INTERBRANCH ACCOUNTABILITY IN STATE GOVERNMENT AND THE CONSTITUTIONAL REQUIREMENT OF JUDICIAL INDEPENDENCE

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I

INTRODUCTION

When contemporary commentators decry what they describe as growing threats to "judicial independence," they typically invoke "judicial independence" as a normative ideal—an institutional virtue. That virtue is the capacity of courts to protect individual rights, to police structural limits on governmental power, and to decide individual disputes based solely on the applicable law and the factual records presented, without regard to intimidation or other impermissible influences.[1] Political attacks on our courts and the politicization of judicial selection and removal endanger that capability.

To understand what is at stake in this debate, it may be important to note that the institutional virtue we call "judicial independence" is also a constitutional requirement. Like "separation of powers" or "checks and balances," "judicial independence" states a legally mandated principle of governance that

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1. "Judicial independence" is often taken to imply also "that resources exist to ensure that justice can be dispensed fairly and efficiently; and that within reasonable limits and with appropriate accountability, the judiciary has the discretion to manage its own affairs." ROBERT A. KATZMANN, COURTS AND CONGRESS 112 (1997). That is, in addition to the "decisional independence" I have described, there is also an element of "institutional independence" that is part of the "judicial independence" ideal. *See* Erwin Chemerinsky, When Do Legislative Actions Threaten Judicial Independence? 3 (July 11, 1998) (unpublished manuscript presented to the Roscoe Pound Foundation, on file with author). Although Professor Chemerinsky thinks the distinction relatively inconsequential, I think it helpful to distinguish between decisional independence, which is unique to the judiciary, and aspects of institutional autonomy that are implicit in any plan of coequal branches and which, therefore, are shared by the legislative and executive branches.

exists separately from the operational details it comprises in any of its local versions. If this is true, then a lack of judicial capacity to protect individual rights, to police structural limits on governmental power, and to decide individual disputes impartially would, at some point, be more than a setback in realizing our institutional ideals. It would be a breakdown of constitutional order. Any intentional efforts by state governors or legislatures to undermine this judicial capacity should be regarded as unconstitutional.

This position has two important implications. First, if "judicial independence" is a legal requirement that exists apart from variable operational details, then it may also be—and I believe it is—a legal requirement that transcends jurisdictions. A significant baseline requirement of independence applies equally to the federal system and to all state systems. "Judicial independence" as a general legal requirement is thus distinct from "judicial independence" as a shorthand description for the particular sets of formal constitutional features and concomitant legal doctrines that shape the exercise of judicial power. Jurisdictions differ in their implementation of judicial power because states are not obliged to adopt the federal government's organizational chart or operating instructions. For example, state constitutions exhibit a wide variety of provisions on judicial selection and removal,[2] on advisory opinions,[3] and on the standards for judicial impeachment.[4] But none of these differences changes the basic point that a robust conception of judicial independence is a mandatory feature for every judicial system in the United States.

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2. For a survey, current as of 1996, of the states' judicial selection methods, see CHARLES H. SHELDON & LINDA S. MAULE, CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES 34-40 (1997).

3. Although the United States Supreme Court held at an early date that it lacked constitutional authority to issue advisory opinions, *see* Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792), a number of state constitutions expressly authorize an advisory opinion process. *See, e.g.*, FLA. CONST. art. V, § 3(b)(10); ME. CONST. art. VI, § 3; MASS. CONST. pt. II, ch. III, art. II.

4. For a hint of the sheer diversity among state constitutions with regard to removal standards, consider, for example, the constitutions of Alabama,

> The . . . justices of the supreme court may be removed from office for willful neglect of duty, corruption in office, incompetency, or intemperance in the use of intoxicating liquors or narcotics to such an extent, in view of the dignity of the office and importance of its duties, as unfits the officer for the discharge of such duties, or for any offense involving moral turpitude while in office, or committed under color thereof, or connected therewith, by the senate sitting as a court of impeachment, under oath or affirmation, on articles or charges preferred by the house of representatives.

ALA. CONST. art. VII, § 173; Arizona, "The Governor and other State and judicial officers, except justices of courts not of record, shall be liable to impeachment for high crimes, misdemeanors, or malfeasance in office. . . ." ARIZ. CONST. art. VIII, pt. 2, § 2; Georgia,

> Any judge may be removed, suspended, or otherwise disciplined for willful misconduct in office, or for willful and persistent failure to perform the duties of office, or for habitual intemperance, or for conviction of a crime involving moral turpitude, or for conduct prejudicial to the administration of justice which brings the judicial office into disrepute.

GA. CONST. art. 6, § VII(a); and Indiana,

> All State officers shall, for crime, incapacity, or negligence, be liable to be removed from office, either by impeachment by the House of Representatives, to be tried by the Senate, or by a joint resolution of the General Assembly; two-thirds of the members elected to each branch voting, in either case, therefor.

IND. CONST. art. 6, § 7.

The second implication relates to how states should seek to protect judicial independence. The relevant literature contains not only a wide variety of reform prescriptions for state judiciaries, but also something of a consensus that courts, through their own behavior, ought to conduct themselves in a way that works toward the preservation of independence. A number of influential commentators have specifically argued that courts ought to follow a paradigm for institutional behavior typically called "judicial restraint" in order to protect judicial independence.[5] In brief, the argument is that courts should conduct decisionmaking that is reflexively deferential to the other branches of government and judges should be reluctant to take on policymaking roles.

I certainly agree that some form of restraint is important for the judiciary, just as it is for both the legislative and executive branches. After all, if a branch is deeply committed to the utmost exercise of its powers without regard to the consequences for governance, the government is headed for a breakdown. As a lodestar for judicial behavior, however, the paradigm of "judicial restraint" may often be misleading, unhelpful, and even counterproductive. Certainly, if judicial independence is a constitutional requirement, then courts must be concerned about adopting forms of restraint that abandon the underlying rationale for the capacity they are seeking to protect.

A paradigm that better captures the appropriate strategy for protecting judicial independence at both state and federal levels is interbranch accountability. Accountability is the ideal embraced in 1997 by the American Bar Association Commission on Separation of Powers and Judicial Independence,[6] and it is an ideal more appropriate than "restraint." Judicial systems may be fearless, but also accountable, in the exercise of their powers. The strategy of accountability, as I would recommend it, would seek to protect judicial independence less by fending off those occasions when the nonjudicial branches might become irritated with the courts and more by giving the nonjudicial branches affirmative reasons to value the judiciary positively and to bolster its capacities.

This proposition has an important corollary: The form of judicial restraint that is most appropriately associated with an independent judiciary is no different from the equally important principles of legislative and executive restraint that ought to be expected of the nonjudicial branches of state government. Each branch has the power to make life more difficult for the others, and probably could do so with relative impunity, legally speaking. But each branch should follow a rule of necessity before risking the efficacy of any other branch.

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5. *See* Paul D. Carrington, *Correcting the Excessive Independence of the Supreme Court: A Proposal to Restore Vitality to State and Local Politics*, 50 ALA. L. REV. (forthcoming 1998); Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 100 (Summer 1998) [hereinafter, Carrington, *Judicial Independence*]; Clifford Taylor, *The Judiciary is Too Powerful*, JUDICATURE, July-Aug. 1998, at 28; *see also* ABA COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE, AN INDEPENDENT JUDICIARY: REPORT OF THE ABA COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE 22-23 (1997) [hereinafter, ABA COMMISSION, AN INDEPENDENT JUDICIARY] (quoting testimony by Daniel Troy, Edwin Meese, Rhett Dehart, Daniel Meador, and Gerald Rosen).

6. *See* ABA COMMISSION, AN INDEPENDENT JUDICIARY, *supra* note 5, at 43.

Just as courts should not adjudicate constitutional issues where there is no genuine need to do so, state legislatures should not curb jurisdiction and state governors should not propose judicial budget cuts, absent some compelling exigency. Institutional forbearance, in other words, ought be the norm for all branches of state government. Except as the conscientious performance of constitutional duty compels otherwise, the branches' common commitment to shared governance should animate their interactions.

II

JUDICIAL INDEPENDENCE AS A UNIVERSAL CONSTITUTIONAL REQUIREMENT

The intimidation or dependency of state courts can undermine the norm of impartiality in any adjudication if judges are diverted from deciding cases based solely on the relevant law and the facts presented. For example, in cases based on state separation of powers principles, the politicization of state judiciaries can undermine judicial review by preventing state courts from effectively policing the boundaries of state legislative or executive power. In cases based on federal law, it can undermine judicial review by preventing state courts from fully implementing the relevant federal constitutional or statutory mandates and prohibitions. State courts whose independence is threatened may simply be reluctant to uphold any valid legal claims of unpopular individuals or groups, whether based in state or federal law.

I wish to argue, however, that litigants in state courts are constitutionally entitled to a reasonable expectation of sufficient judicial independence to ensure that none of these things will occur on any systematic basis. Sufficient judicial independence to ensure meaningful interbranch review is dictated by the existence in every state of a written constitution based on some version of American-style separation of powers theory. It is also no stretch to regard such independence as part of the constitutional guarantee to each state of a republican form of government.[7] Sufficient judicial independence to ensure the fully effective implementation of federal law in state courts is mandated by the Supremacy Clause.[8] Sufficient judicial independence to ensure that state courts will not be bullied into the under-enforcement of constitutionally guaranteed rights or into the improper consideration of factors outside the record in judicial proceedings is guaranteed by the Due Process Clause of the Fourteenth Amendment. These mandates, taken together, amount to a substantial legal guarantee of judicial independence without regard to any other feature of any state constitution of which I am aware.

Before explaining this position, it is worth anticipating the objection that calling the amalgam of these guarantees a legal mandate is unhelpful because, except in very rare instances, such a mandate would be judicially enforceable only with great difficulty or not at all. Skeptics may deem it academic bluster

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7. *See* U.S. CONST. art. IV, § 4.
8. U.S. CONST. art. VI.

to call something a constitutional mandate that cannot be readily enforced through ordinary legal processes.

However, a good deal of what is fundamental to our constitution—especially with regard to matters of organizational structure and ethos—is not judicially enforceable.[9] Surely—a handy word to use in the absence of authoritative judicial pronouncements—it would be unconstitutional for the President to establish religion by conditioning the exercise of his pardon power on whether federal pardon applicants had or had not accepted Christ as Savior while in prison. It also would be unconstitutional for Congress to undermine our system of constitutionally imposed checks and balances by willfully denying to the executive branch all appropriations beyond the President's salary. It similarly would have violated the Constitution for Congress to have refused to create the Supreme Court at all. Yet, in none of these cases would a court be available to enforce a norm we would likely regard as a requirement of constitutional law. Unenforceability does not mean we should read these norms out of the Constitution. Rhetoric matters, and, as Justice Scalia has noted in another context, it is more powerful to call someone a "crook" than simply to note they are "wrong-headed, naive, [and] ineffective."[10] In the debate over judicial independence, it is important, if true, to say that certain forms of assault on the courts are not merely dangerous, wrong-headed, and unprincipled, but also unconstitutional.

