JUDICIAL RESTRAINT: AN ARGUMENT FROM INSTITUTIONAL DESIGN

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I am grateful to the Harvard Federalist Society for inviting me to participate on this particular panel for two reasons. First, my recent experience as a judicial nominee[1] provided me with an occasion to bring my thoughts up to date on the role of judges in our system of government. Second, the subject has always been of special interest to me. My scholarly work has ranged from First Amendment topics[2] to private law issues,[3] but it contains a unifying normative theme: that judges must identify, respect, and maintain appropriate limits on judicial power. In other words, the thread that weaves the disparate strands of virtually all my work together is the notion that the rule of law ought to be a self-imposed constraint on judges, just as it is thought to be a judicially-imposed constraint on the other branches.

These remarks, however, are not directed to the question of legitimacy, or to the rule of law as such, as a normative constraint on what judges ought to do. I propose instead to address a more pragmatic issue, and to emphasize a point that is too often neglected in more abstract debates about originalism. The point I wish to emphasize is this: One of the most compelling of the many reasons why courts should respect their own institutional limitations—that is, exercise judicial restraint and abide by the rule of law—is that, as social engineers, courts are utterly incompetent. In other words, there is a powerful "quality of governance" reason for courts to stay within the institutional boundaries that the Framers established when they separated the three branches.

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1. President Bush nominated me to the United States Court of Appeals for the Fourth Circuit in October 1991. The Senate Judiciary Committee failed to hold hearings on my nomination prior to the election of President Clinton.

2. *See, e.g.*, Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045 (1985); Lillian R. BeVier, *An Informed Public, An Informing Press: The Search for a Constitutional Principle*, 68 CAL. L. REV. 482 (1980); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978).

3. *See, e.g.*, Lillian R. BeVier, *Competitor Suits for False Advertising Under Section 43(a) of the Lanham Act: A Puzzle in the Law of Deception*, 78 VA. L. REV. 1 (1992); Lillian R. BeVier, *Reconsidering Inducement*, 76 VA. L. REV. 877 (1990).

A recent book, entitled *The Hollow Hope: Can Courts Bring About Social Change?*,[4] presents a careful analysis of actual data regarding courts' capacity to effectuate major social change. It concludes that courts, even after *Brown v. Board of Education*,[5] have not had a major impact on social change.[6] The book's conclusions are hardly surprising. Institutional specialization may be an underappreciated virtue,[7] but it nonetheless seems rather obvious that asking courts to be the engine of fundamental social change in our complex society makes as little sense as using a word processor to cook dinner, or a hair dryer to spray-paint a house: It is simply not the job the machine was designed to do. To put the full musculature of fact and argument upon the bare bones of this assertion is far beyond the scope of these brief comments. Hence, I will confine myself to a few observations in the hope of suggesting the existence of an important linkage between institutional design and institutional capacity.

I begin by recognizing that the Constitution assigns different tasks to each of the three branches of the federal government.[8] I readily acknowledge that the nature of, and differences between, the tasks that the Constitution assigns to the various branches are notoriously imprecise, especially at the margins.[9] Nevertheless, we can infer much about the kinds of tasks that the Framers meant to assign to the judiciary by examining how the judicial process was designed to work—or rather, by examining the model of the judicial process that the Framers most surely had in mind. Consider, for example, how judges get their information; think about how the judicial agenda is set and who is entitled to participate in the process. Think about the constituencies to

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

5. 347 U.S. 483 (1954) (overturning the separate-but-equal doctrine of racial segregation as applied to public school education). The decision in *Brown* caused many social activists to recognize civil litigation as a means of changing the law. *See, e.g.*, FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE § 1.11 (3d ed. 1985).

6. ROSENBERG, *supra* note 4, at 169. Rosenberg's thesis is that the civil rights movement of the 1960s was created by economic changes, the Cold War, population shifts, electoral concerns, and increases in mass communication technologies. The Court simply reflected the changing society; it did not create the civil rights movement.

7. *But see* Neil K. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366 (1984).

8. U.S. CONST. art. I (delineating the legislative power); U.S. CONST. art. II (delineating the executive power); U.S. CONST. art. III (delineating the judicial power).

