The Rule of Law: Judicial Restraint and Legal Reasoning

Introduction

The “rule of law” in *common, statutory, and constitutional law* is the law of judicial self-restraint. Judges exercise power over our lives and, rightly so, we expect them to be just and objective in utilizing their power. In establishing a government “…administered by men over men,” James Madison believed that the “…great difficulty lies in [that]: you must first enable the government to control the governed; and in the next place oblige it to control itself.” The answer to the question of achieving judicial self-restraint can be found in the innate characteristics of judicial opinions and strong legal reasoning. In delivering a persuading decision, a judge’s legal opinion should harmonize the *case facts*, the *social background facts*, the *widely shared moral values* and the *rules of law*. The finished product is a public record that provides a reflection of the legal prowess and ethicality of judges. For the aforementioned reasons, judges are aware that judicial opinions contribute to their reputation and this self-interest drives them to provide convincing and impartial legal opinions.

In this paper I will argue that the process of justifying decisions through legal reasoning constrains judges from misusing their power to promote personal or political interests. First, I will begin by providing a brief overview of the important role judicial opinions hold in our society. Second, I will attempt to demonstrate, by using scholarly articles, the importance of

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1 Madison, James. *The Federalist Paper No. 51* (1788)

judicial opinions because it restraints judicial powers in common, statutory, and constitutional law. Additionally, I will derive examples from cases that will prove the importance of strong legal reasoning as a source of judicial impartiality and constraint.

The Role of Judicial Opinions

Judges who exercise power and authority over others must justify their actions or decisions, and this constrains them from pursuing personal or political interests. This unique and rudimentary American belief is central to western political philosophy’s rejection of the authoritarian right of kings. Consequently, judicial opinions serve as a source of justification and judicial constrain in three different aspects. First, the court’s constitutional design gives it the power to overturn, influence or restrict other branches of government. For this reason we demand justification for judicial decisions that can directly impact our self-interest. In response, judges write opinions in most cases explaining and, thereby, justifying their decisions and reasoning. The idiosyncrasy wing of realism argues that the decisions of judges are influenced by a unique set of beliefs such as economic or political biases. These idiosyncratic biases are dangerous to democracy because they produce undesirable social outcomes that may not reflect the general/majoritarian will. However, judicial opinions constrain judges to produce decisions that reflect a desired common goal and, simultaneously, this prevents the emergence of idiosyncratic biases. The law cannot satisfy the desires of all parties involved, but “…legal

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reasoning matters because, done well, it helps communities [or individuals] survive and transcend life’s tragic side,” and this duty, concomitantly, constrains judges.7

Second, the court’s discretionary power to interpret the law makes legal opinions a necessary source of constrain, because it prevents judges from pursuing subjective decisions. In respect to court’s power, realists argue that courts often begin with the results they desire to obtain and in this way modern law was developed.8 A judge’s legal reasoning should provide reasonable and impartial justification that supports the outcome generated by an interpretation of the law. Professor Tulin provides an example of a purpose driven approach in practice and their legal reasoning methods. In two separate reckless driving cases, in Georgia and Iowa, both drivers killed a pedestrian while driving under the influence. In Georgia the judge issued a decision under “assault with intent to kill,” but in Iowa the judge issued a decision under “reckless driving.”9 The reason for the disparity in legal interpretation and reasoning reflects the judge’s individual desire to produce what they considered “adequate punishment” or “desired result.” Even though both states appear to be divided in their legal reasoning the punishment, respective to the state law, was equal. This shows that judges may often begin with a desired result and work backwards to provide sound and impartial legal reasoning.10 According to Federal District Court Judge Joseph Hutchison, “…the vital motivating impulse for the decision is an intuitive sense of what is right or wrong for that cause.”11 The result in these two reckless

8 Frank, Jerome. selections from Law and the Modern Mind (1930) p.139
9 Ibid., p.141
10 Ibid., p.141
11 Leiter, Brian. “Legal Realism,” A Companion to Philosophy of Law and Legal Theory (Dennis Patterson, ed., 1999) p.270
driving cases can be considered to be desirable because of established societal norms. However, nothing ensures that a result oriented approach will always result in “desirable solution” to a current societal issues. So, if we cannot prevent a result oriented approach then legal reasoning provides a viable way to constrain judges from abusing this method of interpretation.

Third, judicial opinions determine the professional reputation of judges and this creates an innate interest to protect their reputation. Judges seek to demonstrate their legal prowess, impartiality and expertise through their opinions. This self-interest to protect a reputation constrains judges from producing untenable decisions that may be scrutinized by colleagues. Also, opinions form part of the legal materials used by judges in future cases and they are available to the public. Judges will not manipulate the law to achieve personal or political interest because they know their work will be scrutinized in future cases. It is for these reasons that judges will restrain themselves from producing outcomes that may be overturned by the higher courts. Justice Rehnquist is well-known for his concern and interest in the way his decisions will be perceived in history. It is clear that the various societal and professional pressures to produce impartial and convincing opinions will constrain judges.\footnote{Professor Dodd. Class Lecture Notes. The Rule of Law. 14 May. 2014}

Common Law

Judicial restraint within common law does not exist. In common law the doctrine of \textit{stare decisis} does not constrain judges, but instead gives judges a great level of discretionary power to pursue an idiosyncratic agenda. Over time, as fundamental social values change, common law also changes to reflect these changes. Social background facts often influence case outcomes more powerfully than case facts. It is for this reason that judges must justify their decisions
through judicial opinions that harmonize the elements of good legal reasoning. The textualist, in addition, fear that the court’s power to make law if left unrestrained has the ability to create potential instability. However, the common law process is inherently constraining because decisions can be overturned by higher courts or the legislature. This system of making law by judicial opinion makes judges accountable for producing reasonable decisions because they fear scrutiny from the higher courts. Used in this form, legal reasoning, constrains judges from pursuing purposes that may be political or personal.

