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# THE CONFLICT BETWEEN TEXT AND PRECEDENT IN CONSTITUTIONAL ADJUDICATION

*Stephen Reinhardt* †

As the last speaker of the day, I appear before you with considerable trepidation, not only because you have heard a lot of speeches by now, but because before I came I read a statement made by one of my colleagues on the Ninth Circuit. It appeared in the Federalist Society article passed out to you today, "Right Place at the Right Time." The article says that you clapped thunderously as my colleague Judge Noonan boomed in righteous indignation, "the enemy is ranting, empty-headed, mealy-mouthed liberalism." Well, I will try not to be empty-headed or mealy-mouthed, but I guess I am the enemy, at least, according to my colleague Judge Noonan—because I stand here today not only as a judge but as an unreconstructed liberal.

I do not condemn all conservatives. Nor do I believe all conservatives have disrespect for the law—only some. The political attack on the role of law and the courts engaged in today by the Justice Department's representative is not only unseemly, it is unfortunately nothing new. Whether it is that the executive branch is above the law, or that the Supreme Court should have no respect for precedent, the Department's message is and has been, consistent. It is not too surprising that there was little mention of justice by the representative of the Justice Department. It is surprising, however, that there is respect neither for law nor order. It is not my place, as I said, to judge any or all conservatives today, or to fulfill Mr. Cooper's prophecy that liberals will tell conservatives to obey the law. Rather, I will try to tell you how I as a liberal try to apply the law, and how I try to answer the question of the conflict between text and precedent in constitutional adjudication.

Preliminarily, I should say I am a strong believer in precedent. I think that our willingness to respect precedent has made our legal system the success it is, and I believe firmly that we must interpret our Constitution in light of the precedent which has been developed over the past 200 years. Still, we all agree that there are times when precedent may properly be overruled. One way to explain when this

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may be done in constitutional cases is to put it in terms of today's topic—when precedent conflicts with the Constitution.

The basic question is how do we determine whether there is such a conflict? Must there be a conflict with the text, or is a purported conflict with the intent of the drafters enough? Must the conflict be with the literal language of the Constitution or the founders, or may it be with the purpose or objectives that underlay the choice of particular terms or phrases? How certain should a judge be of the true meaning of the Constitution before he votes to override precedent? The topic raises *all* the issues inherent in the question, "How should a judge reach decisions?"

Hard as it may be to accept, there are no absolutist answers to these or almost any other questions in the law. There are frequently several plausible and potentially correct answers. Often there is no necessary answer. The basic questions posed today and the basic questions we face as judges are steeped in uncertainty. All require judgment, application of philosophy, values, yes, balancing. And all require a sense of justice—a sense that is too often lacking. The fact that there may be a choice among plausible answers makes law no less important a tool, and compliance with the law, including judicial decisions, no less essential a responsibility.

We cannot leave it to each President and each individual to decide which parts of the law he will obey. Fifteen years ago, we had a President who thought he was above the law, who thought he was not required to obey the law. I thought the question of the President's accountability was put to rest at that time, and I think it must now be answered unequivocally in the affirmative if any doubt remains. To me, that is what the legal system is about, that is what the Constitution is about. Respect for law, respect for justice, and respect for order applies to all of us—Presidents, judges, Congressmen. If the President can disobey the law or treat Court decisions as non-precedential, Congressmen should be able to disobey the law, and I suppose we judges would also be free to ignore the Supreme Court. Sometimes it may seem to some of you as if we judges do that. I can assure you that we do not do it deliberately. We may have legitimate disagreements, but all judges I know, conservatives and liberals, try to follow the law as they understand it. We may have some disagreements on how we reach our decisions, but I do not know any judge personally, or any judge with whom I have had contact, who does not believe it is his duty to follow, obey, and apply the law. I do not think we believe we have any greater right than anyone else in this country to disregard the law.

