

The Future of the Federal Judiciary

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About the Author:

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Note from the Editor:

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I

To understand better the future of the federal judiciary—and why it matters—we should first look to the past. Let's consider where our judiciary began and how it has gotten to where it is today.

A

I begin where any judge should: with the text, of course. Article III of the United States Constitution established the federal courts and vested in them “the judicial Power of the United States.”¹ But, in contrast to the detail it provides for the powers vested in the other branches, the Constitution's description of the judicial power effectively stops there. The Constitution identifies those categories of “Cases” and “Controversies” that will be *subject* to the judicial power of the United States.² But it says little about what such power *is* or how it ought to be exercised.

The concept was not novel to the framers of the Constitution, however. Rather, the general nature of the “judicial power” should have been well known to the founding generation from centuries of experience in England. This included, in the words of Professor Philip Hamburger, the central duty of English judges to “decide [cases] in accord with the law of the land.”³ That the “judicial Power” was left largely undefined in the new Constitution may simply reflect the fact that its general meaning was already understood.⁴

The traditional conception of the judicial power embodied two related ideals. First, because judges would be deciding cases according to the law, they would not be deciding cases according to their personal values. The law alone was to supply the basis for decision. Legal historians have debated the degree to which this was true in England, disagreeing, for example, over the extent to which English judges would stray beyond the text of a law in the service of more ambiguous principles like equity.⁵ But in *Federalist* 78, Alexander Hamilton defended the proposed Constitution on the very ground that an independent judiciary would help ensure that “*nothing* would be consulted [in the courts] *but* the constitution and the laws.”⁶

This critical facet of the judiciary is derived from the unique structure of our government. The Constitution's structure

1 U.S. CONST. art. III, sec. 1.

2 See generally *id.* art. III.

3 PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 17 (2008).

4 See *id.* at 615.

5 See generally John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001); William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990 (2001).

6 THE FEDERALIST NO. 78.

importantly tells us what the “judicial Power of the United States” is *not*: the executive or the legislative powers, which are, of course, vested in the other branches. Unlike in England, where the courts were intertwined with the legislative branch, our judicial power is intentionally separate from the lawmaking powers. Such separation was fundamental to the entire constitutional project. Like Montesquieu before him,⁷ James Madison wrote that “no political truth is certainly of greater intrinsic value than [the separation of powers],” and he warned that the failure to divide the legislative, executive, and judicial powers “may justly be pronounced the very definition of tyranny.”⁸ As Professor John Manning has persuasively argued, this “reject[ion of] English structural assumptions” carries important implications for the nature of our judiciary’s power. Namely, because this structural innovation was made to “limit[] official discretion and promot[e] the rule of law, . . . [i]t is difficult to conclude . . . that the Founders also sought to embrace the broad judicial lawmaking powers and discretion” that might have arisen in England.

Second, and related, the Founders envisioned that the “judicial Power” would be exercised in a neutral fashion. Precisely because judges would be, in the words of Hamilton, “bound down by strict rules and precedents, which serve to define and point out their duty,” there would be no “arbitrary discretion in the courts.”⁹ Ideally, whether a party prevailed would depend not on the whims of any particular judge, but on the content of the applicable law. In that sense, as Hamilton famously put it, the judiciary was to exercise “neither Force nor Will, but merely judgment.”¹⁰ Again, the Constitution’s structure emphasizes why this must be so. If courts were to behave differently then, in the words of Hamilton, “the consequence would equally be the substitution of *their* pleasure to that of the legislative body.”¹¹

B

For much of our nation’s history, that traditional ideal remained the dominant conception of judging. But in the 1920s and 30s, scholars began questioning whether achieving the ideal was possible, let alone desirable.¹² Legal realists, as they came to be known, purported to “look[] beyond ideals and appearances for what [was] ‘really going on.’”¹³ They argued that judges do not in fact decide cases in accordance with the law because conventional legal materials are too ambiguous or conflicting to yield a single

right answer to a case.¹⁴ Thus, the realists argued, judges cannot be trusted when they say the law dictates a particular result; whether judges realize it or not, their decisions rest on considerations outside the law.¹⁵

Having supposedly debunked the traditional ideal of judging, the realists opened the door to new theories of adjudication. The 1940s and 50s witnessed the rise of the so-called legal process school, which went beyond the realists by developing a new approach to deciding cases in the face of legal indeterminacy.¹⁶ Particularly influential in this respect were the teachings of Professors Henry Hart and Albert Sacks at the Harvard Law School when I was a student there in the 1960s.¹⁷ Hart and Sacks built their theory on the premise that every law has a purpose—a purpose, that is, to address some societal need.¹⁸ It is the essential task of the judge, Hart and Sacks argued, to ensure that these purposes are carried out.¹⁹

