

SYMPOSIUM

INTRODUCTORY REMARKS

JUDICIAL DECISIONMAKING AND THE GROWTH OF THE LAW

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I have a special place in my heart for the Federalist Society. I was faculty director of the Harvard Law School chapter before becoming Dean. More importantly, in 1985, the national Federalist Society hosted an extremely important symposium that had many long-term effects on the development of this law school.¹

I want to thank the organizers of this year's symposium for their hard work, and to welcome each of the distinguished scholars and judges who will be participating. The panelists are all of high quality and they reflect a broad range of scholarly opinion. Their topic is judicial decisionmaking. Though I am not going to present a paper on the selected topic, I would like to pose two questions for the panelists.

I must first provide some background for these questions. It is clear that there is more judicial decisionmaking now than ever before. There are many indicators of this phenomenon. One local indicator is that the percentage of Harvard Law School's graduating class that accepts judicial clerkships has increased from approximately ten to twenty-five percent in the past six years.² The clerkship selection process has become much more competitive, and there is no reason to believe that this trend will slow down in the future. Of course, most of our graduates still take jobs with law firms immediately after graduation.

Along with the increase in the volume of judicial decisionmaking is a more general development. There has been a tremendous growth in the amount of law and the number of lawyers in the United States since the Second World War. This can be measured in many ways. For example, the ratio of lawyers to the gen-

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1. Discussion on Critical Legal Studies at the Harvard Law School, Harvard Club of New York (Mar. 26, 1985) (transcript on file with the HARVARD JOURNAL OF LAW & PUBLIC POLICY).

2. MARGARET TUITT, HARVARD UNIV. LAW SCH. OFFICE OF CAREER SERVICES, JUDICIAL CLERKSHIP INFORMATION PACKET (1992).

eral population in 1960 was one for every 627 people. By 1985, it was one for every 354 people. This is a 130 percent increase in the number of lawyers, compared with general population growth of only thirty percent during the same period.³ Extrapolating from this trend, we might suppose that by the year 2023 there will be more lawyers than people in the United States! In addition, the percentage of gross domestic product devoted to outside legal services has more than doubled during the above twenty-five year period.⁴

Also during that period—when the population of the United States grew by only thirty percent—the number of pages added annually to the *Federal Register* increased by 270 percent.⁵ Pages added annually to the *West* regional reporters grew by 149 percent.⁶ Federal judges outdid their state brethren: Pages added annually to the federal reporters grew by 336 percent during the same period. So in 1985 federal judges wrote about 94,000 pages of decisions.⁷ The number of pages continues to increase. This indicates a vast growth in judicial decisionmaking.

The nature of the controversies decided is also much more diverse. There has been a major shift in the areas of human life covered by the law. Regulatory systems that were unimportant twenty-five or thirty years ago are now pervasive. Environmental law, health law, pension law, immigration law, and international trade law have become much larger segments of the legal system, both absolutely and relatively.⁸

My questions for the panelists are the following. First, what is the role of judicial decisionmaking in this process of legal expansion? Is it in part responsible for the expansion? Many writers who worry about judicial activism assume that the answer is yes, but what is the real weight of evidence on this question? Could it be that most of the increase in judicial decisionmaking simply reflects a great growth in law that is not primarily “caused” by judges? In other words, to what extent is judicial decisionmaking *generative* of the expansion of the law, and to what extent is it simply *reflective*?

3. Robert C. Clark, *Why So Many Lawyers? Are They Good or Bad?*, 61 *FORDHAM L. REV.* 275, 276 (1992).

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. See Terry Carter, *At Harvard Law, A New Era Dawns*, *NAT'L L.J.*, Aug. 7, 1989, at 1.

My second question is about the role of the growth of law on the process of judicial decisionmaking. Have the uses of text and precedent, or theories of statutory construction, been altered by the legal system's expansion? My own instinct is that in every part of the natural and human world, changes in scale often imply changes in structure and process. I suspect that this is also true of legal systems. If it is, what exactly is the impact? Does the great growth in our amount of law imply anything about how judges should construe their role?

I look forward to hearing the panelists' responses to these questions.