Now, whether you obtain your meaning of the Constitution by limiting your examination to what you believe a number of individu-

als thought two hundred years ago, whether you believe there is a discoverable natural law waiting for you to come along and reveal it, or whether you believe that you should look for basic constitutional concepts and apply them to society's changing circumstances in light of society's changing values, you are still only talking about selecting a technique. No particular technique leads to a necessary result when we decide legal problems. One can rely solely on the literal words of the Constitution and still find oneself faced with two equally plausible interpretations. So, too, we can look at the legislative history or the words of the founders and not know the "right" answer with any certainty. Most often the answer we reach is influenced by our fundamental philosophy as to the role of government and the rights of individuals. These basic views dictate the conclusions judges reach more often than does our choice of process.

Nevertheless, the process is important, and the technique is also. But none of these questions are as simple as they appear. The technique, like all else, is ordinarily a mixture, a melange. We do not just read the language of the Constitution and ignore the words of the founders. We do not just read the words of the founders and ignore the language of the Constitution. We do not just read both and ignore the cases that the Supreme Court has decided. Finally, we do not overlook the philosophy of the law that we have developed over a lifetime, through study and experience, through pain and through turmoil. Judging is a complex matter, and we look at all of the factors, subjective and objective. Now, that brings us to the unfortunate fact that in the end we need to apply our individual intelligence, our individual understanding, our individual judgment, as judges, to those problems. Fortunately, (to respond to the Solicitor General's comments) we are *not* janitors. Fortunately we have been trained to use the best legal reasoning and the best legal processes possible to arrive at what we believe to be the correct answers—to exercise our best possible judgment. That is all we can do in a system of law and justice administered by mortals.

Now, let us consider a specific question. Was there a conflict between the fourteenth amendment and *Plessy v. Ferguson*?<sup>1</sup> Some would say yes, some would say no, even today. Conversely, does *Brown v. Board of Education*?<sup>2</sup> conflict with the intent of the drafters of the fourteenth amendment? Again, we can probably find legitimate disagreement on that point. Certainly, it is a historical fact that those who supported the fourteenth amendment also supported a system of segregated schools. While I think that most of us now agree that the answer to the constitutional question is clear, it is

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<sup>1</sup> 163 U.S. 537 (1896).

<sup>2</sup> 347 U.S. 483 (1954).

certainly not one that could be arrived at simply and unequivocally by reading the literal words of the Constitution or examining the intent of its adapters.

The question whether a conflict between text and precedent exists is usually a murky one. Almost never, if ever, is there a conflict between the plain, unambiguous, literal language of the Constitution and precedent. If it were all that clear from the literal language, the first Justices to address the issue would normally perceive that fact and follow the plain meaning.<sup>3</sup>

The real issue is when should the Supreme Court overrule precedent. As I have already noted, there is almost never a conflict between precedent and the *plain* meaning of the constitutional language, at least not one that is apparent to most judges. There may, however, be a conflict between precedent and the "*true*" meaning of the constitutional provision even if that meaning is not apparent simply from a quick, literal reading of the constitutional language. We may, in some instances, have to study history. We may have to attempt to obtain a fuller understanding of constitutional purposes and objectives through a variety of examinations and disciplines. So, what do we do when we think that there may be a conflict? How do we decide whether there is in fact a conflict between the meaning of the Constitution and precedent? Well, as I said, there are various techniques, but in most instances none leads to a necessary answer.

Part of the problem is our reluctance to acknowledge what we do when we make choices. A good example is found in three cases decided in one decade by the United States Supreme Court. First, in *Logan Valley*,<sup>4</sup> in 1968, the Court said that there was a free speech right to picket in shopping centers during labor disputes. In 1972, in *Lloyd v. Tanner*,<sup>5</sup> the Court said that Vietnam protesters were different; they were not allowed to picket in shopping centers. In 1976, in *Hudgens v. NLRB*,<sup>6</sup> the Court said there is no difference between labor speech and political speech; therefore, the picketing permitted in *Logan Valley* must be prohibited under *Lloyd*. Accordingly, the court overruled *Logan* in the name of respecting the precedent established by *Lloyd*, although *Lloyd* expressly said it was not

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<sup>3</sup> In this discussion I am talking about the role of the Justices rather than the role of circuit court judges. In our circuit, as in Judge Easterbrook's, we are not free as a panel of three judges to overrule our own precedent. Only an *en banc* court can do that, and we sit infrequently *en banc* and only rarely overrule our own precedent when we do. So, with rare exceptions, the answer to when a precedent should be followed in our court is clear—always.

