

JUDGING IN THE GOOD SOCIETY: A COMMENT ON THE JURISPRUDENCE OF JUSTICE SCALIA

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INTRODUCTION

In his great book, *Justice Accused*,¹ Robert Cover wrote of anti-slavery judges whose adherence to a formal conception of the judicial role prevented them from using their judicial authority to oppose slavery. Although morally opposed to the institution of slavery as antithetical to their vision of a good society, they nevertheless enforced fugitive slave laws and in other ways upheld the legal apparatus of slavery.

Cover, who perhaps more than most appreciated “the complexity of moral choice,”² understood those judges to have confronted a “moral-formal dilemma.”³ I quote from Cover’s description of that dilemma:

[T]he judge’s problem in any case where some impact on the formal apparatus could be expected, was never a single-dimensional moral question is slavery or enslavement, or rendition to slavery, morally justified or reprehensible? rather, the issue was whether the moral values served by antislavery (the substantive moral dimension) outweighed interests and values served by fidelity to the formal system principles or to the content of the principles themselves. In a sense the moral-formal decision was a moral-moral decision a decision between the substantive moral propositions relating to slavery and liberty and the moral ends served by the formal structure as a whole, by fidelity to it, or by some relevant particular element of it. Thus, the legal actor did not choose between liberty and slavery. He had to choose between liberty and ordered federalism; between liberty and consistent limits on the judicial function; between liberty and fidelity to public trust; between liberty and adherence to the public corporate undertakings of nationhood; or, as some of the judges would have it, between liberty and the viability of the social compact.⁴

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¹ R. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975).

² *Id.* at xi.

³ *Id.* at 195.

⁴ *Id.* at 197-98.

I was reminded of Cover's important insight about the moral choices confronting judges as I studied the opinions and writings of Justice Scalia in preparation for this symposium. For Justice Scalia, as for the antislavery judges, the "good society" encompasses not only "substantive moral dimensions," but a "formal structure," and judges fit into that formal structure in a way that both inhibits and directs their exercise of judicial power.

Justice Scalia's deep commitment to the "formal structure," as he understands it, is more than "an intellectual preference for a dispassionate, rationalistic method of deciding cases."⁵ It is central to his view of the good society. As George Kannar has suggested,⁶ Justice Scalia's methodological commitments, at times, may even trump his own strongly held views on substantive issues.

However, unlike the antislavery judges, more often than not Justice Scalia's positivist view of the formal constraints on the exercise of judicial authority leads to results that seem to be consistent with his substantive philosophical, political, and economic beliefs. Thus, in most cases he need not confront a moral-formal (or moral-moral) dilemma. His correct behavior as a judge leads to the correct result in the case.

I. THE LAW OF RULES

Justice Scalia's conception of the formal constraints on the exercise of judicial authority is both principled and inflexible. It leaves little room for balancing competing interests, for assessing compelling state interests, for requiring less intrusive alternatives, for looking to the totality of the circumstances, for exercising judicial discretion. It is rule oriented in its view of the basis for judges' power to act, as well as of the way cases ought to be decided.

For Justice Scalia, the rule of law should be a "law of rules."⁷ Judges must find their authority for acting in existing legal rules contained in the text of a constitution, statute, or judicial precedent, in textual language whose "plain meaning" or original purpose furnishes a basis for precise, principled rule making. Justice Scalia's originalist approach to the interpretation of texts restricts judicial consideration of "evolving concepts" of justice to "the actual practices of the society, as reflected in the laws enacted by its legislatures."⁸

⁵ Wizner, *Passion in Legal Argument and Judicial Decision Making: A Comment on Goldberg v. Kelly*, 10 CARDOZO L. REV. 179, 192 (1988).

⁶ Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297 (1990).

⁷ Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

⁸ *Id.* at 1184. See also Scalia, *Originalism: the Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

Similarly, in their decisions judges should aspire to general rules, not fact-specific rulings that leave discretion to judges in future cases to decide similar issues on fact-specific grounds.