A. Judicial Independence and Interbranch Review

At the federal level, the foundational statement on interbranch judicial review is, of course, *Marbury v. Madison*.[11] In his opinion for the Court, Chief Justice John Marshall laid the groundwork for judicial review of both executive and legislative exercises of power. With regard to the former, he imported and implicitly constitutionalized a distinction from English *mandamus* law between acts of the executive that are political, and thus beyond judicial inquiry, and those that are ministerial, and thus open to judicial review.[12] Although it was

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9. *See* LOUIS FISHER & NEAL DEVINS, POLITICAL DYNAMICS OF CONSTITUTIONAL LAW 16 (1992) ("The courts are an important element, but not the only element, in maintaining a constitutional order. That task is necessarily shared with Congress, the President, the states, and the general public.").

10. Morrison v. Olson, 487 U.S. 654, 713 (1988) (Scalia, J., dissenting).

11. 5 U.S. (1 Cranch) 137 (1803).

12. Marshall wrote:

> By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.
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> In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. . . . [T]he acts of such an officer, as an officer, can never be examinable by the courts.
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> But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on

this part of *Marbury* that most inflamed the Jeffersonians, it effectively laid the basis for all of American administrative law. The doctrine truly has faced no serious intellectual challenge in 200 years.

With regard to the judicial review of statutes, Marshall asserted three fundamental propositions. First, the Constitution expresses the supreme will of the people.[13] Second, the Constitution invalidates any legislative act contrary to its provisions.[14] Third, when an exercise of right or power in a properly presented case depends on an unconstitutional statute, a federal court is obliged to declare the statute unconstitutional and to give it no force or effect.[15]

Volumes have been written assessing the persuasiveness of Marshall's view from the perspective of constitutional theory and history. However, it seems that the existence of federal judicial review to control legislative acts was widely expected prior to *Marbury*.[16] Indeed, despite Antifederalist opposition to judicial review from the 1780s onward, lingering doubts about its propriety all but evaporated by 1820 at both the state and federal levels.[17] Even Pennsylvania Justice (later Chief Justice) John Bannister Gibson, whose dissenting opinion in *Eakin v. Raub*[18] offered one of the later and more eloquent critiques of Marshall's analysis, abandoned his opposition to judicial review by 1845.[19]

Specific evidence exists that the founding generation expected interbranch judicial review to be a feature of the new national government, the most famous of which is Hamilton's defense of judicial review in *The Federalist*.[20] Marshall, however, did not cite Hamilton's analysis, nor did he rely on precedents in state and federal courts prior to *Marbury*, or even evidence in the Judiciary Act of 1789.[21] Instead, he deduced the expectation of judicial review from con-

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> the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.
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> . . . [W]here a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy.

Id. at 165-66.

13. *See id.* at 176-77.

14. *See id.* at 177.

15. *See id.* at 177-78.

16. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 5-12 (5th ed. 1995).

17. *See id.* at 12.

18. 51 Pa. Rep. (12 Sargent & Rawle) 330, 343 (1825).

19. *See* NOWAK & ROTUNDA, *supra* note 16, at 12.

20. *See* THE FEDERALIST NO. 78 (Alexander Hamilton).

21. *See* NOWAK & ROTUNDA, *supra* note 16, at 12. Section 25 of the Judiciary Act provided, among other things,

> [t]hat a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity . . . may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error . . . .

This would seem to contemplate expressly that the Supreme Court might affirm the judgment of a state court invalidating a statute of the United States. *Cf.* GERHARD CASPER, SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD 150-51 (1997) (asserting that "influential members" of the First Congress thought the power of judicial review was "implicit in Article III").

stitutional theory, particularly from three features of the 1789 Constitution: its status as fundamental law, its written character, and its vesting of judicial power, "emphatically the province and duty . . . to say what the law is."[22] In other words, under the theory of popular sovereignty, Marshall concluded that the convergence of a written constitution with an independent judiciary dictated that the courts have the power and obligation to enforce constitutional limits on the power of the legislature.

Numerous commentators over the course of two centuries (including, I would guess, every constitutional law teacher who has ever lived) have pointed out that, in the abstract, Marshall's conclusions are not absolutely compelled by his premises. France, for example, has a written constitution and a separation of powers system that is, if any thing, more categorically separationist than ours.[23] Despite these facts (and perhaps because of the latter), France did not have anything like American-style judicial review prior to 1958—and even now does not leave the constitutional review task to ordinary courts.[24] As a matter of purely philosophical interpretation, Marshall would seem not to have proved his case. As an interpretation of then-recent constitutional history, however, Marshall's analysis was compelling. It captured with total accuracy the flavor of constitutional ideas that were dominant in late eighteenth century America. This is presumably why his opinion won such widespread acceptance in a relatively short time.

When reorganizing government just before the Revolution, the predominant concern of Americans had been freeing legislative and judicial power from executive control.[25] The judiciary was not yet clearly conceptualized as a distinct branch of government. Rather, the administration of justice was commonly conflated with the executive power. The power of adjudication implicated the Crown fully because colonial judges served at the King's pleasure and the Privy Council was the court of last resort for the colonists.[26] When the colonies turned to creating the first wave of new constitutions, their focus was on curbing the magistracy and establishing the broadest scope of legislative

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In terms of other evidence supporting judicial review, the journals of the 1787 Philadelphia Convention, of course, had not been published when Marshall wrote the *Marbury* opinion. Even if jurists of Marshall's period would have considered the subjective expectations of individual drafters to be relevant—which they probably would not—the variety of Framers' statements supportive of judicial review would not yet have been available to the Court for citation.

22. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

23. *See* JOHN BELL, FRENCH CONSTITUTIONAL LAW 23-23, 78-86 (1992) (on separation of legislative and judicial power, and of legislative and executive power); Helen McCleave Cake, *The French Conseil d'Etat—An Essay on Administrative Jurisprudence*, 24 ADMIN. L. REV. 315, 318 (1972) (on separation of executive and judicial power).

24. *See* BELL, *supra* note 23, at 29-41.

25. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 157 (1969).

26. *See id.* at 159.

power.[27] Judges were freed from the power of the governor, but subjected in substantial measure to legislative supervision.[28]

At this same time, Americans were increasingly preoccupied with the importance of written documents as sources of constraint against arbitrary power. Although Americans were devotees of the notion of higher or fundamental law,[29] the failure to put that law into written form came to be seen as an invitation to discretion—especially judicial discretion—that might lead to departures from reason and justice.[30] The revolutionary generation had little experience in enacting the kind of programmatic policy agenda we expect of legislatures today.[31] Instead, by seeking to codify legal principles as statutes, Americans were hoping for clear and unchangeable statements of natural justice that judges would be able, and required, to follow mechanically.[32]

By the mid-1780s, the political winds had shifted profoundly. Anxiety about legislative arbitrariness, no longer considered less dangerous than executive oppression, was spreading. Constitutional reformers began to emphasize the necessity of separating the judicial from the legislative power as the only plausible safeguard against legislative tyranny. According to Gordon Wood, "[n]early all" of the 1780s' proposals for constitutional reform were aimed at a separation of the *three* powers of government—legislative, executive, and judicial.[33] It was during this time that the old theory of balanced government, in which distinct governmental institutions represented various social orders,[34] decisively shifted to the new American version of separation of powers, in which each branch of government was charged predominantly with its own distinct function, the discharge of which was invariably representative of the whole people:

> The assumption behind this remarkable elaboration and diffusion of the idea of the separation of powers was that all governmental power, whether in the hands of governors, judges, senators, or representatives, was essentially indistinguishable; that is, power in the hands of the people's "immediate representatives" in the lower houses of the legislatures was basically no different, no less dangerous, than power in the hands of the governors, senators, and judges.[35]

The shift in sentiment occurred, in part, because the revolutionary legislatures so abused their authority. Their written output did not turn out to be self-evidently just; nor, in their superabundance, did new statutes significantly limit judicial discretion. If anything, legislative interference in the administration of justice was provoking widespread distrust of legislative devotion to the public

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27. *See id.* at 135-50.

28. *See id.* at 160-61.

29. *See id.* at 292-95.

30. *See id.* at 298-301.

31. On the evolution of colonial and revolutionary legislative activity, see JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 213-17 (1997).

32. *See* WOOD, *supra* note 25, at 301-02.

33. *Id.* at 452.

34. *See* RAKOVE, *supra* note 31, at 245.

35. WOOD, *supra* note 25, at 453.

interest.[36] As a consequence, of all the branches of government, it was clearly the judicial branch that was benefiting most from constitutional reform from the 1780s on.[37]

Wood credits James Iredell of North Carolina as having understood with special prescience the direction in which American constitutional thought was proceeding. Iredell's remarks illustrated a shift from faith in statutes as written documents intended to constrain judges to faith in the Constitution as a written document intended to restrain the abuses of legislative power. He called judicial review "unavoidable" because the Constitution was not "a mere imaginary thing, about which ten thousand different opinions may be formed, but a written document to which all may have recourse, and to which, therefore, the judges cannot willfully blind themselves."[38]

Moreover, by the end of the 1780s, at least five states were moving "gingerly and often ambiguously in isolated but important cases to impose restraints on what the legislatures were enacting as law."[39] This was no threat to republicanism because, as expressed by James Wilson:

> The executive and judicial powers are now drawn from the same source, are now animated by the same principles, and are now directed to the same ends, with the legislative authority: they who execute, and they who administer the laws, are so much the servants, and therefore as much the friends of the people, as those who make them.[40]

It is reasonable today to read these same foundational premises into all our state constitutions, both for the original states and for those that came later.[41] All states have embraced written constitutions and some checks-and-balances

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36. *See id.* at 454.
37. *See id.* at 453-54.
38. *Id.* at 461-62.
39. *Id.* at 454-55.
40. *Id.* at 598.
41. Because Rhode Island and Connecticut were corporate colonies, they did not originally frame new constitutions, but reenacted their existing charters with "minor verbal changes." *Id.* at 276-77. As a consequence, the written statements of fundamental law with which they commenced independent statehood did not embrace separation of powers principles to the same degree as in the other former colonies. "Modern" separation of powers did not become an explicit part of these states' constitutions until the 1818 Connecticut Constitution, *see* CONN. CONST. art. 2, and the 1842 Rhode Island Constitution, *see* R.I. CONST. art. 5, respectively. Former Connecticut Chief Justice Ellen A. Peters has speculated that this history, at least in Connecticut, has produced a pattern in which judicial authority to revoke a state statute on state constitutional grounds has been used only rarely. *See* Ellen A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543, 1549 (1997). Nonetheless, both states have now long recognized judicial power, and obligation, to review the constitutionality of state statutes.