9. *See, e.g.*, THE FEDERALIST No. 47, at 301-03 (James Madison) (Clinton Rossiter ed., 1961) (recognizing that the system of checks and balances, consistent with Montesquieu's theory of separation of powers, does not entail total separation of the branches of government).

which judges are accountable, and about the kinds of arguments deemed relevant and persuasive in a judicial forum.

Because the theme of this paper is comparative institutional advantage with respect to major policy initiatives, let us compare the judicial with the legislative process. The Framers envisioned a judiciary whose task would be to resolve existing disputes between two parties, not to engage in legislative policymaking.[10] Courts were not to initiate the problem-solving process, but rather were to wait passively for the parties to bring their disputes before the court. In presenting their grievances to courts, parties had to structure their claims within well-established, pre-existing legal frameworks and had to argue their positions according to rigorously enforced notions of relevance. When resolving disputes brought before them, courts were limited to considering only the facts that the parties had proved and arguments they had made in open court;[11] courts' remedial choices were thought to be quite limited because they possessed neither the sword nor the purse.[12] Non-parties, though they might be substantially affected by the outcome, had no claim on the court's time. Further, the system did not entail any assurance that the parties themselves would present for the judge's consideration the full story about the implications of a decision one way or the other. Courts' decisions also had retroactive effect as a matter of course.[13]

To be sure, modern courts have devised a variety of means to surmount these obstacles to judicial activism. For example, they generously interpret congressionally-imposed standing requirements;[14] they entertain what are essentially collusive suits;[15] they

10. *See* THE FEDERALIST No. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The courts must be the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure for that of the legislative body.").

11. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES, at *379-80 (stating that the "principles and axioms of law" should be applied by judges only "to such facts as come properly before them").

12. *See* THE FEDERALIST No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

13. *See* BLACKSTONE, *supra* note 11, at *327 (observing that judicial declarations of the law retroactively resolve disputes where the law is uncertain).

14. *See, e.g.*, United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973).

15. *See, e.g.*, Bates. v. Johnson, 901 F.2d 1424 (7th Cir. 1990); Dunn v. Carey, 808 F.2d 555 (7th Cir. 1986). *Cf.* Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19, 30-41.

appoint special masters to run local school systems;[16] they permit submission of amicus briefs; they find effective substitutes for the formal power of the purse;[17] and they occasionally abandon the restricting demands of retroactivity.[18]

Still, each of these devices is problematic, and, more importantly, none can fully transform the essential nature of the judicial process. Because judges in the federal system have life tenure, they are not formally accountable to any constituency for their policy blunders. Their colleagues on the bench might criticize them; the lawyers who practice before them might argue vigorously for different results; the press might castigate them; law professors might engage in their own intellectually polished carping. However, no formal mechanism exists for internalizing to the federal judiciary the costs of their mistaken policy choices. In contrast, perhaps the most obvious difference in the institutional design of the legislative branch is the electoral accountability of legislators. Formally, at least, Senators and members of Congress risk defeat at the next election should they make "mistakes." Indeed, the electoral non-accountability of judges has been the linchpin of many an argument in favor of judicial restraint.[19]

Another way to view the institutional differences between courts and legislatures is in terms of the two institutions' access to information about the nature of the problems that come before them, and the impact of the range of available solutions. Legislatures are constrained in neither their agenda-setting nor in their remedial choices, but courts are. Legislatures have almost total discretion to craft their own agenda,[20] from making war to enacting welfare reform, and to devise elaborate regulatory mechanisms to realize their stated goals. Legislatures are not limited to making decisions based on relevant or probative evidence, nor must they even attempt to appear neutral or free from partisan influences. Indeed, legislative decisions are paradigmatically the outcomes, not of disinterested evaluations

16. *See, e.g.*, Reed v. Rhodes, 422 F. Supp. 708 (N.D. Ohio 1976), *aff'd in relevant part*, 607 F.2d 714 (6th Cir. 1979), *cert. denied sub nom.* Cleveland Bd. of Educ. v. Reed, 445 U.S. 935 (1980).

17. *See, e.g.*, Missouri v. Jenkins, 495 U.S. 33 (1990); Spallone v. United States, 493 U.S. 265 (1990).