Justice Scalia takes a dim view of judicial discretion employed to advance the welfare of society, achieve social justice, or protect individual interests. The “common-law, discretion-conferring approach”⁹ to deciding individual cases should, in his view, give way to the necessity for rule-based rule making, even if on the facts of a particular case the result may not be what appears right as a matter of justice or policy.

Justice Scalia does not advocate this rule-bound approach to judicial decision making for purely formalistic reasons. For him there is much more at stake no less than his vision of the good society. Here is how he describes it:

[T]he value of perfection in judicial decisions should not be overrated. To achieve what is, from the standpoint of the substantive policies involved, the “perfect” answer is nice but it is just one of a number of competing values. And one of the most substantial of those competing values, which often contradicts the search for perfection, is the appearance of equal treatment. As a motivating force of the human spirit, that value cannot be overestimated. . . . The Equal Protection Clause epitomizes justice more than any other provision of the Constitution. And the trouble with the discretion-conferring approach to judicial law making is that it does not satisfy this sense of justice very well. . . . Much better, even at the expense of the mild substantive distortion that any generalization introduces, to have a clear, previously enunciated rule that one can point to in explanation of the decision.¹⁰

It is this idea of the social importance of generally applicable rules that may explain Justice Scalia’s sweeping majority opinion earlier this year in *Employment Division, Department of Human Resources v. Smith*.¹¹ In that case, the Court reversed an Oregon Supreme Court decision holding unconstitutional on first amendment free exercise grounds the denial of unemployment benefits to members of the Native American Church whose sacramental use of peyote resulted in their dismissal from employment.

The claimants argued that the state lacked a compelling interest

“[E]ven if one assumes . . . that the Constitution was originally *meant* to expound evolving rather than permanent values . . . I see no basis for believing that supervision of the evolution would have been committed to the courts.” *Id.* at 862.

⁹ *Id.* at 1178.

¹⁰ *Id.*

¹¹ 110 S. Ct. 1595 (1990).

that could not be served by less intrusive means in denying them unemployment benefits, and that therefore the denial of benefits imposed an unnecessary, and unconstitutional, burden on their free exercise of religion. Four Justices (O'Connor, Blackmun, Brennan, and Marshall) agreed with the claimants' assertion that a balancing test should be applied. Justice O'Connor, in a concurring opinion, came out on the state's side; the other three dissented.

But Justice Scalia, in a radical departure from what had become the customary approach to such cases balancing the state's interest in uniform enforcement of its law against the individual's assertion of religious exemption from particular effects of the law's enforcement, the exemption to be allowed and the religious practice accommodated unless the court determines that the state has a compelling interest in the particular application of the law that cannot be served by less intrusive means enunciated a "single categorical rule:"¹² "[I]f prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."¹³ In Justice O'Connor's words, this new rule "disregard[s] our consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct."¹⁴

With a sweep of the pen, Justice Scalia rewrote Supreme Court constitutional history in the first amendment area to conform to his view of the proper role of the judiciary in a good society. So central to Justice Scalia's vision of the good society is a judiciary bound by and articulating general rules that are not subject to the exercise of judicial discretion, that he appears to be prepared to abandon the traditional special role of judges in protecting individuals and minorities from the democratic process:

[T]o say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.¹⁵

¹² *Id.* at 1607 (O'Connor, J., concurring).

¹³ *Smith*, 110 S. Ct. at 1600.

¹⁴ *Id.* at 1607 (O'Connor, J., concurring).

¹⁵ *Smith*, 110 S. Ct. at 1606.

One can only wonder what the result in *Smith* would have been had the proscribed practice involved ritual circumcision of male children, or special methods of slaughtering animals for food, or even the use of wine as a sacrament. It is likely that a balancing approach would protect all of those practices. It is equally likely that Justice Scalia's categorical rule would not.

Lest there be any doubt about that conclusion, here is Justice Scalia's rationale for his interpretation of the first amendment text:

[T]he "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has involved the point), that a state would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display.¹⁶

However, the constitutional protection of the "free exercise of religion" does not prohibit a state from "requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires). As a textual matter, we do not think the words must be given that meaning."¹⁷

It is slight consolation to hope that the democratic legislative process would protect or exempt these particular religious practices because they are "widely engaged in."¹⁸

¹⁶ *Id.* at 1599.

