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Conflict Between Text and Precedent in Constitutional Adjudication

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THE CONFLICT BETWEEN TEXT AND PRECEDENT IN CONSTITUTIONAL ADJUDICATION

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There is, I think, a threshold problem before you get to the question of what you are going to do with resolving a conflict between text and precedent, and that is, are there in fact any conflicts between text and precedent? This is not a purely facetious question because it is possible to take the extreme positivist point of view that what the precedent says is indeed what the text means. This is not a point of view that I adopt at all, but it is jurisprudentially very interesting, and it is not totally easy to explain what is wrong with this point of view. One piece of evidence that suggests that the cases that you read cannot be authoritative in the same way as the text is the highly contingent nature by which precedents are actually decided. Imagine nine Supreme Court Justices heading into the courthouse to conduct their businesses one day and there is about to be a five to four decision, and two of the conservative Justices or two of the liberal Justices happen to be run over by a bus and killed. This sort of thing may change the outcome of the decision, but it is rather troublesome to say that if the vote had been taken yesterday, then the verdict for the plaintiff would have been correct, but now since it is going to be taken today, that the judgment for the other side is correct. We feel rather uncomfortable allowing correctness to turn on that sort of thing and yet, that is the sort of coincidence that dictates so many, many judicial decisions that actually get made. It is interesting to contrast this problem with how we would feel if this was a vote on legislation or a constitution. If on the way to the Constitutional Convention several people were run over by a bus and did not make it to the vote, and the vote went the opposite way and the Constitution had been written differently, we would indeed have a different idea of what the Constitution correctly said. It is because of this sort of reasoning that I think that judicial decisions are instinctively on a very different basis than textual legislation or constitutions.

So let us just make the rather simplistic assumption that there are at least some decisions that might be called incorrect. For in-

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stance, say maybe *Marbury v. Madison*[1] was decided incorrectly. *Marbury* is sort of an interesting case in that it is the one that nobody at the Federalist Society thinks actually was decided incorrectly. At the last panel, we heard many people talking about the power of the courts not to bind the legislature and the fact that when a judge decides a case the decision only has authoritative impact with regard to the facts of the particular case. If precedents do not have this kind of limited impact, of course, then the executive is not going to be bound. Well how do they prove this? Well, they cite *Marbury v. Madison* as precedent. *Marbury* seems to have this unusual magical flavor of being able to survive any criticism of the judiciary or the system of precedent at all.

Once you decide that there exists in fact the possibility of incorrect decisions, that really changes somewhat the nature of the question you are asking. Once you decide this, then it seems at first blush to be a very easy question: "What ought a judge to do when he or she is faced with one of these incorrect decisions, assuming that he or she in fact decided that the decision is incorrect?" There is an instinct when you are presented with one of those cases, and it is an instinct that I sympathize with very strongly, which is, once you have decided that the decision is incorrect, it really does seem immensely, immensely problematic to go ahead and apply it anyway.

Which is more important, the real meaning of the Constitution or some precedent that made its way into the law books? When I am faced with a decision that I truly feel is incorrect this way, I have something of the same feeling as I did a few weeks ago when I read in the *New York Times* a little announcement about what the Pope had decided about various forms of surrogate motherhood and birth control and whatnot, and I read this whole long complicated list of things about what the Pope had decided that God really wanted. As somebody pointed out in the last session, there is an enormous resemblance between this problem of comparative religion and the problem of constitutional interpretation. You have this authoritative interpreter, the Pope, but is he really speaking the truth when he gives some kind of religious interpretation? As I read this long discussion, about how if I was infertile it was all right for me to have sex but it was not alright for me to have artificial insemination, I came away with a clear feeling that this is simply intrinsically implausible on its face. I just do not believe that God says this. And when I read *United States Reports*, I often have this same feeling. In fact, you can push the resemblance a little further; as I was reading this *New York Times* article, and it had all this incredible detail about

[1] 5 U.S. (1 Cranch) 137 (1803).

one's uterus and times of conception and all this stuff, I wondered why does this seem so familiar, and all of a sudden I realized, my God, this is *Roe v. Wade*[2] again. On some level, I think this is what I really believe about precedent.