Of course, a number of the state constitutions authorize judicial review expressly or by conspicuous implication. *See, e.g.*, GA. CONST. art. 11, § 1:

> All laws in force and effect on June 30, 1983, not inconsistent with this Constitution shall remain in force and effect; but such laws may be amended or repealed and shall be subject to judicial decision as to their validity when passed and to any limitations imposed by their own terms.

For any such state, one need not resort so extensively to constitutional theory to substantiate the point that judicial review of state statutes is intended to be a critical aspect of the state's checks and balances system.

version of the separation of powers. In the American constitutional tradition, the core significance of these developments is everywhere the same: The citizens of each state depend upon the judicial branch to make real the delineation and limitation of legislative and executive powers that the state constitutions recognize. This may not be inevitably true as a matter of pure logical analysis. It may not be true in France or in other countries with different political cultures and constitutional traditions. It is true, however, in the United States.

The capacity of courts to invalidate legislative or executive initiative is a capacity that either of the nonjudicial branches might resent on at least some occasions. It therefore follows from the mandatory character of judicial review that the judiciary in every state must have sufficient decisional independence to perform its interbranch policing function steadfastly. That does not preclude judicial elections. It does not require lifetime tenure for state judges. It presumably would, however, prevent state legislatures from depriving state courts of jurisdiction to hear challenges to state statutes as exceeding the bounds of the legislature's constitutional authority. It would invalidate state legislation conditioning judicial appropriations on the favorable exercise of judicial review. In virtually all cases, it would make it unconstitutional to treat a state judge's decision to enforce constitutional limits on other branches' powers as providing grounds for impeachment and removal. It is, in short, a requirement of substance. It is not exaggeration to say that a republican system of government, defined in the American tradition, depends upon the judicial capacity to enforce constitutional limits on legislative and executive power. Independence sufficient to render judicial review meaningful is a corollary requirement of republican constitutional order.

B. Federal Expectations of State Judicial Review

Policing their sister branches is not the only politically irritating task assigned to state courts. After declaring the status of the Constitution and the laws "made in pursuance thereof" as "the supreme law of the land," the Supremacy Clause provides: "[T]he Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding."[42] The obvious implications of this provision are that state legislative and executive acts shall be subject to judicial review for consistency with federal law and that state judiciaries must, therefore, enjoy sufficient independence to render their federal review function meaningful.

There was consensus among the Framers that judicial enforcement of national law would be imperative to the success of the new union. Judicial review was the most modest of the options apparently available and then under debate. The alternatives would have been institutionalizing a national veto power over state legislation or authorizing the use of force against states, whether military or prosecutorial.[43]

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42. U.S. CONST. art. VI.

43. *See* RAKOVE, *supra* note 31, at 172.

The fundamental role of state courts in preserving the constitutional scheme was reinforced by the Framers' decision not to insist upon the creation of national courts of original jurisdiction.[44] To assuage the anxieties of those who feared the nationalizing impact of a fully articulated federal court system, the Framers went no further than to vest discretion in Congress to constitute "inferior tribunals."[45] This decision left Congress the discretion to rely entirely upon state courts for the original hearing of all "federal question" cases, a prospect that would have been unthinkable without a firm expectation that state courts would take their review powers seriously. As historian Jack Rakove has put the matter: "In this sense the supremacy clause marked an attempt to incorporate a principle of judicial review into all the state governments by the unilateral fiat of the Constitution."[46]

However ambitious this new role for state courts may have appeared in 1789, the ratification of the Fourteenth Amendment intensified its importance profoundly. The new Equal Protection and Due Process Clauses not only imposed new and profoundly significant state obligations to be enforced through judicial review, but section five of the Amendment, authorizing its implementation through national legislation, gave Congress the additional and wide-ranging power to create federal rights enforceable in state courts—a power unencumbered by Tenth and Eleventh Amendment limitations.[47]

Moreover, the Due Process Clause—as it operated on the state courts themselves—provided a new federal guarantee of judicial formality and impartiality in the resolution of every state adjudication. It has been used, for example, to invalidate a statutory scheme that would give an adjudicator a financial stake in particular adjudicatory outcomes.[48] Similarly, it would prohibit impos-

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44. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 2-3 (1989).

45. *See* U.S. CONST. art. I, § 8, cl. 9; *id.* art. III, § 1.

46. RAKOVE, *supra* note 31, at 175.

At the ABA symposium, Professor Geyh suggested that it might be problematic to regard the Supremacy Clause as imposing an obligation of judicial independence on the states because the Framers truly did not think the existence of the clause, by itself, would produce reliable state fidelity to state law. Professor Rakove takes a similar stance: "The supremacy clause could only encourage state judges to aspire to the enhanced notion of judicial independence on which it was premised; it provided more of an incentive than a mandate, even if the framers hoped that incentive would evolve into a norm of judicial behavior." *Id.* It is certainly evidence of the founding generation's concern about state fidelity to federal law that the Judiciary Act of 1789 provided for Supreme Court appellate review of state judgments rejecting claims based on assertions of federal right.

I would argue, however, that early efforts—such as the Judicary Act of 1789—to buttress the efficacy of state judicial review based on federal law actually strengthen the argument that the meaningful conduct of such review and the independence necessary to assure it ought be considered matters of constitutional obligation. The fact that the First Congress recognized that such obligations would not likely be enforceable except through Supreme Court review was surely not intended to diminish the duty of state judges to apply federal law conscientiously. Instead, their enactment confirms the aspirational meaning of the Supremacy Clause, which ought now guide its interpretation.

47. *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (Eleventh Amendment); EEOC v. Wyoming, 460 U.S. 226, 243 n.18 (1983) (Tenth Amendment).

48. *See* Gibson v. Berryhill, 411 U.S. 564 (1973) (invalidating administrative disciplinary hearing before the Alabama Optometry Board because of board members' pecuniary interest in the outcome of the proceeding); Tumey v. Ohio, 273 U.S. 510 (1927) (invalidating enforcement scheme for state

ing on a state adjudicatory system any other structural feature that would conspicuously compromise the obligation of state judges to decide cases based solely on the records presented to them. A rule of procedure authorizing *ex parte* contacts in pending cases by either the Governor or by state legislators would be a clear example.[49]

The degree of judicial independence implicitly required by the Supremacy and Due Process Clauses may appear insignificant because it is hard to imagine that any state would so shockingly politicize its judiciary as to come close to a systematic violation of such a mandate. After all, we are talking about a minimum "floor" level of judicial independence as a constitutional guarantee, not its furthest possible institutionalization.[50] As a result, no federal court is ever likely to reach an issue of state judicial behavior unless the state court failed to apply federal law properly or to afford due process in a particular case. In these instances, relief would involve no more than vacating the particular judgment or proceeding rather than an ambitious institutional injunction aimed at bolstering the independence of the state courts. The suspicion that judicial error had been induced by an impermissibly intimidating climate for state judges would not likely bring additional relief.

But the fact that it is difficult to imagine suing a state for its systemic failure to provide an independent judiciary is chiefly a reflection of how deeply we have collectively internalized the judicial independence norm. Our right to independent state judiciaries is no less fundamental because it is so little doubted and, in general, so widely observed. Our common allegiance to the value of state judicial independence confirms that independence represents, to some degree, not merely an ideal, but an entitlement. If things truly got bad enough, constitutional redress would be imaginable.

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prohibition act under which town mayor, who tried cases, would recover his own legal costs only if the defendant were convicted).

49. *Cf.* Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534 (9th Cir. 1993) (upholding application to the President and his staff of a statutory ban on *ex parte* communications with administrative adjudicators regarding a formal on-the-record proceeding).

50. At the ABA symposium, Professor Geyh suggested that, for this reason, my argument might have some backfire potential. By underscoring the modest nature of any trans-jurisdictional constitutional *obligation* of judicial independence, Professor Geyh worries that I may be suggesting, or even highlighting, the discretion states have to cut judicial independence back to that baseline. Thus, states that now go beyond what most likely could be considered the mandatory baseline—for example, by providing for appointed judges removable only by impeachment—might realize that they could move to a system less protective of judicial independence, such as an elected judiciary, without violating any federal mandate for judicial independence.

As much as I sympathize with Professor Geyh's point, I do not think there is anything we can do to prevent states from realizing they have substantial discretion to trim the formal accouterments of judicial independence if they are so disposed. In contrast, I think it an important contribution to public debate to point out that the baseline value—sufficient decisional independence to conduct meaningful and impartial judicial review—is a mandatory feature of governance under any American written constitution that embraces a checks-and-balances system, which all do.

III

POTENTIAL INTERBRANCH INCURSIONS ON JUDICIAL INDEPENDENCE AND THE LIMITS ON JUDICIAL RESTRAINT AS A SELF-PROTECTIVE STRATEGY

A. Judicial Restraint as a General Strategy for Supporting Judicial Independence

In assessing contemporary threats to the decisional independence of state courts, the culprits chiefly cited are judicial elections and their corollary, campaign fund-raising. But the quality of judicial independence at the state level depends also on the attitudes and activities of the state legislative and executive branches. The sources of potential legislative leverage over state courts are mostly familiar. The most obvious is appropriations power. State legislatures can severely hamper the courts' ability to do their work conscientiously by denying them sufficient resources to accomplish their tasks. In many states, the legislature also has the power to curtail the jurisdiction of state courts, limit increases in judicial compensation, and determine appropriate procedures for judicial discipline and removal. Any of these powers could be used in retaliation against unpopular courts. Finally, state legislatures can effectively politicize issues of judicial performance either formally, through oversight hearings, or informally, during election campaigns. The sum of these powers affords state legislators a significant capacity to intrude upon judicial independence.[51]

The executive also has the power to intimidate the judiciary. Like state legislators, a governor can take public issue with either individual judicial decisions or with the overall performance of the judiciary. Such criticism might become especially heated during campaigns for elected judgeships or during gubernatorial campaigns.[52] The executive also has the power of criminal investigation. It is not inconceivable that a state executive branch would target its limited resources to investigate judges whose decisions were displeasing to the executive.[53] In the same vein, the executive also could be a source of refer-

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51. It is plausible that these tendencies may grow worse in states that adopt legislative term limits. There is already evidence that term limits are having an adverse impact on civility within state legislatures as the prospects diminish for long-term friendships and working relationships among legislators. *See* William Schneider, *Where the Sun's Setting on Comity*, NAT'L J., Aug. 15, 1998, at 1950. One would expect a similar diminution in short-term legislators' allegiance to long-term institutional values that simply may appear less salient in the day-to-day political life of a legislative "short-timer."