<sup>4</sup> *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).

<sup>5</sup> *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

<sup>6</sup> 424 U.S. 507 (1976).

overruling *Logan*. I think a legitimate criticism may be offered of the Supreme Court's technique because there was a deception in the way the Court arrived at its result. There was a lack of honesty that can only injure the judicial system.

There is too little honesty in all too many of our opinions when we describe how we reach our conclusions. For example, and I am as guilty of this as anyone else, when you finish reading one of our opinions, ordinarily you would think that the judge believed there was not the slightest possible doubt as to the proper outcome. The arguments in the opinion appear so persuasive, at least to the author. The result seems so simple and obvious; all the arguments favor one side. But that is not how it really is. There are hidden choices in every decision, choices that are difficult and complex, that take us down different roads and lead us ultimately to different results. We ought more frequently acknowledge that there is real doubt as to the outcome, set forth in our opinions some of the doubts we have, and admit to some of the choices that we have made along the way.

Now, in making those choices, I would have to say that every judge I have ever known is influenced by his fundamental philosophy of law and of life, by the changes that have occurred in society, by his view of his role as a judge, and his view of the legal system, as well as by *stare decisis*. The choices involve personal, subjective elements, but they fit within an orderly process of reasoning, within a logical, rational process of attempting to determine the meaning of the law. Some people in this country have a longing for simplistic answers, for the return to a simpler society, to a day when law was law and men were white males. It would be nice if we could fit all of our problems into neat little pigeonholes, if we could all become janitors, or even computer operators who need do very little but push a button and obtain an answer from a machine. But most problems that concern the public do not have simplistic solutions, and they require judges to judge, to exercise judgment, to do their best to try to understand what the law is.

Our basic constitutional principles are ordinarily stated quite broadly. We can legitimately draw various interpretations and justifications, and precedent usually exists on both sides. The primary disputes that we have today reflect longstanding differing views of the law, both procedural and substantive. Often, one view has prevailed in some occasions and the opposite view on others. We can find numerous cases in the books adopting the varying principal views. As judges, we can find persuasive precedent for almost everything, and, in many cases, we can find strong precedent for both sides of the argument. That is when our judgment is required.

Now, when a Justice decides, through whatever complex process of reasoning he follows, that under his view of the meaning of the Constitution a precedent conflicts with that document, or to put it differently, that he believes that the last group of Justices to consider the issue was wrong, under what circumstances should he vote to overrule precedent? Here, I think I agree in part with Judge Easterbrook, although I am not certain how much.<sup>7</sup> I know he does not like balancing, but he agreed that often there is no clear answer, that there are a number of factors to consider. I believe we must give weight in varying degrees to a number of factors, and I do not think we can do it by applying the law of economics. I do not think we can engage in a statistical analysis. I do not think we can profitably apply a cost-benefit analysis.

Yet there *are* factors that we must apply. It is easier to list the factors than to say what a judge should do once he identifies them. The factors are as follows: How sure is a Justice that he is right? How well established is the "erroneous" precedent? How wrong does the Justice believe the precedent to be? How important are the rights involved in light of the Justice's own view of the essence of the Constitution? How disruptive will the change be? How likely is the reversal to last and be stable?<sup>8</sup> Is there a principled way to limit rather than overrule the precedent?<sup>9</sup>

Now take all these factors and add them up, and there is still no mechanical system, no mathematical formula, that allows you to arrive at a foreordained judgment. We cannot assign points to each factor, and even if we could, not one of them is itself subject to a precise mathematical application. Each invites an answer from a scale rather than an absolute yes or no. So in the end we must make an overall judgment by weighing and balancing—yes, this will often yield a subjective judgment, but always, we would hope, a principled and reasoned one.

