it is used, and who is using it.

I, for one, would urge that we abandon the concept of restraint for a combination of the reasons set out above—and surely there are others—were it not for two simple, but critical, considerations. First, although it has been shown that many members of the Supreme Court have not closely and consistently adhered to restraint and its maxims, over the course of its history the philosophy of the Court has been primarily one of restraint—or at least mild and infrequent activism. Major exceptions, of course, include several landmark decisions of the Warren Court, and a number of decisions of the federally-oriented Marshall Court and the conservative laissez-faire Court. Still, it is accurate to say that a majority of the decisions of even the Marshall, laissez-faire, and Warren Courts were not truly activist. Despite all of the shortcomings of the concept of restraint, then, history suggests that it deserves a place in our efforts to describe and explain the Court’s decision-making.

Second, we remain in the position of not having developed a concept to

83. Id. at 415.
replace restraint. Despite the opposition to labels and "code words" voiced by justices and scholars alike,\textsuperscript{4} they often are indispensable. Although the term restraint is admittedly an imprecise and even misleading tool for analysis, rejecting it without an improved conceptual substitute does not resolve our fundamental need to generalize about trends in Supreme Court decision-making. Instead, we would be left with a significant conceptual void. It has been possible to criticize the premises and maxims of restraint, as is always true with qualitative labels. The far more formidable challenge is to create an alternative theoretical construct to replace restraint, or to clarify its conceptual validity. Some may say that, to an extent, this need is met by the liberal-conservative dichotomy, if carefully employed. Nevertheless, one must keep in mind the distinctions between activism and restraint on the one hand, and liberalism and conservatism on the other. They serve two entirely different functions. One unfortunate legacy of the Warren Court was to equate judicial activism and liberalism in the public's mind. Yet, while a conservative may tend to exercise restraint, conservatives have been activists in certain historical eras, and liberals have been restraintists in others.

Perhaps, then, all that we can do is to be especially precise in how we define and apply the term restraint. Some problems may be solved by speaking of gradations of activism and restraint, rather than arbitrarily labeling a decision, a justice, or a Court as either activist or restraintist. It is also possible that rigorous behavioral analysis will clarify the confusion that often surrounds the idea of restraint.\textsuperscript{5}