In the latter half of the twentieth century, such approaches to the law grew even more freewheeling and became ascendant. For decades, law schools, the Supreme Court, and the legal profession as a whole were hostile to the traditional view of the judge, which had been replaced by the model of the judge as benign policymaker. This was certainly true in 1963 when I graduated from Harvard during the heyday of the Warren Court, and it was still true in September 1986, when I joined the Ninth Circuit Court of Appeals. Indeed, one of my preeminent colleagues on the court, the late Judge Harry Pregerson, had proudly declared at his confirmation hearing in 1979 that “if a decision in a particular case was required by law or statute . . . offended [his] own conscience,” he would, “try and find a way to follow [his] conscience.”²⁰ I can assure you that Judge Pregerson did just that, as did many of my colleagues, including the late Stephen Reinhardt who himself advocated for what he described as “judging from the perspective of social justice.”²¹ To quote Justice Elena Kagan, at that point in our history, the entire American judicial endeavor was

7 1 BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS*, bk. XI, ch. 6, at 163 (Thomas Nugent trans., London, George Bell & Sons 1878) (“[T]here is no liberty if the judiciary power be not separated from the legislative and executive . . .”).

8 *THE FEDERALIST* No. 47.

9 *THE FEDERALIST* No. 78.

10 *Id.*

11 *Id.* (emphasis added).

12 See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 169-92 (1992) (describing the rise of legal realism).

13 BRIAN BIX, *JURISPRUDENCE: THEORY AND CONTEXT* 190 (5th ed. 2009).

14 *Id.* at 196.

15 *Id.* at 190, 193, 196.

16 See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 570-73 (3d ed. 2001); William N. Eskridge, Jr., *The Case of the Speluncean Explorers: Twentieth-Century Statutory Interpretation in a Nutshell*, 61 GEO. WASH. L. REV. 1731, 1738-43 (1993).

17 See Horwitz, *supra* note 12, at 254 (“The most influential and widely used text in American law schools during the 1950s was *The Legal Process* by Henry Hart and Albert M. Sacks.”).

18 See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 148 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

19 *Id.* at 1374.

20 Sam Roberts, *Harry Pregerson, Judge Guided by Conscience, Dies at 94*, N.Y. TIMES, Nov. 29, 2017.

21 Stephen Reinhardt, *The Role of Social Justice in Judging Cases*, 1 UNIV. ST. THOMAS L.J. 18, 22 (2003).

“policy-oriented” with judges and law students alike “pretending to be congressmen.”²²

II

In many areas, this freewheeling approach to the law remains alive and well today. I find this troubling, of course, because such views grossly misconceive the “judicial Power” created in Article III and distort the proper role of the judge under our Constitution.

We have all seen the harmful effects of more than a generation of such judicial practice. Any educated American will be familiar with at least some of its more controversial legacies in cases concerning abortion rights, physician-assisted suicide, same-sex marriage, and so on. The chief problem, as I see it, is that these many well-known cases removed social and political questions from the democratic process without a basis in the Constitution’s text or structure. Consider perhaps the most egregious example of social change through judicial fiat: *Roe v. Wade*, which constitutional scholar and former dean of Stanford Law School John Hart Ely once declared “bad,” not because of its political outcome, but “because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be.”²³

Whatever one thinks about the policy outcomes in cases like these, it would be hard to deny the distorting effect they have had on the legitimacy of our federal courts. These cases represent a troubling trend in our country by which litigants, the public, and even members of the bench themselves have come to regard the judicial branch simply as an alternative forum for achieving partisan political goals. We see this starkly in the ugly and personal ways in which we debate judicial nominees today. But perhaps we shouldn’t expect anything different. If courts can deliver results like *Roe* with hardly a connection to the Constitution, then why wouldn’t these divisive political battles migrate from the Capitol to the courtroom?

Ultimately, I fear, such a trend is unsustainable. It erodes the important divisions between powers erected by our Constitution’s structure, and it raises vital questions about the civic health of our country.

III

I suggest the time has come for a renewed embrace of the Constitution’s limitations on the judicial power to return our courts to their proper role and to reinvigorate our democratic processes. And indeed, there are positive signs on the horizon that change might eventually come.

