JUDICIAL DECISIONMAKING: THE ROLE OF TEXT, PRECEDENT, AND THE RULE OF LAW

The Founders of the American Republic considered "the natural guardians of the Constitution" to be the people,[1] but they established the judiciary as "the bulwark of a limited Constitution."[2] In so doing, the Founders recognized the need both for judicial independence and an uncommon level of fortitude on the part of judges, who could be called upon to resist laws that were popularly supported but nonetheless violated the Constitution.[3] Accordingly, the Constitution affords federal judges a unique role in American government that is characterized by permanence of tenure and independence from electoral accountability.

In *The Federalist Papers*, Publius asserted that, in spite of its special powers, the judicial branch would "always be the least dangerous to the political rights of the Constitution" because of its limited capacity to act and its dependence on the Executive for enforcement of its decisions.[4] Underlying this belief, however, was an implicit understanding about the proper function of judicial interpretation of the law.[5] Over the past two centuries, a much broader range of jurisprudential theories has arguably led to increased politicization of the courts. Judicial decisionmaking is the process that reflects and realizes this jurisprudential evolution, and understanding the factors directing it is critical to comprehending modern law. To that end, in March 1993, the Federalist Society held this symposium at Harvard Law School to discuss the role of text, precedent, and the rule of law in judicial decisionmaking.

The first panel introduces "The Enterprise of Judging" by asking what the judge's role should be in relation to the other branches of government and to the law itself. In *The Federalist*

1. THE FEDERALIST No. 16, at 117 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

2. THE FEDERALIST No. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

3. *See id.* at 470 (observing that "it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community").

4. *Id.* at 465 (stating also that "[t]he judiciary . . . may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments").

5. James Madison called for an interpretive methodology that has since become known as originalism: "[If] the sense in which the Constitution was accepted and ratified by the nation . . . be not the guide in expounding it, there can be no security for a . . . faithful exercise of its powers." 9 THE WRITINGS OF JAMES MADISON 191 (Galliard Hunt ed., 1910).

Papers, Publius argued that while "courts must declare the sense of the law,"[6] their role was properly one of judgment and not the exercise of political will.[7] The panelists explore this distinction first by discussing common-law methods of judging. Under the common-law approach, fidelity to the law is the core of the enterprise of judging; to this end, the panel offers a set of guiding principles to which modern judges should subscribe. The panel goes on to discuss judicial self-restraint as a conception of the rule of law. Its analysis of comparative institutional advantage concludes that legislatures are better equipped than the judiciary to make policy, and that as social engineers, judges are incompetent. Consequently, just as the judiciary constrains the other branches of government, judges should restrain themselves.

The second panel, "*Stare Decisis* and Constitutional Meaning," begins with an argument that the federal courts' application of horizontal precedent in constitutional cases is itself unconstitutional. According to this argument, courts are obligated to prefer the Constitution's true meaning over that ascribed to it by precedent, just as courts must review the meanings that the President or Congress attributes to the Constitution. Prior federal constitutional decisions should not be treated as legally authoritative merely because of their status as prior judicial decisions; they should only be as authoritative as they are persuasive. The panel responds to this position, first by arguing that adjudication of complex constitutional questions is impossible without the aid of some doctrinal framework—and that if such a framework exists, precedent should be allowed to play more than merely a persuasive role in it. The panel goes on to critique the assumption that the Constitution is textually sufficient to guide determinations about itself. Finally, the panel offers several other responses that reject an unconditional prohibition on the use of precedent, and suggests that absolute compliance with precedent may be troubling as well.

"Text and History in Statutory Construction" is the subject of the third panel, which explores the value of textualism, the validity and status of the "plain meaning" rule, and the role of legislative history in statutory interpretation. The panel addresses the proposition that the text and structure of a statute supply a better analytical foundation for determining its meaning than do its

6. THE FEDERALIST No. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
7. *See id.*

legislative history and imputed intent. Because legislative history can be subject to manipulation, and because attributing a consistent "intent" to a diverse legislature risks engaging in an exercise of legal fiction, a focus on the language and structure of the law provides a superior analytical framework for determinations of statutory meaning. The panel also observes, however, that legislative history may serve a useful judicial function by confirming or informing a tentative textual analysis.

The fourth panels considers "Non-Legal Theory in Judicial Decisionmaking." The panel begins by asking whether any distinctively "legal" theory of decisionmaking exists, and then addresses the effect of other disciplines, such as literary criticism and consequentialist philosophy, on legal analysis. Although judges necessarily rely heavily on non-legal theory, the panel cautions that legal analysis that draws upon other disciplines may appear shallow in comparison to those disciplines' own standards. Special attention is paid to two particular non-legal disciplines, moral philosophy and economic analysis, and the effects that they have had on judicial decisionmaking.

The final panel brings several interesting perspectives to bear on the question of "The Supreme Court as a Political Institution." The panelists address whether and to what extent they believe the Supreme Court has become politicized, and what the appropriate response is to their perception of the current state of affairs. The panel asks whether judges should play a policymaking role in American government, and observes that judicial policymaking tends to be both liberal and antidemocratic. One response to this observation is a "modest proposal" that the Court should openly acknowledge its exercise of political discretion. Paradoxically, such an acknowledgement of its policymaking role could result in constraints being placed on the Court that would help return it to its proper role.[8] Another response to the recognition that judicial activism favors liberalism is the suggested innovation of "a republican remedy for the diseases most incident to republican government"[9] in the form of federal judicial term limits.

8. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 349 (1990) ("The Supreme Court is our preeminent symbol of the rule of law. If the Court comes to seem illegitimate, the legitimacy of law itself declines and the moral obligation to obey it is cast into doubt.").

9. THE FEDERALIST No. 10, at 84 (James Madison) (Clinton Rossiter ed., 1961).

The process of judicial decisionmaking has profoundly affected American political and cultural life, and reflects quite distinctly the world views of its participants.[10] The articles that follow take up this timely inquiry, and explore what constitutes modern judicial decisionmaking.

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10. *See* BORK, *supra* note 8, at 355 ("Those who made and endorsed our Constitution knew man's nature, and it is to their ideas, rather than to the temptations of utopia, that we must ask that our judges adhere.").