When I read one of these outrageous opinions, and believe me, *Roe v. Wade* cannot hold a candle to some of the Supreme Court's choice of law decisions that are my real interest, I find myself outraged by these decisions. I think that I actually do believe that it is very important for judges to be willing on the drop of a hat to reexamine a decision that is clearly wrong. Evidence that this really is my true belief is that I write law review articles about these opinions that criticize these opinions and point out how stupid they are, and suggest in the most tactful way that I can that at the very first opportunity and with all due deliberate speed, that the Supreme Court ought to do whatever it can to get rid of these decisions that I dislike so much. Now I cannot really believe that I am asking the Supreme Court to do something immoral. If I am willing to argue in print that these decisions ought to be overruled, it must be because I believe that the Court would be doing the right thing.

So, on one level, I think I do believe that it is important to reexamine precedent whenever it is necessary, whenever you are faced with something that is clearly a stupid decision. On the other hand, because I see very good arguments on both sides of this, the problem is that the argument, if you really believe it, goes much too far. This really is a problem about the relationship of truth to hierarchy. This is a problem that arises whenever you have some kind of "truth," but you also have a hierarchy that is involved in enforcing the truth. Someone lower in the hierarchy or later along in the system of stare decisis is going to be in the position of having to decide whether to do what she thinks is true, or whether to do the thing that she is authoritatively supposed to do according to the institutional arrangements of which she is a part.

I am going to give you two examples that show why I think it is so problematic to strictly go with the very sympathetic position that you do the thing that is true rather than the thing that is required by the institutional hierarchy. One of those was actually alluded to this morning by Judge Posner when he was discussing the now famous *Enelow-Ettelson* doctrine. Posner prefaced his remark, after he said this is the most moronic doctrine that he had ever seen, with the statement that he had, of course, applied it. Now, why of course did he apply it? Well, I think that part of what he was saying was that as an appellate judge, subject to Supreme Court review, he felt that

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2 410 U.S. 113 (1973).

this was an additional reason for applying the doctrine. We have to keep in mind that stare decisis is not merely a matter of whether the Supreme Court follows what the Supreme Court did five or ten years ago. We also have to decide whether this is something that we want appellate judges to follow, because they too are going to be faced with the problem of deciding: "Should I do the institutionally authoritatively correct thing, or shall I do what I think is true?"

There is one final example that I want to give, and I think this one is very problematic. It has to do with the executive branch. When I mention the executive branch, you probably think about the example that was given in the last panel about whether the executive branch should follow the Court. That is not the example I have in mind. I am talking about the hierarchy within the executive branch. Certainly, the President has a role in enforcing the Constitution. Certainly, the people operating underneath him play a part in that role. Suppose someone who is operating within the executive branch is supposed to, routinely, on a case by case basis examine every decision that the President made, and make up his or her own mind about whether this ought to be enforced. Those who would have later courts or the executive branch ignore or overrule *Roe v. Wade* would rarely also require that every member of the executive branch re-examine all of the President's instructions to assess their constitutionality.

I hope, if anything, that I can convince you that this is a very complicated problem. There are good arguments on both sides. It is simply not enough to say what Mr. Cooper says, which is that because these are idiotic decisions they have to be overruled. You have to think about what this means in the entire context of the institutional hierarchy and also perhaps in terms of what it means in terms of original intent. What, after all, was the framers attitude towards stare decisis? If the framers themselves had believed in stare decisis, then you can, at least, make the argument that this sort of slippage in the judicial process was built into the Constitution and protected in some way. I do not know enough history to know whether that is a plausible argument. I hope merely that it is something to think about.