52. A notorious example involves Tennessee Governor Don Sundquist's public criticisms of former Supreme Court Justice Penny White. *See* Jeff Woods, *Sundquist Admits Early Ballot to Boot White*, NASHVILLE BANNER, July 26, 1996, at B2. White was targeted as "soft on crime" for joining (without a separate opinion) a unanimous Tennessee Supreme Court decision overturning a death sentence. *See* Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions*, 72 N.Y.U. L. REV. 308, 313-14 (1997).

53. Supporters of former federal judge Harry Claiborne, who was impeached and removed in 1986 following his conviction two years earlier for filing false tax returns, have argued that his prosecution occurred in retaliation for a number of rulings in which he had been critical of the Justice Department and of the FBI. *See* Todd D. Peterson, *The Role of the Executive Branch in the Discipline and Removal of Federal Judges*, 1993 U. ILL. L. REV. 809, 872-79 (1993). The conduct of that investigation and the resulting criminal trial and impeachment were strongly criticized in a Nevada Supreme Court opinion

rals to agencies within state judiciaries that might be legally charged with the discipline (and even removal) of state judges. Yet another source of leverage may exist if the state executive has a role in reviewing the judiciary's budget requests. Although some state legislatures receive judicial budget requests directly from the courts, others receive such requests as part of a gubernatorial budget submission. Even if a state's judiciary enjoys independent authority to submit its budget proposals directly, the governor's support may be critical to eliciting legislative enactment of the judiciary's requests.

The process of judicial appointments—namely, through gubernatorial nomination and legislative confirmation—also creates problems for judicial independence. Judicial independence of state court judges is threatened when they become too concerned with their prospects for promotion and worry too much about whether potential decisions on their current court could compromise their political prospects for reaching a higher court. Without the endorsement of the nonjudicial branches, even the most meritorious of lower-court judges cannot advance to another position in an appointive system.

Because the nonjudicial branches are critical to the preservation of judicial independence, a number of commentators have urged the courts, as a self-preserving strategy, to practice so-called judicial restraint in the exercise of judicial review—especially judicial review aimed at enforcing constitutional provisions.[54] The animating thought seems to be that the failure to practice judicial restraint—a failure that is typically called judicial activism—so threatens to antagonize the nonjudicial branches (and the public) that activist courts have only themselves to blame if their sister branches seek to act out their displeasure through curbs on judicial independence. Although there are several sound ways of understanding this advice, the unadorned recommendation is not among them. In general, courts cannot and should not seek to preserve their independence through reflexive deference to other branches' political decisionmaking or by shrinking from unpopular judgments that defend constitutional rights.

Three tenable understandings of judicial restraint ought to be noted at the outset. The first is that state courts, like their federal counterparts, should consider seriously the circumstances under which judicial review may be unnecessary. A variety of doctrines—standing, ripeness, and reviewability chief among them—permit federal courts to forgo judicial review when the stakes involved do not warrant a judgment on the merits. Their implementation is consistent with a philosophy well articulated by Lord John Russell, who was quoted by Woodrow Wilson in his famous 1885 treatise, *Congressional Government*: "Every political constitution in which different bodies share the supreme power is only enabled to exist by the forbearance of those among whom this power is

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refusing to impose additional discipline on Judge Claiborne. *See* State Bar v. Claiborne, 756 P.2d 464 (Nev. 1988).

54. *See supra* note 5 and accompanying text.

distributed."[55] In other words, if any branch pushes its plausible powers to the extreme, governance fails. Procedural doctrines that limit access to constitutional judgments institutionalize this insight.

State courts ought to be especially cautious in the relaxation of standing requirements. Pennsylvania, for example, has gone rather far in its willingness to police constitutional rules governing legislative procedures in situations where no more is at stake than the sort of generalized political grievance that a federal court would eschew.[56] This is not to deny the importance of constitutionally prescribed legislative processes, but rather to question whether the remedy for their nonobservance ought to be political instead of judicial. When a state judiciary extends its reach into policing legislative observance of procedural requirements, it risks unnecessarily provoking legislative resentment—an especially dubious enterprise if the state judiciary also resists legislative oversight of judicial procedures.

The second, perhaps obvious, counsel is that judges should feel deeply the difference between the legislative and judicial functions, even if some element of policymaking is entailed in both. Judicial determinations ought to be persuasively based in background legal materials—constitutions, statutes, regulations, and judicial precedents. Courts ought to defer to nonjudicial authorities, not out of any self-preservative instinct, but because such deference is the law. Following *McCulloch v. Maryland*,[57] for example, Congress is legally entitled to exercise its implied powers in any manner that rationally furthers a legitimate purpose without transgressing any constitutional provision. For a federal court to demand more than rationality in the typical implied powers case would not be to engage in activism; it would be to commit legal error. This presumably holds as well under state constitutions.

Third, state courts, like their federal counterparts, should beware of generating judicially enforceable liability rules that are unlikely to be implemented in a principled and responsible way. For example, the great problem with the federal nondelegation doctrine[58] is that any serious enforcement would require

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55. WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 163 (John Hopkins Paperbacks ed. 1981) (1885).

56. *See, e.g.*, Sprague v. Casey, 550 A.2d 184 (Pa. 1988) (permitting a taxpayer to challenge the date of a judicial election). This phenomenon is discussed from an especially critical perspective in Bruce Ledewitz, *What's Really Wrong with the Supreme Court of Pennsylvania?*, 32 DUQ. L. REV. 409, 423-26 (1994).

57. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

58. The nondelegation doctrine prohibits Congress from abdicating to others "the essential legislative functions" with which it is vested by Article I, § 1 of the Constitution. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935). In theory, the Supreme Court enforces the doctrine by requiring Congress to "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." J.W. Hampton & Co. v. United States, 276 U.S. 394, 409 (1928). The Court, however, has only twice found that Congress has violated the nondelegation doctrine—both times with respect to provisions of the National Industrial Recovery Act. *See* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (invalidating delegation to President of powers to regulate interstate commerce in oil pumped in violation of state law); A.L.A. Schechter Poultry Corp., 295 U.S. at 495 (invalidating delegation to private parties of power to devise enforceable rules of fair competition).

courts to exercise judgment in a manner that would invite indefensible and unacknowledged subjectivity. A judge obligated to determine *de novo* whether a legislature has done "enough" to specify the fundamental policy judgments that ought guide the exercise of a statutorily delegated power would be hard-pressed to avoid answering, "Yes," whenever the judge agrees with the statute, and, "No," when it seems unwise. In such a situation, courts ought to police a sister branch lightly because engaging more deeply in the problem risks the abandonment of judicial self-discipline.[59]

Having acknowledged these three appropriate versions of self-restraint, I still cannot endorse the unnuanced call for judicial restraint as it is usually made. The usual recommendation is that courts should defer wherever possible to the political judgments of the executive and legislative branches and to the political and moral values widely shared by the larger polity. To enter into this topic comprehensively would be to traverse a subject that probably has occupied more scholarly attention than any other in the legal academy since *Brown v. Board of Education*,[60] and perhaps since *Marbury*. I do not do so here, in part because, in an earlier article, I have already tried to explicate the common philosophies of judicial restraint and to show why they are weakly justified, based on a misunderstanding of the role of majoritarian government under our Constitution, and inconsistent with a higher ideal of judicial self-discipline, which often requires that judges second-guess the judgments of other institutional actors.[61] In discussing the case for restraint by state courts, I will limit myself to four broad countervailing arguments that may be especially salient in the context of state institutions.

The first such argument is that the case for judicial restraint at the federal level is often based on a variety of institutional considerations that are less forceful at the state level.[62] It is often urged that, because federal judges are unelected, they have no legitimate role to play in interjecting policy judgments into their decisional processes. As strongly as I argue below against judicial elections, the fact is that, as long as the overwhelming majority of state judges run for office, they have whatever policymaking legitimacy is conferred by a direct electoral connection.

Another supposed defect of federal innovation in constitutional doctrine is that any such ruling by the United States Supreme Court constrains federalism by imposing a uniform legal interpretation on all fifty states. This problem obviously does not affect state courts. Additionally, it is sometimes urged that federal courts resist constitutional rulings because it would require an extraor-

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59. *Cf.* I K.C. DAVID & R.J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.6, at 76-79 (1994). The Supreme Court is unlikely to "be able to identify a justiciable standard that would perform tolerably well the function of distinguishing between constitutional and unconstitutional delegations of power to agencies." *Id.* at 79.

60. 347 U.S. 483 (1954).

61. *See* Peter M. Shane, *Rights, Remedies and Restraint*, 64 CHI.-KENT L. REV. 531 (1988).

62. *See* Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 429-30 (1998).

dinary effort to overcome the judicial ruling through a constitutional amendment. Mobilizing citizens and legislatures to amend state constitutions is, by comparison, a far easier task. On each of these grounds, state courts are arguably better situated to take a more aggressive stance than do the federal courts in the implementation of their respective constitutions.

The second general reason why truly thoroughgoing judicial restraint may be problematic is that state courts cannot plausibly avert controversy through timidity. Most state courts' judicial decisions likely to prompt voter dissatisfaction arise from the diligent application of federal constitutional law—especially with regard to criminal procedure and abortion.[63] State courts have no legitimate alternative to the conscientious application of that law, the development of which they simply cannot control.

Moreover, courts are targeted for scathing criticism when they ratify government action as much as when they overturn it. Critics routinely lambaste the United States Supreme Court for alleged creativity in the invention of fundamental rights protected by the Due Process Clause of the Fourteenth Amendment. Such creativity, however, is no more a departure from the historic Constitution than was the Court's failure to read any significant meaning into the privileges and immunities clause of the same amendment.[64] The Court's aggressiveness, in *Dred Scott*,[65] in finding grounds to invalidate the Missouri Compromise is appropriately infamous, but so are its failures to enforce the Fifteenth Amendment and to require prompt racial desegregation of our public schools. The Court's historic complicity with respect to the worst behavior of both state and federal governments has cast at least as much doubt on its legitimacy as has its alleged activism. Although political conservatives are today's most vituperative critics of judicial decisionmaking, this was not always so.[66] If the Supreme Court persists in its current aggressiveness in protecting property rights[67] and in curtailing Congress's regulatory powers,[68] there will surely be left-wing backlash. State courts should attend to all of this history in deciding whether judicial restraint can protect them from politicization and interbranch intimidation.