¹⁷ *Id.*

¹⁸ *Id.* at 1606. It might be argued that since Justice O'Connor reaches the same substantive result as Justice Scalia, while claiming to employ a method that accommodates religious practices, we are better off with the Scalia approach which denies judicial authority to create religious exemptions. In Mark Tushnet's words, "It is best . . . for the system to be set up so that somewhere someone will see the blood on his or her hands." (Personal communication to the author. October 30, 1990). The difficulty I have with this view is its assumption that if the judiciary is denied (or disclaims) the power to protect minority religious practices, either the democratic legislative process will, or the religious intolerance of the political system will be exposed. This approach derives from a view that it is preferable for the legislature to protect minorities, or that minorities not be protected, rather than for courts to be expected to perform that role. I might be tempted to agree with Professor Tushnet were it not for the fact that courts often *do* relieve minority religious practices from legislatively and administratively imposed burdens. *See, e.g.,* Wisconsin v. Yoder, 406 U.S. 205 (1972); United States v. Seeger, 380 U.S. 163 (1965); Sherbert v. Verner, 374 U.S. 298 (1963); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

II. THE SEPARATION OF POWERS

A. *Standing*

Justice Scalia's theory of standing is in contrast to his notion that judges ought to decide cases, to the maximum extent possible, by articulating categorical rules of general applicability. In his view, the requirement that a plaintiff have suffered a particularized, legal injury "which sets him apart from the citizenry at large" is "a crucial and inseparable element" of the principle of separation of powers. Disregard of that principle "will inevitably produce . . . an overjudicialization of the process of self-governance."¹⁹

What is the relationship between the doctrine of standing and the separation of powers? For Justice Scalia, the relationship is a "functional" one: in order to confer standing, a plaintiff's injury must be a "legal" injury, which "by definition" is one that results from violation of a "legal right;" a legal right, in turn, can only be "created by the legislature."²⁰ Hence, for a court to recognize and protect a right not specifically created by the legislature is to violate the principle of separation of powers.

As with his theory of rules, Justice Scalia's version of the standing doctrine is central to his vision of the role of the judiciary in a good society:

[T]he law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest *of the majority itself*.²¹

Obviously, this narrow view of standing is the antithesis of the liberalized view that would confer standing in any situation in which a party is in fact adversely affected or aggrieved by government action, particularly if they are "individuals and minorities" seeking judicial protection from the "impositions of the majority."²²

B. *Deference to Agency Interpretation of Statutes*

Justice Scalia's belief that courts should give nearly conclusive deference to statutory interpretations by administrative agencies,²³ notwithstanding his own philosophical reservations about the capac-

¹⁹ Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881-82 (1983).

²⁰ *Id.* at 885.

²¹ *Id.* at 894 (emphasis in original).

²² *Id.*

²³ Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511.

ity of government to manage economic and other matters,²⁴ is a further reflection of his conception of the proper role of the judiciary in a good society. In Justice Scalia's view, excessive deference to agency interpretation of law, like the narrow approach to standing, is required by the doctrine of separation of powers.

Judicial deference is due even when an agency interprets a statute "one way today and another way tomorrow."²⁵ The reason is not that "the agency knows more about it than [judges] do, that somehow they have more expertise, because they were present at the founding when the statute was passed, or because they have worked with the statute more and therefore they are smarter about it than [judges] are."²⁶ In fact, they may not be better than judges at interpreting the statutes they are charged with enforcing. Rather,

the reason that [courts] give deference to the agency's interpretation . . . has something to do with the allocation of power among the branches of government. Where Congress chooses not to be specific in a statute, as it often does, where it leaves something open, where it leaves interstices in the strict meaning of the law, the general principle is that the filling-in of those interstices has been left to the agency. . . .²⁷

