

Discussion: The Conflict Between Text and Precedent in Constitutional Adjudication

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Discussion: The Conflict Between Text and Precedent in Constitutional Adjudication, 73 Cornell L. Rev. 442 (1988)
Available at: <http://scholarship.law.cornell.edu/clr/vol73/iss2/26>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

DISCUSSION: THE CONFLICT BETWEEN TEXT AND PRECEDENT IN CONSTITUTIONAL ADJUDICATION

MICHAEL KINSLEY (Editor of *The New Republic*): I want to ask Charles Cooper if he could address a point that I think that Judge Reinhardt and Judge Easterbrook both made in slightly different ways. It seems quite obvious that if the Supreme Court has done something completely stupid and everybody on the current Supreme Court agrees about that, then they should overrule it. I guess if you had to put this point in a nutshell, it would be a question of humility. In most circumstances, it is not all that certain to people what the proper result is. Even if it is certain to them, they should have a grain of doubt in their minds whether, if at least five of the nine Justices were wrong in the past, they could be wrong themselves. In addition to this kind of humility, this kind of sense of uncertainty, should a sense, as Judge Easterbrook put it, of the institution being more important than any individual justice play some role and give them some reluctance about simply overturning a precedent because they happen to think it was wrong?

COOPER: I think you properly characterized it as a sense of humility or perhaps judicial modesty. I certainly concede that if the judge cannot conclude that he or she is persuaded that the precedent is an error, it is entirely appropriate to defer to the decision that has been made. That to me is a sense of modesty. Once the judge persuades himself or herself that the decision was in error, and I candidly confess there are degrees of persuasion, I think fidelity to the law and the lawmaker, and in essence to our system and to the notion of consent by the governed, requires that the judge vote to overrule the decision.

KINSLEY: Should the degree of certainty be higher if there is a precedent than if this is a new question on which the Court has never ruled before?

COOPER: If a challenge has been made to the reasoning of the decision, I think the reasoning should be tested and if it survives the rigors of re-examination, certainly it should be adhered to. Again, if one cannot conclude that it is wrong, then I think it has survived the rigor of re-examination.

HIGGINBOTHAM: Well, with regard to the degree of persuasion, I first want to emphasize the obvious; the distinction between the horizontal and vertical reaches of precedent, which is a distinction we keep blurring. The authority of the Court to re-ex-

amine its own precedent is quite different from the authority of an inferior court to re-examine precedent of the higher court. First, with regard to the horizontal reach of precedent, and we are talking about constitutional precedent, I remind you that both Justices Brennan and Marshall have noted in every death penalty case that they view the death penalty as unconstitutional; that is an automatic two votes for a stay in every death penalty case. Of course, the Court has "authoritatively" spoken on that basic issue. Nonetheless their vote is, and it is the same each time, that in all circumstances, the death penalty is unconstitutional. That signals two Justices' view of the Court's own precedent. Of course, they are not disregarding the controlling force of the majority vote; rather they are repeating their continuing view that the issue is not settled.

It is a different matter when one is looking vertically because there are also quite different interests involved. When one turns vertically, other institutional concerns are important, not the least of which is orderliness. Now, an inferior court judge, it seems to me, has the latitude to read precedent within the limits of *stare decisis*. And while we cannot define it scientifically, there is inevitably a plain holding, if we are intellectually honest. The fact of the matter is, that when we look at it, if there is no way around it, we abide by it, although we may not like it. If you believe that constitutional text has been misread, and you cannot within the authority given to you to so read precedent, then you have a choice, you either abide by it or resign as an inferior court judge.

On the other hand, the Justices ought to reconsider when persuaded that they are wrong. And in considering whether they are wrong, they must weigh the considered view of those who have gone on before, and weigh that expectations may have been settled. Having done so, if yet persuaded, they turn it back.

EASTERBROOK: I want to make one point about the question of how confident someone should be before he votes to overrule precedent. The stability interest in a system of precedent is that it collects contributions of many people, each of whom has given a great deal of study to some area of law. That suggests some difference in the way in which you think about overruling a precedent. There is a difference between overruling a precedent that can be picked out as itself a sore thumb in the law and overruling a precedent that would call into question a very large body of precedent that judges have contributed to and worked on for a much longer period. In a case in which the attack is being made on a single reading of a statute which is not embedded in a very strong set of doctrines, there seems to me no particular reason why you should demand a higher than ordinary degree of confidence. To the extent

there is a higher than ordinary degree of confidence, it is simply that you have the benefit of hindsight, something that your predecessors lacked, and you have everything else they had, and you can make your own decision accordingly.