The third broad point to consider is that, in practice and in theory, the courts' most successful defense of their independence has not been restraint *per*

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63. Compare, for example, the recent and unsuccessful campaign to oust California's Chief Justice Ronald George and Associate Justice Ming Chin based on their votes to extend abortion rights under the California Constitution. *See, e.g., Abortion Foes Lobby Voters to Oust California Justices; Prosecutors, Police and Prominent Figures from Both Political Parties Support the Judges*, GREENSBORO NEWS & REC. (N.C.), Sept. 21, 1998, at A2. It is hard to believe the campaign against them would have been any less virulent had they ruled for pro-choice plaintiffs in reliance on *Roe v. Wade*, 410 U.S. 113 (1973).

64. *See* Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1872).

65. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

66. Barry Friedman, *"Things Forgotten" in the Debate over Judicial Independence*, 14 GA. ST. U. L. REV. 737, 753-55 (1998).

67. *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

68. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995) (invalidating Gun-Free School Zones Act as exceeding Congress's regulatory powers under the Commerce Clause).

se, but a self-disciplined commitment to a proper institutional role. In a rule of law system such as ours, where countermajoritarian constitutions often envision judicial second-guessing of executive and legislative authorities, disciplined adherence to the law will often compel conscientious judges not to defer to the political judgments of others. Of course, judges should not forgo deference on the sole or primary ground that they personally would have preferred the executive or the legislature to have conducted itself differently. Rather, a judge should forgo deference when, upon diligent and open-minded consideration of all legally relevant materials and the facts before the court, he or she comes to the good-faith, intellectual conclusion that the best interpretation of the law forecloses the political judgment being challenged. Only by following the path of the law can judges retain the high ground in public debate over their roles—even if the path of the law entails politically controversial judgments and interpretations.

This approach to constitutional law, at both the state and federal levels, represents what I believe is our dominant national tradition of constitutional interpretation—which I have elsewhere called "aspirationalism":

> viewing the Constitution as a signal of the kind of government under which we would like to live, and interpreting that Constitution over time to reach better approximations of that aspiration. This vision treats as essential to constitutional understanding the broad normative purposes that the Constitution invokes: "to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." To use John Marshall's words, those purposes are vindicated by remembering "it is *a constitution* we are expounding," that in a constitution, "only its great outlines should be marked," and that our constitution was "intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."
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> Aspirationalism is not tantamount to regarding the Constitution as perfect, or perfectible through ingenious reading. . . . Aspirationalism does insist, however, that new or evolving understandings of the Constitution may not require formal amendment for their implementation. Cultural change, that is change in social understanding, may make certain reasoned arguments compelling to later generations that earlier generations did not foresee.[69]

Because this tradition is so dominant in our judicial history, I have found the acerbity of some criticism of the Supreme Court rather difficult to understand. For example, there is much to be debated about whether the holdings of *Roe v. Wade*[70] were appropriate or appropriately defended, and I do not mean to suggest that the controversy has an obvious resolution. The Court's critics often argue, however, as if no sane interpreter of our Constitution could ever have thought abortion implicated by its individual rights guarantees. But, why is that? Perhaps the founding generation—or the drafters of the Fourteenth Amendment—would have been puzzled by the precise question, "Does the Constitution provide any protection for a woman to decide whether to bring

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69. Shane, *supra* note 61, at 550-51. A similar position is expressed in SOTIRIOS BARBER, ON WHAT THE CONSTITUTION MEANS 34-37 (1984).

70. 410 U.S. 113 (1973).

her pregnancy to term?" However, as a matter of natural law, our forbears probably would have thought it implausible that government could constitutionally limit the number of children a woman might bear or condition the imprimatur of marriage on a solemn undertaking to have any minimum number of children. If this is true, then the general holding of *Roe*, reaffirmed in *Planned Parenthood v. Casey*,[71] seems a quite plausible and principled extension of earlier generations' aspirations for personal liberty. Especially after the Supreme Court had already affirmed constitutional protection to allow married[72] and unmarried persons[73] access to contraceptives, the majority view in *Roe* seems to me no less plausible than the dissent.

My point here, however, is not to reargue *Roe v. Wade* or to defend any other particularly aggressive use of judicial review. It is simply to underscore that, even in controversial cases, conscientious judges operating at the highest levels of craft and good judgment may come to the occasional conclusion that the best view of the law precludes a particular legislative or executive initiative. Withholding such a judgment, for fear of antagonizing the nonjudicial branches of government in such a case, would be to abandon one of the core purposes of judicial independence. Courts unprepared ever to protect controversial personal liberties are no more in need of institutional independence than professors who are unwilling to challenge convention are in need of tenure.

This brings me to the fourth broad reason why judicial restraint *tout court* is not an optimal strategy for state courts to follow in the pursuit of protecting their independence. In addition to being criticized justly for abandoning what I have called the aspirationalist tradition of constitutional interpretation, unduly restrained courts could be criticized for devaluing federalism by refusing to take seriously the distinctiveness of state constitutions. It is one of the most common defenses of federalism that each state, with its distinct history, traditions, and economic, social, and political circumstances, has the capacity to pursue its own set of public practices and ideals, so long as these are consistent with the minimal constraints of federal law. For state courts to forswear the possibility that state constitutions can and should be interpreted as expressing the distinctive ideals of a polity far smaller than the nation as a whole would be to deprive Americans of an important component of the very diversity that federalism promises.[74]

B. Legitimacy Issues in Institutional Reform and "Inherent Powers" Cases

I believe that a state judiciary's most self-protective stance is one of principled adherence to the law, rather than judicial restraint *per se*. However, there are two sets of cases that deserve special consideration. The first—cases involving the enforcement of a state legislature's affirmative obligations to main-

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71. 510 U.S. 1309 (1994).
72. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).
73. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972).
74. *See generally* Schapiro, *supra* note 62.

tain the quality of conditions in schools, mental hospitals, prisons, and other state institutions—entails especially difficult remedial problems even when, in principle, the state's liability is clear. The second also implicates state resources, but does so in a context where state courts have been exceedingly more activist than their federal counterparts—these are cases involving the assertion of inherent judicial power to compel state support for the judiciary itself. These cases, too rarely discussed in debates over judicial role, most effectively illustrate the capacity of courts to consume whatever political support they might have had from the nonjudicial branches of government or the larger electorate. In this context, a greater devotion to restraint might well be in order.

In the last thirty-five years, there has been a marked increase in the number of both state and federal lawsuits challenging the constitutionality of conditions in public school systems, mental hospitals, and prisons. Some critics of state courts have counseled that state courts either forbear from finding any affirmative state constitutional guarantees as to institutional conditions or interpret such guarantees as nonjusticiable in order to avoid the remedial challenges that inevitably draw a state judiciary into a policymaking role.[75] Such exhortations to judicial restraint could be understood in different ways. One argument might be that courts should eschew institutional conditions cases on the ground that state constitutions simply do not authorize them.[76] Alternatively, even if state constitutions are conceded to impose affirmative guarantees with regard to the quality of some state institutions, adjudicating compliance draws courts into a policymaking role that is not entirely constrained by ordinary legal interpretation. It might, therefore, be urged that these cases pose unique legitimacy problems that courts should avoid.[77] It could further be argued that, even if state constitutions impose justiciable guarantees regarding institutional conditions and even if some judicial policymaking is legitimate in principle, nonjudicial state authorities will deeply resent institutional remedies that impose significant budgetary obligations and limit the resources available to fulfill other worthy public purposes. Therefore, courts might seek to avoid these cases because the political stakes are too high. On any of these grounds, involvement in institutional reform cases might elicit the kind of responsive pressure that will threaten judicial independence.

The first proposition—that state constitutions should not be read as imposing any affirmative obligations on state legislatures to maintain a certain quality of schools, prisons, or mental hospitals—seems both improbable and futile. In the school finance area alone, courts in at least twenty states have declared that state formulas for public school funding run afoul of one or another state con-

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75. *See, e.g.*, Carrington, *Judicial Independence*, *supra* note 5, at 100.

76. *See* Michael Hotra, *Above the Law*, FYI: JOURNAL OF THE AMER. LEGISLATIVE EXCHANGE COUN., Mar. 23, 1998, at 11-12.

77. *See generally* DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977); William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982).

stitutional provision.[78] Given the wide range of states involved, and the professional training and political acumen of most judges, it seems highly unlikely that all of them are simply fabricating unpersuasive arguments to impose school reform on state legislatures. One would expect state constitutions to differ on this issue; judicial opinions in at least sixteen other states that deny school funding claims suggest that they do.[79] But, given the overwhelming importance of public education, it would be amazing if all fifty state constitutions left state legislatures complete discretion to determine the sufficiency of interdistrict equity.

Even if state courts stayed out of the schools, there would still be many occasions for adjudications concerning state institutions. Because the Eighth Amendment to the federal Constitution precludes "cruel and unusual punishment," and because the Fourteenth Amendment Due Process Clause precludes arbitrary treatment of anyone kept in state custody involuntarily,[80] cases involving prisons and mental institutions are inevitable. Although states may win such cases on the merits, they could not plausibly be dismissed by state courts as nonjusticiable. Thus, in adjudicating whether states are fulfilling their legal obligations with regard to prisons, mental hospitals, and schools, state courts should adhere to their essential adjudicatory role and do their best conscientiously to construe the law. If a state is not living up to its obligations, soundly interpreted, state courts should not withhold judgment.

It is true that institutional cases—whether involving the adequacy of conditions or funding equity—will entail significant remedial complexity. This complexity may itself pose substantial institutional problems for a court. If a state judge determines, based on a faithful interpretation of the law, that the rights of public school students, prisoners, or mental health patients have been violated, the judge will then need "a theory of remedial design that links the understanding of rights to some measure of the remedy's appropriate scope."[81] In determining whether the remedy's aims are to be compensatory, corrective, prophylactic, or all three, the judge must address the following issues: Should the aim of a remedy be to restore plaintiffs to the position they would have enjoyed but for the state's violations of law? If so, in what respects? The school desegregation cases, for example, have engendered significant debate as to whether courts are empowered to redress inadequacies in the educational programming provided to the targets of racial segregation, or only to seek to restore a pattern of school attendance that would have occurred but for the inten-

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78. *See* Douglas S. Reed, *Twenty-Five Years After* Rodriguez*: School Finance Litigation and the Impact of the New Judicial Federalism*, 32 L. & SOC. REV. 175, 176 (1998).

79. *Id.*

80. *See* O'Connor v. Donaldson, 422 U.S. 563, 576 (1975) ("[A] State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.").

81. Shane, *supra* note 61, at 555.

tional acts of racial separation.[82] And, most important for the quality of inter-branch relations, what is to be a court's recourse if the state's nonjudicial branches resist efforts at remediation?