In his use of the term "interstices" to refer to gaps or ambiguities in statutory language that invite interpretation ("interstitial lawmaking"), Justice Scalia cannot have been unmindful of Cardozo's use of that very term in his justly famous lectures on judicial discretion.²⁸ But, as we have seen, Justice Scalia's objective is to restrict the exercise of judicial discretion, not, like Cardozo, to rationalize it. Even though, as an administrative law specialist, Justice Scalia is at least as aware as the ordinary citizen of the frequently inefficient, arbitrary, inconsistent, and erroneous actions of bureaucrats who exercise discretion within administrative agencies, he is prepared in the name of separation of powers to grant them the exclusive right to fill in "interstices" in their governing statutes, in order to avoid the "overjudicialization of the process of self-governance."²⁹

It is such excessive deference to administrative interpretations of law that can lead to decisions like the Court's five-to-four holding in

²⁴ See, e.g., Scalia, *Morality, Pragmatism and the Legal Order*, 9 J.L. & PUB. POL'Y 123, 127 (1986).

²⁵ Scalia, *The Role of the Judiciary in Deregulation*, 55 ANTITRUST L.J. 191, 193 (1986).

²⁶ *Id.*

²⁷ *Id.*

²⁸ B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 69, 114 (1921).

²⁹ Scalia, *supra* note 19, at 881.

Sullivan v. Everhart.³⁰ *Sullivan* involved the interpretation of overpayment provisions of the Social Security Act that prohibited "adjustment of payments to, or recovery . . . from, any person who is without fault if such adjustment or recovery would defeat the purpose of [the statute] or would be against equity and good conscience."³¹ A similar provision of the Act regarding overpayments of Supplemental Security Income benefits directed the Secretary of Health and Human Services to "avoid[] penalizing such individual or his eligible spouse who was without fault in connection with the overpayment, if adjustment or recovery on account of such overpayment . . . would defeat the purposes of [the statute], or be against equity and good conscience"³²

In a 1979 decision, *Califano v. Yamasaki*,³³ the Court had held that Social Security beneficiaries who had received overpayments had a due process right pursuant to these statutory provisions to a hearing where they would have an opportunity to demonstrate that they were entitled to waiver of recovery of the overpayments on hardship grounds. Notwithstanding this precedent, and the clear intent of the statute, Justice Scalia's opinion for the five-to-four majority in *Sullivan v. Everhart*³⁴ upheld an administrative interpretation of the statute that permits the agency to "net" overpayments and underpayments from the month of the first payment error to the month in which the agency determines that a payment error was made.

Thus, if over a period of months the Social Security Administration first overpays, then underpays a beneficiary, as happened to the plaintiffs in this case, the regulation permits the agency to recover the overpayment by "netting" it together with subsequent underpayment, thereby preventing the beneficiary from obtaining the additional amount owed as a result of the underpayments, and from seeking the waiver provided for in the statute for hardships situations where the beneficiary is not at fault.

Writing for the majority, Justice Scalia strained to uphold this agency interpretation, asserting that the statutory language "reasonably bears the Secretary's interpretation that netting is permitted,"³⁵ since the statute "nowhere specifies that the correctness of payments

³⁰ 110 S. Ct. 960 (1990).

³¹ *Id.* at 963 (quoting 42 U.S.C. § 404(b)).

³² *Id.* at 963 n.** (quoting 42 U.S.C. § 1383(b)(1)(B)).

³³ 442 U.S. 682.

³⁴ 110 S. Ct. 960 (1990).

³⁵ *Id.* at 966.

must be determined on a month-by-month basis,"³⁶ and therefore the Secretary was free to interpret the statutory term "payment" to encompass several monthly payments.

In his determination to give deference to the agency interpretation of the statute, Justice Scalia went out of his way to find a possible reading of the statutory language that would uphold the Secretary's netting regulation, even if that meant ignoring the waiver provision enacted by Congress, and the Court's own precedent in the *Yamasaki* case.

As Justice Stevens wrote in dissent, this result is "inconsistent with both common sense and the plain terms of the statute."³⁷ "The kingly power to rewrite history has not been delegated to the Secretary of Health and Human Services. Nevertheless, the Secretary now claims authority to determine that no underpayment has been made to a beneficiary who concededly received a deficient monthly payment"³⁸ in any situation where an overpayment has been made in a prior month, even if that overpayment was due solely to agency error, and even if the subsequent underpayment causes hardship to the beneficiary.