18. *See, e.g.*, Teague v. Lane, 489 U.S. 288 (1989); Kelly v. Gwinnel, 476 A.2d 1219 (N.J. 1984).

19. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 4-5 (1990).

20. Komesar, *supra* note 7, at 371-72.

of the evidence, but of assessing the relative intensity of interest group pressures. Log-rolling and interest group bargaining are the norm; though we may profess our disdain for them, we could hardly characterize them as perversions of the legislative process. Although legislatures are not constitutionally required to listen to all affected parties, they generally tend to do so, at least if the parties are well-enough organized to realize that their interests are likely to be affected by pending legislation. It is in the interest of legislators to obtain as much information as they possibly can about the likely impacts of what they plan to do before they do it, so that their chances for re-election are not jeopardized by unexpected fallout from their legislative product.

In contrast, the information that courts receive is backward-looking; the database upon which their decisions rest is limited.[21] There is no systematic way for them to acquire knowledge about the effects of their decisions on the behavior of all those foreseen and unforeseen persons who will be affected by the decision. This fact alone suggests that, the more complex the problem, the more constrained should be the judicial role in solving it. The reason is that good decisionmaking—decisionmaking that actually brings about the result that the decisionmaker intends—requires more than good intentions. In fact, one of the principal problems that bedevils policymakers is that their good intentions are so frequently sabotaged by unintended, unforeseen, and undesired consequences. Policymakers tend to assume that people will comply with their edicts, and hence they neglect to inform themselves about what will happen when, because compliance is costly or disagreeable, people take quite predictable steps to avoid them.

To be sure, unintended consequences bedevil legislative policymakers as well as courts. Consider, for example, the "luxury tax" on yachts that went into effect in 1991.[22] It was supposed to be a tremendous revenue-enhancer for the federal government. Instead, it caused prospective yacht buyers to find other ways to spend their money. Hence, the ultimate, quite unintended, effect of the yacht tax was to shrink the market for yachts so dra-

21. *See, e.g.*, FED. R. EVID. 401-12 (limiting the presentation of evidence in federal judicial proceedings to that which is deemed relevant).

22. I.R.C. § 4002 (1993).

matically that some yacht makers were forced to close down their boatyards and fire their workers.[23]

Unintended consequences are peculiarly endemic to judicial policymaking, however, because of the limits on judges' access to information about their decisions' effects and because judges do not have the power or the flexibility to craft rules to attenuate the untoward effects. A prime example of unfortunate, unintended consequences is forced busing. The Court's object in permitting forced busing was to achieve more, not less, racial integration in the schools.[24] Instead, busing was an important factor in the middle class's abandonment of inner city public schools, and thus it helped cause the opposite of its intended consequence.[25]

Well-intentioned decisionmakers with laudable goals alone do not guarantee good decisions. Good decisionmaking requires good information. A legal decisionmaker who does not know what the facts are, who has only been told part of the story, who cannot predict and has no way of calculating the likely effects of his decisions, and who is without comprehensive power to prevent the kinds of evasive actions his decisions will induce in others is *going to mess up*. When dealing with complex social problems, courts do not know enough to avoid blundering, and they cannot possibly find out enough because of the way their information-gathering processes have been designed. Perhaps legislatures do not know enough either, and maybe they too are systematically incapable of informing themselves—but that is a subject for another Symposium.

One final word. The point I have sought to make has nothing to do with the judiciary's supposed comparative advantage at discerning and implementing values, and precious little to do with courts' universally acknowledged obligation to protect individual rights. Rather, it has everything to do with judges' comparative *dis*advantage at knowing what, in fact, they are doing.

23. Sales of yachts over $100,000 dropped from 9,000 in 1990 to 4,250 in 1992. As a result, the shipping industry estimates that over 25,000 jobs were lost. James K. Glassman, *Big Money Luxury Tax Follies*, WASH. POST, July 16, 1993, at D1.

24. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 27-31 (1971).

25. *See generally* LINO A. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS (1976) (arguing that public schools in virtually all major cities are predominantly black, Hispanic, and poor precisely because of the busing policies designed to eradicate this segregation).