It is common for governors and legislators to bemoan the scope of judicial interest-balancing and policymaking that answering such questions requires. However, the legitimacy of remediation in institutional reform suits is sustained by both history and principle. As argued by Malcolm Feeley and Edward Rubin in their superb study of prison reform litigation, the regulatory nature of the modern administrative state demands a judicial administrative capacity designed "to secure compliance with the law" by public institutions.[83] The administrative role of modern courts is a direct outgrowth of traditional equity tools and doctrines being applied to new circumstances.[84] The judicial policy role entailed in equity jurisprudence has been played so often and for so long by so many American courts that it has become conventional. Voters and legislators should now understand that "when courts are granted jurisdiction the potentiality of policy making is inherent in that grant. Part of the meaning of a court, as that institution is understood in our culture, is that it will make public policy under . . . constrained conditions."[85]

Undoubtedly, what is most anxiety-producing about the institutional remediation efforts of state (and federal) courts is the alleged resemblance between the balancing judgments entailed in designing institutional remedies and the balancing judgments typically thought to be the exclusive province of legislators. Judicial policymaking in the course of remedial design is, however, necessarily more constrained than legislative policymaking. As a threshold matter, in designing remedies, judges must "engage[] and connect[] with legal doctrine" as it describes the legal wrongs involved and delimits a judge's remedial powers.[86] Although there may not be clear preexisting rules telling judges precisely how much or how little they can do, judges are constrained in their use of doctrine by supervision and culture within the judiciary itself.[87] In terms of supervision, trial judges are reviewable by appellate judges, often at multiple levels, who provide highly regularized protection against wholly idiosyncratic judgment. In terms of culture, state courts, like other social institutions, "depend upon embedded norms, and [the fact] that human agents are most powerfully controlled by their internalized beliefs."[88] The internalized belief system of American judges traditionally values deference to and accommodation of non-

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82. I have explored this uncertainty at length in Peter M. Shane, *School Desegregation Remedies and the Fair Governance of Schools*, 132 U. PA. L. REV. 1041 (1984).

83. MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 327-28, 343 (1998).

84. *See id.* at 328-29; PETER CHARLES HOFFER, THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA 180-98 (1990); Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980).

85. FEELEY & RUBIN, *supra* note 83, at 359.

86. *Id.* at 340.

87. *See id.* at 351.

88. *Id.* at 353.

judicial authorities—even as it values providing every legal wrong with a remedy. Judges know they can attack problems only through existing structures, which means that "[j]udicial administration . . . always involves negotiations, persuasion, and the recruitment of allies from within and without the subject institution."[89] In short, as described by Feeley and Rubin, judicial policymaking "is a standard method of judicial action, . . . [with] distinct modalities. . . . When judges use these modalities, they are making public policy in the standard manner that our prevailing legal culture establishes—they are 'talking the talk.'"[90] The "talk" they are "talking" is very different from the plenary discretion enjoyed by a state legislature.

A relatively new attack on institutional remedies argues that judicial assertiveness in the creation and enforcement of rights has been counterproductive. Gerald Rosenberg's *The Hollow Hope*[91] is but the most recent of several major works suggesting that courts are profoundly limited in their capacity to advance social reform, and that their remedial efforts actually may impede social progress. The data, however, are far from clear in this regard.[92] Feeley and Rubin, for example, argue that, although the prison reform litigation movement may not have yielded the desired degree of deinstitutionalization, the federal judiciary effectively ended the "Southern plantation" model of prisons and contributed significantly to the most important modern trends in prison administration. These include the professionalization of corrections administration, the evolution of national corrections standards, and the advent of increased bureaucratic accountability within state prison systems.[93] Similarly, Douglas S. Reed of Georgetown University has found that some state supreme courts have had a significant positive impact on the equitable distribution of public schooling resources, especially as compared to trends in states where courts have stayed away from the issue.[94] Both the magnitude and durability of these changes is variable, but it is interesting, especially for those who advocate judicial restraint, that the most aggressive courts appear to be the most successful in eliciting reform rather than those that are deferential in the imposition of remedies.[95] This result echoes similarly suggestive findings in school desegregation cases.[96]

None of this is to deny the fact that legislators resent judicial intervention in state institutions. Aside from signaling possible political disagreement, a judi-

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89. *Id.* at 357.

90. *Id.* at 7.

91. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

92. *See generally* FEELEY & RUBIN, note 83, at 366-75; Reed, *supra* note 77, at 180-82; Malcolm M. Feeley, *Hollow Hope, Flypaper and Metophors*, 17 L. & SOC. INQUIRY 745 (1992); Michael W. McCann, *Reform Litigation on Trial*, 17 L. & SOC. INQUIRY 715 (1992).

93. FEELEY & RUBIN, *supra* note 83, at 366-75.

94. *See* Reed, *supra* note 78, at 184-204.

95. *See id.* at 212-14.

96. *See* JENNIFER L. HOCHSCHILD, THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION (1984).

cial declaration that a current school funding scheme is unconstitutional or that some state institution does not meet the requirements of the Due Process Clause or Eighth Amendment will impinge on the legislators' most precious asset—time—and limit the legislators' freedom in distributing scarce state resources. Therefore, the manner in which a court comports itself may influence whether courts engaged in institutional reform litigation will become vulnerable to political retaliation. A court may thus properly be alert to structuring remedial processes to build institutional support for the court. For example, the court should ensure that both media and the citizenry have easy access to judicial opinions and portions of the record relevant to remediation—perhaps through a website. Courts also may structure their orders to hold out the hope for a relatively early extrication of the judiciary from remedial administration. By making clear, for example, that relatively early compliance will entail less expense and more deference than delayed compliance, courts may provide incentives for nonjudicial authorities to cooperate in developing, assessing, and implementing genuine remedial alternatives. In balancing the competing interests relevant to a particular remedy, the court may take into account strong public concerns other than simply redressing the harms to the plaintiffs.[97] For example, courts may decide not to order the release of inmates from prisons that fall short of constitutional requirements, even though the inmates are ultimately entitled to be relieved of unconstitutional conditions.

In short, a court's strongest defensive posture in an institutional reform case is the same as it is in any case—be conscientious (and appear to be conscientious) in following the law. Do not shirk from the duty of reviewing the constitutionality of institutional conditions. If a court is required to balance competing interests and make policy judgments, it should take care to acquire the best possible information, to give state authorities ample opportunity to shape constitutional remedies, and to create incentives for legal compliance by the nonjudicial branches of government. By conspicuously striving to implement constitutional values on behalf of poor families, mental health patients, and even prisoners, a court has an important opportunity to build understanding and support for the judicial role.

The institutional cases that may be more troubling in terms of interbranch relations and their implications for judicial independence do not involve public schools, prisons, or mental institutions—but the courts themselves. Courts in roughly half the states have asserted inherent judicial power to compel legislative funding of the judiciary.[98] Although the federal courts are most often singled out for their extraordinary independence, federal courts have never purported to exercise this power. For example, I doubt federal judges have thought to force Congress, on pain of contempt, to underwrite the undoubted

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97. *See* Fletcher, *supra* note 77, at 650-51; Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 591 (1983).

98. *See* Carl Baar, *Judicial Activism in State Courts: The Inherent-Powers Doctrine*, *in* STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM 129, 131 (Mary Cornelia Porter & G. Alan Tarr eds., 1982).

judicial costs imposed when it federalizes what traditionally had been crimes within exclusive state jurisdiction. Yet, it is clear that thoughts akin to this have crossed the minds of state judges.

Strictly speaking, the overwhelming majority of the "inherent powers" cases are not separation of powers confrontations. Courts are often funded at the county level, and, most frequently, the judicial mandate that arises in an inherent powers case orders a county or other local government to meet its statutory or constitutional obligation to fund a particular judicial function.[99] If one indulges the assumption that state legislatures expect local governments to fulfill their fiscal obligations, a court order toward that end does not really constitute a confrontation between coequal branches.

Such confrontations, however, may well loom on the horizon. In 1991, the then-Chief Judge of the New York Court of Appeals, Sol Wachtler, sued Governor Mario Cuomo, alleging that the New York courts had inherent power to compel state government to provide nearly one billion dollars for the state judicial system.[100] Although Governor Cuomo had originally supported the judicial budget request, he ultimately submitted a budget at a figure ten percent lower than the Wachtler proposal—a figure nearly three percent lower than the previous year's appropriation—in light of what Cuomo regarded to be a profound budget crisis.[101] Chief Judge Wachtler responded by filing suit.[102] In a move nearly as extraordinary, Governor Cuomo then brought suit in the United States District Court for the Eastern District of New York to enjoin the state court action.[103]

The branches ultimately settled their differences and withdrew their suits when Governor Cuomo agreed to restore the judiciary budget to its previous year's funding level.[104] Nonetheless, well-publicized budget shortfalls continued to be greater than anticipated, and Governor Cuomo responded with successive and difficult cuts in virtually every other sector of state spending.[105] As a result, the Chief Judge seemed to be insensitive to the budgetary pain inflicted on virtually every other agency and appeared unreasonably aggressive in pushing for substantial additional resources. One commentator clearly saw the suit as a setback for judicial independence: "Although *Wachtler v. Cuomo* was successful in publicizing the difficulties faced by the courts, there is no evidence that the campaign mounted by the Chief Judge translated into public support for

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99. *See* Howard B. Glaser, Wachtler v. Cuomo*: The Limits of Inherent Power*, 14 PACE L. REV. 111, 115 (1994).

100. *See id.* at 111-12.

101. *See id.* at 124-25.

102. *See id.* at 128.

103. *See* Cuomo v. Wachtler, No. 91-CV-3874 (E.D.N.Y. Oct. 7, 1991), *cited and discussed in* Glaser, *supra* note 99, at 131 n.114; *see also* Wachtler v. Cuomo, No. 91-CV-1235 (N.D.N.Y. Nov. 21, 1991).

104. *See* Glaser, *supra* note 99, at 135.

105. *See id.* at 133.

the judiciary. . . . [P]ublic confidence in the courts may actually have eroded in the wake of the suit."[106]

A current Pennsylvania imbroglio raises the specter of similar confrontations erupting in other states. The Pennsylvania Supreme Court has not yet asserted inherent judicial power to compel the state legislature to enact specific levels of judicial appropriations. But it has interpreted a reference in the Commonwealth's 1968 Constitution to a "unified" court system[107] as implicitly requiring the state to take over funding for all state courts, from the trial level up.[108] After the Court's 1987 order to this effect was ignored for nine years, the Supreme Court granted a writ of mandamus directing the General Assembly to comply with the Court's original decision.[109] It appointed Senior Pennsylvania Superior Court Judge (and former Pennsylvania Supreme Court Justice) Frank J. Montemuro as special master to study funding alternatives and the impact of statewide funding, as well as to formulate a set of recommendations for a new funding system.[110] Judge Montemuro's recommendations,[111] issued on July 24, 1996, have not yet elicited legislative reform.[112] If the General Assembly accepts the Supreme Court's instruction as to the fact of its funding responsibilities, it is not hard to imagine that the Supreme Court might be tempted at a later date to instruct the legislature as to the precise level of those responsibilities.