A

Just as unbound judicial decisionmaking is the primary cause of our current dilemma, a return to sound interpretive principles may be the most promising cure. Let’s consider the two dominant models of restrained judicial interpretation today: textualism and its close relative originalism.

Textualism, at its core, is the simple idea that written statutes should be interpreted according to what their text *means*. Originalism extends this same idea to constitutional interpretation. In the words of Justice Antonin Scalia, originalists simply believe that the Constitution “means today not what current society, much less the court, thinks it ought to mean, but what it meant when it was adopted.” There is much to be unpacked within these interpretive methods, but for present purposes suffice it to say that each stems from the premise that we should do our best to remove the individual *interpreter* of a law (i.e., the judge) from the law’s proper *interpretation*. The meaning of written laws does not depend on the external values of the judge, but instead on the identifiable content of the legal text.

So how do such methods of interpretation reinforce the constitutional design and promote our democratic processes? Primarily by respecting, as opposed to *changing*, the “legislative bargain”—the deal struck when legislators with competing interests enact law.²⁴ Passing law is a messy and haphazard business. To a judge hoping to enforce some lofty purpose behind a legal text, its many idiosyncrasies might seem inexplicable. But a law’s peculiarities are not necessarily its flaws, and textualists enforce the law that the parties actually agreed upon and passed—not the one that *some* of them, in the *court’s* view, might have wanted. Enacting public policy requires of legislators a significant commitment of time and other political resources, but textualism promises that the hard-earned fruits of that commitment—i.e., the law itself—will be upheld regardless of the court’s own views on the matter.

This encourages policymakers to do the hard work that their job of governing requires, and it enhances the courts’ legitimacy by keeping them free from partisan political fights. But, more deeply, textualists’ respect for the legislative bargain promotes democratic self-rule and reinforces political accountability. When the textual meaning of a law determines its interpretation, the public knows *how* and *why* the law is the way it is, and it knows who can change it: the elected legislators. By contrast, when unelected judges are willing to shape the law themselves, interested parties might find litigation more expedient than engaging in the democratic process. This weakens democratic responsiveness, and it undermines the electoral means by which we normally hold political actors accountable.

Settling these baseline structural questions frees up political actors to focus on addressing the problems of the day and ensures that they will engage in the very democratic mechanisms that exist for them to do so. Professor and former judge Michael McConnell offers a useful analogy: “The rules of basketball do not merely *constrain* those who wish to play the game, but also make the game possible.”²⁵ Speech without grammar is gibberish, and democracy without structure is mob rule. The Founders wrote the rules of the game in 1787, and their rulebook continues to make democratic politics possible in 2019.

22 *A Dialogue with Justice Elena Kagan on the Reading of Statutes*, Antonin Scalia Lecture Series at Harvard Law School (Nov. 18, 2015), available at <https://www.youtube.com/watch?v=dpEtszFT0Tg>.

23 John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973).

24 John Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 431 (2005).

25 Michael McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1130 (1997).

B

With this background in mind, let's focus on the future and see how a return to the traditional role of the judge might one day evolve.

I

The idea that the words of legal instruments determine their meaning is as old as the Constitution itself.²⁶ But at some point, judges lost their way, and free-ranging judicial methods gained primacy. Textualism and originalism, as theories of interpretation, are still relatively new, developed largely in response to this shift.²⁷ Indeed, Justice Kagan remarked that, during her time at Harvard Law School in the 1980s, the only interpretive question was typically “what should this statute be,” rather than “what do the words on the paper say.”²⁸ If someone had mentioned “statutory interpretation” to her while she was in school, she was not sure she “would even quite have known what that meant.”²⁹

The good news is that American law has since undergone a sea change. Thanks to the efforts of countless lawyers and judges—and especially to the elevation of Justice Scalia to the Supreme Court—originalism and textualism have become commonplace terms. When *Judge* Scalia became *Justice* Scalia, jurists who might once have risked losing their credibility for adopting such legal approaches now had a formidable advocate on our nation's highest court. He paved the way for judges like me to embrace openly a traditional view of judging that advocated a limited role for the courts. Gradually that view took hold, and the supremacy of an amorphous, outcome-oriented approach to the law waned. Justice Kagan gave perhaps the greatest testament to this seismic shift when she declared in 2015 that, thanks to Justice Scalia, “We’re all textualists now.”³⁰