As Justice Stevens observed, Congress intentionally differentiated between underpayments and overpayments, mandating payment without qualification in the case of underpayments, while subjecting recovery of overpayments to mandatory waiver procedures.

The reason for this distinction is easily surmised. A needy person who unknowingly receives an overpayment may spend it, not realizing that the Government will later take back money by reducing needed benefits, or by refusing to compensate for a prior underpayment. The beneficiary may be left without money essential to pay monthly bills.³⁹

The Secretary's netting procedure, in Justice Stevens's words "is nothing short of rewriting history to destroy a citizen's valuable statutory right."⁴⁰ The "netting regulations permit the Secretary to accomplish what the waiver provisions plainly and unequivocally forbid; namely a recovery by the United States of overpayments without a hearing on waiver."⁴¹

In Justice Scalia's "good society," the idea of separation of powers requires judges to interpret statutes in such a manner as to uphold

³⁶ *Id.* at 965.

³⁷ *Id.* at 968 (Stevens, J., dissenting).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 970.

⁴¹ *Id.* at 971 (citation omitted).

administrative agency regulations purporting to carry out congressional intent, even when that is manifestly not the case. While this may well be a principled approach to the separation-of-powers doctrine, it is also a highly theoretical and rigid one that sacrifices the welfare of individuals on the altar of principle.⁴²

An alternative, more realistic approach to the separation of powers recognizes the dynamic relationship between the legislative, executive, and judicial branches of government in protecting and promoting democratic values. In his study of *Judicial Discretion*⁴³ the Israeli jurist, Aharon Barak, has written:

The pure, theoretical model of separation of powers, in which each governmental authority is separate, is not only not accepted, but also is not desirable. In a democratic regime, one must strike a balance between majority rule and fundamental democratic values. This balance cannot exist if each branch stands alone, without interacting with the other branches, and without balancing and supervision. This situation will ultimately lead to an accumulation of strength and power in the hands of one of the branches, with the result that the democracy's fundamental values will be harmed. This will frustrate the very goal of the separation of powers, which is not to create an independent, theoretical structure, but to guarantee the fundamental values of the democracy.⁴⁴

It is through the exercise of judicial discretion in the interpretation of constitutional and statutory texts that the judicial branch carries out its unique role of judicial review. This means that in a case like *Sullivan v. Everhart*,⁴⁵ the "judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."⁴⁶

III. JUDICIAL DISCRETION

Benjamin Cardozo once observed that "the judge is under a duty,

⁴² Toby Golick has identified four elements of Justice Scalia's approach to claims made on behalf of poor people challenging administrative agency interpretations of statutes: (1) ignore the legislative and administrative history, and the purpose, of the program in question; (2) ignore the consequences to the claimant of the court's decision; (3) examine the statutory language to determine whether its "plain meaning" compels the result sought by the claimants "reasonably bears" the interpretation of the agency; (4) if the plain meaning of the statutory language does not compel the result sought by the claimant, defer to the agency interpretation. Golick, *Justice Scalia, Poverty and the Good Society*, 12 CARDOZO L. REV. 1817, 1823-24 (1991).

⁴³ A. BARAK, JUDICIAL DISCRETION (1989).

⁴⁴ *Id.* at 204.

⁴⁵ 110 S. Ct. 960 (1990).

⁴⁶ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

within the limits of his power of innovation, to maintain a relation between law and morals, between the precepts of jurisprudence and those of reason and good conscience."⁴⁷ Cardozo was critical of "analytical jurists" whose emphasis on the "verbal niceties of definition" caused them to lose sight of the "deeper and finer realities of ends and aims and functions," to insist "that morality and justice are not law. . . ." ⁴⁸

Justice Scalia has conceded that "one would be foolish to deny the relevance of moral perceptions to law," and he understands "the word 'justice' to have a moral connotation."⁴⁹ But he rejects Cardozo's conclusion that judges ought to exercise judicial discretion which, however "informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life,' "⁵⁰ nevertheless strives to achieve justice and promote the fundamental moral norms of the society.