Cases like this, pitting a state's highest judicial authority directly against its highest nonjudicial authorities over an issue of fiscal support for the courts, are troubling for at least two reasons, one legal and one political. The legal problem is that, notwithstanding the frequency with which state courts invoke inherent power, there is often little persuasive legal support for its assertion. The federal courts provide ample evidence that an independent judiciary can exist without the assertion of such a power, and it would be very difficult to persuade either a legislature or its constituents that a particular level of funding is absolutely necessary for the state's judiciary to function as an effective coequal branch.

Authority to determine the adequacy of judicial resources is sometimes asserted as a critical aspect of institutional autonomy, which provides a legal basis to support the inherent judicial power to command appropriations. In this context, however, conflating judicial independence in the sense of institutional autonomy with judicial independence in the sense of decisional integrity truly leads to confusion. When a court invokes separation of powers theory to assert

106. *Id.* at 146.

107. *See* PA. CONST. art. V, § 1.

108. *See* County of Allegheny v. Commonwealth, 534 A.2d 760 (Pa. 1987).

109. *See* Pennsylvania State Ass'n of County Comm'rs v. Commonwealth, 681 A.2d 699 (Pa. 1996).

110. *See id.* at 700.

111. Frank J. Montemuro, Jr., Interim Report of the Master on the Transition to State Funding of the Unified Judicial System, No. 112 W.D. Misc. Dkt. 1992 (Pa. Dec. 7, 1992) (filed July 31, 1997) (last visited Mar. 7, 1999) <http://www.courts.state.pa.us>.

112. *See* Dana Stuchell, Comment, *Constitutional Crisis in Pennsylvania: Pennsylvania Supreme Court v. Pennsylvania General Assembly*, 102 DICK. L. REV. 201, 232 (1997).

authority over its own funding level, it is asserting not its independence, but its coequality with the legislative and executive branches. But coequality means only that all branches are on par. Because the executive cannot unilaterally determine its own funding levels and even the legislature's funding preferences must pass muster with a veto-armed governor, it is hard to argue that a state's courts are deprived of being a coequal branch if they cannot insist on a particular level of appropriations irrespective of the political judgments of the nonjudicial branches.

In asserting a state-level obligation to fund all state courts, the Pennsylvania Supreme Court has opened itself to criticism that the legal basis for its judgment was thin. It is far from self-evident that the designation of a state's court system as "unified" dictates its funding mechanism.[113] Given the procedural posture in which the Pennsylvania Supreme Court acted, there was no record before the court (or before the court of public opinion) to establish that disparate funding levels across the state had resulted in judicial inefficacy anywhere.[114] Other states should be cautioned that, as meager as the Pennsylvania Supreme Court's support may have been, it was no less skimpy than the support existing in most states to assert an inherent power to compel appropriations by the state legislature. The Pennsylvania countdown to compliance now reads, "Eleven years and counting."

Politically, these cases are troubling because they inevitably cast the courts in their most vulnerable position. When a court purports to compel better treatment for public schools, mental hospitals, or prisons, there are typically constituencies outside the judiciary—as well as strongly held public norms—to which the courts may implicitly appeal for support. In contrast, when a court seeks to compel support for the judiciary, it risks exposing how little popular support may actually exist. Legislative intransigence in the face of court-funding orders threatens to undermine the judiciary doubly—once because willful noncompliance with any judicial order weakens the presumptive authority of state court judgments, and then again because noncompliance with a judicial order to assist the courts must be read as a sign of the courts' political, as well as constitutional, weakness.

It may be instructive to compare Pennsylvania's attempts to secure statewide judicial funding with Chief Judge Judith Kaye's efforts in New York to reform its archaic and labyrinthine judicial structure, which includes eleven separate trial courts[115] complicating much litigation in New York. Judge Kaye could not have been tempted to hold this structure unconstitutional; it is expressly embedded in the New York State Constitution.[116] After four years of sophisticated political effort, however, she was able to unite various proponents of

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113. *See* Pennsylvania State Ass'n of County Comm'rs, 681 A.2d at 708 (Castille, J., dissenting); Stuchell, *supra* note 112, at 213-15.

114. *See* Stuchell, *supra* note 112, at 217-18.

115. *See* Judith S. Kaye & Jonathan Lippman, 1998 Legislative Program of the New York State Judiciary 1 (Apr. 1998), *available at* <http://ucs.ljx.com/lsum/lsum98.htm>.

116. N.Y. CONST. art. VI, § 1(a).

court reform behind a bipartisan proposal to significantly streamline and consolidate the New York trial court system.[117] Although Judge Kaye is a Democrat, New York's Republican governor, George Pataki, has endorsed the plan.[118] Judge Kaye's skill in building alliances through judges who had previously served in the state legislature has been described as a key to her political success.[119]

Because her plan has yet to be enacted, in some sense, Judge Kaye has no more unified her court system than the Pennsylvania Supreme Court has succeeded in imposing statewide funding of its trial courts. However, the key difference is that the delay in implementation of the New York plan is regarded as discrediting the legislature rather than the judiciary. A *New York Times* editorial referred to the legislature's failure to enact the reform plan as its "most disappointing" performance.[120] Judge Kaye seems better poised to accomplish her objectives than the Pennsylvania Supreme Court. Moreover, Judge Kaye has risked none of her court's authority in pressing her case. This model may be worth emulating by other courts intent on preserving their independence.

C. Mutual Restraint and Sound Governance

One way of distilling the foregoing argument is that courts should be conscientious in the fulfillment of their duties, but should impinge upon legislative or executive discretion only when the nature of judicial obligation, broadly conceived, compels such a result. Of course, it would be profoundly helpful if the nonjudicial branches exercised the same restraint with regard to state courts. After all, the nonjudicial branches have the same capacity as the courts to limit their interference with the other branches' constitutional functions—except as the nature of their duties may compel. Legislators, for example, may be empowered to curtail state court jurisdiction, but should only do so when they believe the current grant of jurisdiction is somehow undermining the judiciary's capacity to function. Likewise, budget exigencies may require a conscientious governor to withhold support for judicial appropriations requests, but "executive restraint" should counsel governors to support those requests as much as reasonably can be accommodated within the state's overall fiscal plan.

The effective operation of all branches of government is critical to sound governance. If each branch exhibits forbearance in the exercise of powers that impinge on other branches, the courts' capacity to implement the law, the legislature's capacity to represent the people of the state in making law, and the executive's capacity to provide sound administration should all be advanced. Forbearance of this sort recognizes that, although each branch in conscientiously pursuing its constitutional functions will inevitably reach points of ten-

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117. *See Still Time to Overhaul Courts*, N.Y. TIMES, June 17, 1998, at A30.

118. *See id.*

119. *See* John Caher, *Kaye puts political prowess to work*, ALBANY TIMES UNION, Mar. 23, 1997, at A1.

120. *See The Underachieving Legislature*, N.Y. TIMES, June 20, 1998, at A10.

sion with the other two, each branch has the capacity to advance the work of the others and is willing, within appropriate constraints, to do so.

IV

INTERBRANCH ACCOUNTABILITY AND THE PROTECTION OF JUDICIAL INDEPENDENCE

Even if "restraint" does not adequately capture the judicial posture most likely to promote healthy interbranch relations while protecting judicial independence, it does not follow that courts must or should be oblivious to their ability to build institutional support within the legislative and executive branches. The ideal should not be to establish a mood of invariably smiling agreement, but rather to generate an ethos of mutual understanding and support. The ideal should be one of interbranch accountability.

As scholars of judicial affairs have noted, part of the difficulty in improving the quality of interbranch relations is a prevailing sense of uncertainty regarding the appropriate forms of, and limits upon, judicial-nonjudicial contact.[121] At the federal level, the judiciary's self-discipline in engaging in contacts with Congress may have bolstered its credibility by avoiding any appearance that federal judges are merely another species of political agent.[122] The relative aloofness of judges from ordinary politics also may have contributed to an aura of impartiality that is an important institutional asset. Nonetheless, as Professor Charles Geyh has noted, "too much separation begets unfamiliarity. Unfamiliarity, in turn, begets mistrust, mistrust that could give way to debilitating hostility in an era in which the public is predisposed to suspect the worst of its government."[123] Observations by federal officials suggest strongly that both Congress and the courts feel that each branch is unattuned to the other's institutional challenges and needs.[124] One suspects that a survey of state judges and legislators would yield similar results. Thus, when a judiciary promotes its own autonomy within state government, it may foster an isolation that perpetuates misunderstanding and forfeits opportunities to evoke the loyalty and appreciation of the other branches, which can benefit from judicial expertise.

In elaborating any framework for judicial-nonjudicial contacts, Professor Geyh warns that "a key prudential constraint is that the judiciary [must] avoid tactics and interactions that could damage the reputation that fuels its influence."[125] The trick is to find a way toward "the judiciary remaining a part of the political fray while appearing to stay above it."[126] What I would suggest, following upon the work of Professors Geyh and Robert Katzmann, as well as the

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121. *See* KATZMANN, *supra* note 1, at 6, 82-86; Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1182-83 (1996).

122. *See* KATZMANN, *supra* note 1, at 85.

123. Geyh, *supra* note 121, at 1238.

124. *See* KATZMANN, *supra* note 1, at 6.

125. Geyh, *supra* note 121, at 1170.

126. *Id.* at 1171.

recommendations of the American Bar Association Commission on Separation of Powers and Judicial Independence, is the creation of new institutions within states that will foster increased dialogue between the judicial and nonjudicial branches.

One of these institutions should seek to promote dialogue specifically on judicial administration, practice, and procedure.[127] Some state courts have gone quite far in asserting their exclusive authority over such matters, often claiming that such judicial autonomy is integral to judicial independence.[128] However, the failure to involve executive and legislative branch officials in an ongoing and systematic discussion of these issues can run the risk of seeming indifferent to their very serious public policy consequences—even to the point of arrogance. It sacrifices possible opportunities to acquaint legislators and their staffs with the realities of the judicial workload. For these reasons, the states should follow the ABA's recommendation to Congress with regard to the federal courts, namely, to consider establishing a permanent commission on the courts, to comprise

> representatives from all three branches of government, as well as representatives of litigants and other groups with an interest in the . . . courts. The Commission would develop, on an ongoing basis, recommendations for [the legislature] concerning court practice, procedure, administration, and the like, and evaluate legislative proposals affecting the courts introduced by members of [the legislature].[129]

Based on Judge Kaye's experience in New York, special consideration might be given to emphasizing the role of former-legislators-turned-judges and judges-turned-legislators, whose unique dual branch perspectives should be especially important in pursuing the work of such a commission.