Suppose the question, however, was whether we should suddenly reverse, nearly one hundred years after it was decided, *Ball v. United States*,¹ the first important double jeopardy case. Overturning this precedent would mean that the double jeopardy clause picks up the English system of double jeopardy so that any time a conviction is reversed on non-jurisdictional grounds, the defendant may not be retried. That is the English system. Before we say that our double jeopardy clause really picks up the British system of former acquittal and former conviction, we would have to be exceptionally confident that we understood not only the genesis of the double jeopardy clause, but also all the consequences of making that move. That is a body of doctrine that has been elaborated on for a very extended period, and it has not proved to be terribly unsatisfactory in outcome. You would naturally, in dealing with such a body of doctrine, demand a substantially greater degree of study and confidence than you would in dealing with single shot decisions on a particular statute that does not appear to affect or come from a much broader study or much broader doctrine.

COOPER: I certainly do not have any disagreement with that analysis. It may well be that in undertaking the re-examination of a well-established body of doctrine, you have to do a whole lot more work, and I do not regard that as problematic.

HIGGINBOTHAM: The other observation is that we are talking principally about the practice of overturning precedent. I suggest to you that the law changes more often than not by the Supreme Court simply cutting precedent back to an irrelevant state, by stripping the legs from it, and by narrowing precedent, than by expressly overruling it. Stare decisis has allowed the Justices to do this.

REINHARDT: Well, I thought we were going to clear up our disagreement after Mr. Cooper's first rebuttal. My notes of what he said are, that if the judge cannot conclude that the precedent is in error, he should not vote to overrule it. Well, of course. Who would vote to overrule precedent if he thought it was right? That was, however, the only limitation that Mr. Cooper advanced. As I understood his response, it was that if the judge thinks the precedent is wrong, then he should vote to overrule it. Then, in this next response, he added, the judge may have a lot of work to do, he may

¹ 163 U.S. 662 (1896).

have to read the precedent and look at its reasoning, and then decide whether it is wrong. As I understand his position, it is still that there is no role for precedent other than as a document for a judge to read—the way he would read a brief—to see what the legal reasoning is and whether he believes it is correct.

If that is the position of Mr. Cooper or the Justice Department, I am in complete disagreement with it, and I am in agreement with Judge Easterbrook's position, at least in general. I believe that there are a number of factors we must give weight to in deciding whether to overrule precedent. I mentioned them previously. The weight to be given the various factors may differ depending on the type of case involved. As an extreme example, I might mention Justice Brennan's and Marshall's votes on the death penalty. Those votes probably would meet the test that I offered. Is it a fundamental right? How persuaded is the judge that the precedent is erroneous? How important is it that the precedent be reviewed? What will the effect be? I would suspect that Justice Brennan and Marshall considered all these factors and decided that the cases upholding the death penalty are the type of precedents they should vote to overrule. That does not mean they would overrule every type of precedent just because they disagree with the decision. It means that after evaluating, weighing, and balancing all the relevant factors, they have come to what they believe to be the appropriate judgment as to a particular precedent or line of cases.

We should attempt to arrive at a set of factors which should generally apply when determining which precedent we overrule and which we do not. While the application of those factors would not be precise and would contain elements of subjectivity, we would at least have a rational and orderly intellectual process to follow. But even if we do not succeed, the system currently is working reasonably well.

I wish there were an absolute answer to this and other legal questions. There simply is not. The alternatives to the system I and most others endorse is to either overrule precedent willy-nilly, as Mr. Cooper suggests, or never to overrule it, as others might suggest. I do not think either liberals or conservatives can accept those responses. Therefore, we will probably continue to muddle along, as we have with considerable success for the past two hundred years, recognizing that precedent should be overruled only in limited circumstances and that, whatever the criteria we apply, the burden on those who would change our understanding of the Constitution is far from a light one.

COOPER: Or we overrule precedent when we want to, and

basically that, I think, is the essential test we have been offered. And I rest my case.

QUESTION: Concerning various constitutional debates that are touching us today, like abortion and affirmative action, should the Supreme Court opt not to decide and thus allow a greater amount of freedom of choice to each state to decide these issues?

EASTERBROOK: Yes. The reason is exactly the reason that Judge Reinhardt and Professor Neuborne of the last panel gave. That is, when it is possible to describe a constitutional issue as being open-ended, as not having a right answer, as being difficult to pin down, as having a range of admissible answers, you have given a reason why the Court cannot demand to have a single absolute answer and be obeyed. You have in other words defeated the argument for judicial review in *Marbury v. Madison*.² *Marbury* was based on the proposition that there were right answers. When you deny Chief Justice Marshall's premise in *Marbury*, you have denied the power of judges to have the last word.

² 5 U.S. (1 Cranch) 137 (1803).