For those of us who remember a time before “textualism” even had a name, this is astounding. Only thirty years after Justice Kagan was taught at Harvard to interpret statutes by what they *should* say, she described her present approach to the law this way:

When judges confront a statutory text, they’re not the writers of that text; they shouldn’t be able to rewrite that text. There is a text that somebody . . . has put in front of them, and . . . what you do with that text is a very different enterprise than the enterprise that Congress . . . has undertaken in writing that text.³¹

As I reflect on the state of the federal courts when I first joined the bench, it is remarkable to me that this description of the judicial task is so uncontroversial as to be proudly declared by

26 See, e.g., THE FEDERALIST NO. 81; JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION §§ 400, 433 (1833).

27 See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 641–50 (1990).

28 Kagan, *supra* note 22.

29 *Id.*

30 *Id.*

31 *Id.*

a Supreme Court Justice—one who was appointed by President Obama, no less!

So that is the first sign that the future of the federal courts might be bright. Textual approaches to the law, though still inconsistently followed, have a real prominence in the legal community today, all the way up to the Supreme Court.

2

The second, and related, sign for hope is in the many promising judges who have recently joined the federal bench.

At the very top, the elevation of Justices Neil Gorsuch and Brett Kavanaugh to the Supreme Court provide for the first time in generations at least five justices with relatively firm commitments to textual interpretations of the law (and, in statutory cases, perhaps more). But the more widespread impact might be in the recent appointments of so many lower court judges who share these same commitments. The combined effect of these new judges could be substantial. Between them, they will decide many thousands of cases—and that means, presumably, many thousands of decisions that will be rooted in a traditional view of the judicial role.

Just as the scores of many contrary decisions shaped the legal community for generations, so too might these decisions have a profound impact on the law and how it is perceived and taught. Even as many law schools remain hostile to these views, I question how long they might continue to produce young lawyers who are not conversant in the language of the law as it is actually written by the judges deciding cases. A concentrated body of textual jurisprudence should clear the way for such methods to be taken seriously in the academy.

Perhaps Stanford Law School is a good example. Here, at the preeminent law school on the west coast and one of the finest schools in the world, you have a Constitutional Law Center directed by one of the leading originalist thinkers in the country: Judge McConnell. The new dean of my alma mater, Harvard Law School, is John Manning, a former law clerk to Justice Scalia and another leading conservative legal thinker. These developments would have been unthinkable when I joined the court. And they have the potential to influence your generation of lawyers and beyond.

And I have no sense that this judicial movement is likely to decline. The thoroughness with which the qualifications, intellectual rigor, and jurisprudential foundations of judicial nominees are reviewed these days is striking. This is not the first time in our history that textualists have been appointed to the federal bench, nor is this the first administration to care about appointing judges of this sort. But, until very recently, these concepts—originalism, textualism, and so forth—simply weren’t the way most people learned, discussed, or thought about the law. They now are, and I believe that can only be a harbinger of good things to come.

IV

In closing, I would like to touch upon something President Reagan said at the investiture of Chief Justice William Rehnquist and Justice Scalia in 1986—the same year I joined the federal bench and the very start of this ongoing judicial movement. There,

the president mentioned two areas of struggle to nurture and to preserve the structure of our government.

The first struggle is within the judicial branch itself, as judges attempt to stay true to their oaths to “bear true faith and allegiance” to the Constitution, even against the political pressures of the day. Judges must resist the temptation to follow personal preferences over the text of the Constitution—a temptation that is especially great in hard cases, when it’s important to have judges who *both* care deeply about the Constitution *and* have the sharpest legal minds. I have been pleased to see that the most recently appointed federal judges seem to have such qualities, and we can hope that those who to continue to join the bench will as well.

The second struggle that President Reagan mentioned is one within the United States at large. At the close of his speech that day, he observed that the entire citizenry must work to preserve the constitutional structure:

We the people are the ultimate defenders of freedom. We the people created the government and gave it its powers. And our love of liberty and our spiritual strength, our dedication to the Constitution, are what, in the end, preserves our great nation and this great hope for all mankind.³²

Nurturing this dedication to the Constitution among citizens and within the legal community is a worthy and difficult task. I commend all those who are dedicated to the noble effort of sustaining our founding principles.

32 Ronald Reagan, Remarks at the Swearing-in Ceremony for William H. Rehnquist as Chief Justice and Antonin Scalia as Associate Justice of the Supreme Court of the United States, September 26, 1986, *available at* <https://www.reaganlibrary.gov/research/speeches/092686a>.