A second institution would seek to promote legislative-judicial communication on the subject of statutes. Following up a suggestion offered by Justice Ginsburg, among others, the Governance Institute, headed by Robert Katzmann, has initiated an experiment in improving congressional access to federal judicial opinions bearing on statutory law.[130] Of special interest are opinions that discern statutory gaps, ambiguities, and probable errors of wording or grammar. Although such opinions do not obligate Congress to react, Professor Katzmann found from extensive interviewing that relevant congressional committees were largely unaware that judicial opinions were finding problems with particular statutes.[131] The Governance Institute helped establish a system through which the D.C. Circuit's chief counsel would send complete judicial

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127. *See id.* at 1233-40.

128. *See, e.g.*, *In re* 42 PA C.S.S. 1703, 394 A.2d 444, 447 (Pa. 1978) (stating that provision of the Pennsylvania Public Agency Open Meeting Law that would make the law applicable to rulemaking deliberations of the Supreme Court would violate the separation of powers because of the court's exclusive constitutional authority "to prescribe general rules governing practice, procedure and the conduct of all courts"). The Pennsylvania Supreme Court's broad view of its exclusive authorities is extensively critiqued in Ledewitz, *supra* note 56.

129. ABA COMMISSION, AN INDEPENDENT JUDICIARY, *supra* note 5, at 54.

130. *See* KATZMANN, *supra* note 1, at 70-71.

131. *See id.* at 73-74.

opinions, without elaboration, to the leaders of both parties in the House and Senate, as well as the chairs and ranking minority members of the relevant committees and key legal staff.[132] Not only did this effort help to keep committees informed as to how the courts reacted to their work, but it apparently encouraged legislative counsel to evaluate systematically their roles in legislative drafting.[133] It is easy to imagine the creation of a similar conduit at the state level, although any implication that the judges are seeking to change the substantive policies embodied in legislative enactments must be avoided. The sole function of the new mechanism should be to foster greater awareness within the legislature of the technical issues the courts have faced with particular statutes, thus inviting the legislature to address those issues it chooses and helping to underscore the judiciary's awareness that the framing of statutory policy is, in the first instance, most certainly a legislative matter.

On the subject of statutes, there is yet another way—also noted by Professor Katzmann—for judges to underscore their accountability to the legislature in the implementation of statutory law. Courts should avoid adopting what has come to be known as the Scalia view of statutory interpretation, namely, that recourse to legislative history should be all-but-categorically avoided in the discernment of statutory meaning.[134] Despite the theoretical arguments in favor of such a position—chiefly, that a legislature votes for the statutory language, not for its supporting documentation—it seems implausible that a court is more likely to give a statute its intended effect if it utterly ignores the documentation surrounding its enactment. A judge who asserts he or she is "merely" giving a statute its best reading based on its precise wording, interpreted against the context of all other relevant statutes, hardly diminishes judicial discretion to confer on a statute virtually whatever meaning the judge chooses. The license that textualist judges take with statutes is surely not lost on legislators who struggle to negotiate the appropriate wording that will embody the legislature's intentions.[135] Although the utility and persuasiveness of legislative history may vary, one suspects that former Representative Robert Kastenmeier, who served as ranking majority member on the House Judiciary Committee, expressed a common sentiment when he characterized the Scalia approach as "an assault on the integrity of the legislative process."[136] Judges owe it to their legislatures to be understanding and respectful of the processes by which legislation is made when they interpret the outcomes of those processes.

In many states, a natural institutional defensiveness may impede efforts to generate enhanced dialogue between judges and legislatures. But I would sus-

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132. *See id.* at 77.

133. *See id.* at 78-79.

134. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997). The Scalia approach is usefully critiqued in Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277 (1990).

135. *See* KATZMANN, *supra* note 1, at 61.

136. *Id.* at 64.

pect there is a hidden culprit behind the failure to innovate—namely, judicial elections. Judicial elections have been widely criticized for their apparent adverse impact on judicial independence. Substantial evidence supports the proposition that the method of selection significantly affects judicial behavior—especially judicial willingness or unwillingness to uphold unpopular individual interests, such as the interests of criminal defendants, when they clash with those of the state.[137] In recent years, both the reality and appearance of judicial independence have been compromised further by the skyrocketing costs of judicial elections.[138] The fact that judicial campaigns are typically financed by the lawyers and interest groups who appear before the victors stands in obvious tension with the goal of judicial impartiality.[139]

Less noticed is another defect of judicial elections that may be every bit as dangerous for judicial independence. From the point of view of interbranch relations, judicial elections are a design mistake. Governors and legislators come to know judges not as distinguished public servants, but as fellow politicians. The judges' stake in their fellow partisans' political fortunes is distressingly direct. In states having partisan elections, judges must maintain their partisan ties; presumably they need the support of powerful members in the nonjudicial branches to secure either reelection or nomination to a higher court. Furthermore, judges risk competing with legislators and governors for political contributions. Because judges have an electoral mandate—a mandate in the case of statewide courts that may even be less parochial than that of state legislators—judicial elections invite judicial confusion as to the nature of their role. Judges who win statewide races might wonder, at least subconsciously, why they should defer to the policy judgments of state senators and representatives. Elected legislators, for their part, are probably less likely to credit elected judges as having any more public-interested an outlook than their own.

It is sometimes argued that judicial elections are justified because they lend legitimacy and popular accountability to the courts.[140] As the federal courts demonstrate, however, elections are not a necessary precondition for judicial legitimacy. As for popular accountability, the low voter turnout in judicial elections and the thoroughly inadequate information available to virtually all voters regarding judicial qualifications greatly diminish the democratic significance of a judicial election.[141] In Pennsylvania, the state constitution perversely ensures this state of affairs by requiring that judicial elections occur at the same time as

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137. *See* DANIEL RAY PINELLO, DOES JUDICIAL-SELECTION METHOD MAKE A DIFFERENCE? A COMPARATIVE ANALYSIS OF SELECTION-METHOD IMPACT ON POLICY IN AMERICAN STATE SUPREME COURTS 207 (1991); Melinda Gann Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 23 AM. POL. Q. 485, 495-96 (1995).

138. *See* Mark Hansen, *A Run for the Bench*, A.B.A. J., Oct. 1998, at 68, 70.

139. *See* PATRICK M. MCFADDEN, ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL CAMPAIGNS 26-27 (1990).

140. *See* Harry L. Witte, *Judicial Selection in the People's Democratic Republic of Pennsylvania: Here the People Rule?*, 68 TEMPLE L. REV. 1079, 1093 (1995).

141. *See* PHILIP L. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 178-218 (1980); Witte, *supra* note 140, at 1140-42.

municipal elections, when voter interest is generally far lower than during statewide and national races.[142]

Certainly, there is reason to doubt whether the elected courts' connection to the electorate enhances their legitimacy in the eyes of governors and legislators. In 1996, an interbranch squabble erupted in Illinois when that state's elected Supreme Court declined the Attorney General's request to promulgate rules to implement a judicial bypass procedure that the Attorney General deemed essential to preserving the constitutionality of a statute generally requiring parental notification prior to a minor receiving an abortion. Legislators responded that the elected "jurists are arrogant and 'have lost touch with the views of the people of Illinois,'" and introduced proposals to redistrict Supreme Court elections in the hope of producing a different philosophical composition for the court.[143] Perhaps ironically, one of the proposals to reform the "out-of-touch" court would have divided the Supreme Court into civil and criminal divisions, with the civil division subject to merit selection.[144]

What judicial elections may accomplish most effectively is preventing either the state legislature or the executive branch from claiming any "ownership" over the composition of the courts. If the courts function well, the nonjudicial branches get no credit. If they function poorly, they are not to blame. Having no role in populating the state's judicial hierarchy, the state's political leaders may not feel obligated to facilitate the effective institutional operations of those whom they did not choose. One advantage of eliminating judicial elections might be to promote the idea that although the separate branches check and balance one another, they also depend upon one another for the pursuit of effective governance.

V

CONCLUSION

The decisional independence of state courts is of paramount importance to the quality of justice that Americans enjoy. The protection of that independence deserves the support of every lawyer—indeed, of every citizen. It would be both politically helpful to the cause and a sound reading of our history and traditions to conceptualize judicial independence as a constitutional entitlement in every state. Even if every intrusion into that independence is not legally actionable, we should recognize that efforts to intimidate or politicize the judiciary threaten not merely an ideal, but an entitlement.

The quality of state judicial relations with governors and state legislators will have an impact on the pursuit and protection of judicial independence. Judges, like governors and legislators, should be careful to avoid unnecessary interbranch clashes. They should pursue their role within a value framework

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142. *See* PA. CONST. art. V, § 13(a); Witte, *supra* note 140, at 1140-42.

143. David Heckelman, *Measures to Revamp High Court Another Salvo in Ongoing Battle*, CHI. DAILY L. BULL., Feb. 16, 1996, at 1.

144. *See id.*

that attends to the appropriately constrained nature of judicial policymaking. However, "restraint" should not be pursued as an overriding ideal for its own sake. Unless courts interpret the law fearlessly, and are seen to be doing so, they will undermine the rationale for judicial independence. The cases in which greater restraint might seem most prudent are cases that seek to compel state resources for the courts themselves. The assertion of such powers, rather than bolstering the judiciary's institutional autonomy, actually may underscore the courts' political dependency. It is best to pursue a court's legislative agenda through legislative means.

The quality of interbranch relations would help sustain judicial independence more effectively if state judges were not elected. Appointive systems can bolster the nonjudicial branches' sense of responsibility for the institutional effectiveness of the courts, and foster interbranch relations that cast judges as skilled, public-minded experts, rather than as citizens of the rough-and-tumble political world. Failing that, judges may help to elicit the understanding and loyalty of other branches through new institutions that provide legislators and executive officials with information useful to their respective functions, as well as opportunities for input into the workings of the courts.

The current threats to federal judicial independence are not trivial, but it is astonishing how well the federal courts have survived despite a two-century history of controversial decisionmaking. Their success has rested in large measure on the federal system for judicial appointments and on the federal courts' self-declared dependency on Congress for appropriations and jurisdiction, both of which have fostered a spirit of mutual accountability. There is a great deal of difference, constitutionally speaking, between independence and isolation. Judicial acceptance of mutual obligation may go further to protect the core of judicial independence than any other strategy.