In Cardozo's words, "when the demon of formalism tempts the intellect with the lure of scientific order," a judge needs to be reminded that "the final cause of law is the welfare of society."⁵¹

Justice Scalia understands the judge's obligation to "do justice" in the legal positivist sense: ". . . deciding the rights of litigants . . . in accordance with the laws as they are written. . . ." ⁵² Thus, he writes, ". . . I have never been able to isolate obligations of justice, except by defining them as those obligations that the law imposes."⁵³

Justice Scalia's "originalist," "plain meaning," approach to the interpretation of legal texts, combined with his highly formalistic theory of separation of powers, leaves little room for the exercise of judicial discretion in carrying out "those obligations that the law imposes."⁵⁴ But, as Barak has observed, "[l]aw without discretion ultimately yields arbitrariness."⁵⁵

Justice Scalia's opinions in *Employment Division, Department of Human Resources v. Smith*⁵⁶ and *Sullivan v. Everhart*⁵⁷ exemplify how a rigid, formalistic approach to the exercise of judicial function can lead to unjust results—in the case of *Smith*, a categorical rule that

⁴⁷ B. CARDOZO, *supra* note 28, at 133-34.

⁴⁸ *Id.* at 134.

⁴⁹ Scalia, *supra* note 24, at 123.

⁵⁰ B. CARDOZO, *supra* note 28, at 141 (citation omitted).

⁵¹ *Id.* at 66.

⁵² SCALIA, *supra* note 24, at 123.

⁵³ *Id.* at 125.

⁵⁴ *Id.*

⁵⁵ A. BARAK, *supra* note 42, at 261.

⁵⁶ 110 S. Ct. 1595 (1990).

⁵⁷ 110 S. Ct. 960 (1990).

threatens the free exercise of religion by minority religious groups; and in *Everhart*, the upholding of an agency regulation that contravened the clear intent of an act of Congress and *de facto* overruled a controlling judicial precedent, both of which were intended to protect the welfare of the poor.

In Justice Scalia's vision of the good society, judges have a very limited role, one that is rule-bound, essentially nondiscretionary, and rigidly deferential to the other branches of government. He believes that the rule of law demands no less than reverence for "the formal structure."⁵⁸

While the rule of law may be a necessary attribute of any "good society" we are likely to know, it does not guarantee that a society will be good. We need only recall Nazi Germany, or consider South African *apartheid*, to be reminded that a society may be governed by legal rules and nevertheless be unjust and immoral. In the words of Grant Gilmore:

Law reflects, but in no sense determines the moral worth of a society. The values of a reasonably just society will reflect themselves in a reasonably just law. The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.⁵⁹

To be good, a society requires not just *law*, but *just law*. In the good society not only the legislature and the executive, but the judiciary, and especially the judiciary, must pursue justice.

In his classic study of *Democracy in America*,⁶⁰ Alexis de Tocqueville wrote that "there is hardly a political question in the United States which does not sooner or later turn into a judicial one. . . ."⁶¹ Tocqueville's well-known statement is not simply a perceptive observation about a unique attribute of the American political system. It cuts to the core of our national identity, and points to an essential element of the American definition of the good society.

Judicial review of legislative and executive actions not only provides a political check and balance against unconstitutional excesses or failures of elected or appointed government officials, but also serves to advance the American ideal of protecting individuals and minori-

⁵⁸ R. COVER, *supra* note 1, at 197.

⁵⁹ G. GILMORE, *THE AGES OF AMERICAN LAW* 110-11 (1977).

⁶⁰ A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1835).

⁶¹ *Id.* (J. P. Mayer, ed.) at 270.

ties from majoritarian governmental decision making by the legislative and executive branches of government.

Self-imposed rigid, formalistic limitations on the exercise of judicial review inhibit judges from carrying out this special responsibility. For, to the extent that a judge subscribes to a legalistic and inflexible understanding of formal interpretive doctrines such as judicial restraint, limited judicial discretion, adherence to precedent, strict construction of textual language, and deference to legislative and executive interpretations of constitutional and statutory provisions, he will not broadly exercise his judicial authority to protect the weak and powerless from the will or indifference of the majority.