What we could do to aid those who should have more respect for law and order, and for judicial decisions, is to strip the masks, remove the mysteries, eliminate the rationalizations, expose the myriad of choices, and make them understand that law is truly complex. They should also understand that judges are generally honest, decent people. Judges *do* apply their personal philosophies, and

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<sup>7</sup> I do not believe, for example, that a precedent is without force simply because reasonable men could arrive at a different result or the decision was issued by a divided Court.

<sup>8</sup> See Justice Rehnquist's dissent in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 580 (1985), in which he suggests that the next time there is an appointment to the Court, the Justices will reverse the precedent once again.

<sup>9</sup> Is that what Justice Powell attempted to do in advance, somewhat inartfully, in *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986)?

that is why the judges who have been appointed during this administration generally have one philosophy, and why many of the judges appointed in the past administration have another. Unfortunately, the last administration did not have an Attorney General who was as committed to a particular philosophy of law as the present one. I have no criticism of the present Attorney General for having that kind of commitment. I wish some of the past ones, however, had had a similar commitment to their administration's point of view.

To end with a specific: if basic human rights are involved there is far more reason to overrule precedent than in other cases. Now, that reflects *my* view of what the Constitution stands for; others will disagree. I believe that our understanding of fundamental rights changes as society progresses. We no longer put people in stocks or stone them, although we still have capital punishment. If the Constitution expresses a set of fundamental principles, as I believe it does, then its interpretation must change with the times.

In my opinion, historicists, or as they sometimes like to call themselves, interpretivists, do an injustice to the Constitution if they seek to freeze its meaning so that a particular clause can be applied only to specific circumstances contemplated at the time of its enactment. I will not get into that debate here. But if at the time of *Plessy v. Ferguson*<sup>10</sup> we thought separate but equal was constitutional, it was because that was the specific view of at least some framers of the fourteenth amendment. Was that their general view as well? That is the issue you heard about earlier. But more important than whether the specific or general intent should control, or even what the general intent was (and each side can find arguments as to whether *Plessy* should have been overruled under traditional criteria), by the time *Brown v. Board of Education*<sup>11</sup> was decided society simply knew better. Therefore, the court was right when it overruled an erroneous precedent. *Plessy* was a fundamental decision that adversely affected basic rights, and that, we learned with the passage of time and with increased wisdom, was contrary to the essence of our Constitution. That knowledge alone, regardless of the applicability of the other criteria, necessitated the abandonment of *Plessy* as precedent.

To me the Constitution is not a cold, bloodless document. This country and our Constitution stand for far more than freedom of contract, far more than Adam Smith's economics. They stand for a government that will promote the general welfare, and for the right of individuals to be free from arbitrary governmental actions. The Constitution stands for a just society, and for justice. In my opinion when Justices make their decisions, when they decide whether to

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<sup>10</sup> 163 U.S. 537 (1896).

<sup>11</sup> 347 U.S. 483 (1954).



overrule what they think may be erroneous precedent, they should do so with those fundamental concepts firmly in mind.

To conclude, there is unfortunately no simple answer to the question before us today. Sometimes precedent should be overruled; sometimes it should not. There is no mechanical, no mathematical, no rigid formula for deciding when. Justices must weigh the various factors they have identified as important in making such determinations. Unfortunately, we may not agree on all of those factors; some of us might utilize different ones. But whoever is on the Court must take precedent seriously, must apply the factors he deems appropriate, and must do his best to try to give the Constitution the interpretation he believes proper, in light of history, in light of its text, in light of precedent, and in light of the fundamental values that the Constitution incorporates and that illuminate its meaning.