A reasonable decision to create stability or change in the law, by ignoring or upholding precedent, can be justified through strong legal reasoning. The tradition of precedent has created an evolving law that builds upon prior cases and seeks to achieve stability. According to the natural model of precedent, people look to the past decisions of courts in an attempt to scrutinize how the court in a possible legal dispute may see their current actions. People rely on the stability of law to order their private affairs, and make legal decisions. However, the lack of judicial guidance available through precedent and the ability of judges to reject precedent undermines the strength of stare decisis as a constraining force on judges. In spite of the apparent flaw in the doctrine of stare decisis, the freedom to apply or reject precedent is an opportunity to maintain stability in the law or create change in the law. The ultimate path chosen by the court, to maintain stability or produce change, should be justified through convincing and impartial legal reasoning.

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Legal reasoning provides justification of a judge’s choice to ignore *stare decisis* in favor of change or to uphold precedent in their quest for stability. In *Hoffman v. Armstrong* (1866), also known as “The Cherry Tree,” precedents did not bind judges. There was a question of trespassing and establishing property boundaries. At the time there was no precedent to guide the question of property boundaries in New York State, so the courts and parties looked to Connecticut and British precedent for authority and guidance. Yet, the reasoning of the courts varied when describing their application of precedent. The result was two different decisions at the supreme and appellate levels of the New York State Courts. The first court decision was bolder and shifted to the newer precedent that created a workable doctrine, because “digging up tree roots” would unpractical.\(^{15}\) The second court was more cautious and wanted to avoid creating new policy that would affect not only “The Cherry Tree” case but any similar case in the future.\(^{16}\) There is no rule on how a judge should choose or use precedent, because precedent “provides a source of guidance but it does not automatically resolve problems.”\(^{17}\) In both of these cases the courts chose to elevate the relevance of one precedent over a rival precedent. However, strong legal reasoning provided people, lawyers and judges with an impartial justification for the applied precedent.

**Statutory Law**

In statutory law, judges as faithful agents of the legislature should adhere to the statutory text. Unless, ambiguous text produces an unreasonable decisions. The role of the judge as a “faithful agent” in interpreting ambiguous text varies according to a purposivist or textualist


approach. While both share conceptual common grounds differences remain in the methods of interpretation.\textsuperscript{18} A purposivist approach gives priority to \textit{policy context}— the use of legislative purpose to interpret ambiguous statutory text.\textsuperscript{19} On the other hand, textualists give preference to \textit{semantic context}—evidence that suggest the way a reasonable person would interpret the text.\textsuperscript{20} In both methods judges have an equal level of freedom to interpret the text subjectively. In Judge Leventhal's immortal phrase, he argues, that consulting legislative history is like "looking over a crowd of people and picking out your friends." Similar to Leventhal’s criticism, Justice Scalia argues that a “search for legislative intent is a window dressing for a judge’s biases and personal objectives.”\textsuperscript{21} However, through the use of legal reasoning judges are equally constrained when choosing either a purposivist or textualist method of interpretation. Because convincing and impartial legal reasoning would harmonize the four elements and address overarching questions such as, “What social problem does this statute try to correct?” “Does the case before the court represent the statute the problem addresses?”\textsuperscript{22} These questions should be part of harmonizing legal reasoning, and by including such a justification judges may avoid criticism and strict scrutiny. In applying this method of legal reasoning judges will be constrained from cherry-picking purpose or intent in an attempt to promote personal or political interests.

\textsuperscript{19} Ibid., p.76
\textsuperscript{20} Ibid p.76,78
Impartial and convincing legal reasoning in statutory law is essential because it may provide a source of guidance for future application of statutes or help overturn unreasonable decisions. In Mortensen v. United States, Justice Murphy uses legislative purpose to reverse the guilty verdict made by the Court of Appeals. Justice Murphy convincingly argues that to accomplish its purpose the statute enumerates the prohibited acts in broad language. According to Justice Day, “the language [of the Mann Act] is capable of application beyond that intended by the legislative framers.” Yet, the overarching purpose of the statute restrains the broad language by stipulating the use of interstate transportation for the execution of an illegal act. The use of purpose questions inevitably leads judges on a search for the social background facts of a case. In a judge’s search for social background facts he/she uncovers the nature of the social problems associated with a case and the possible way a statute aims to resolve the social problem. The advantage of these overarching questions is that it creates a necessity for judges to synthesize the various components of legislative history, and prevents them from “cherry-picking.” This is a good example of legal reasoning because Justice Murphy uses legislative purpose to overturn a lower court decision. Not only does he reverse an absurd decision, but he also provides us with his justification through strong legal reasoning and creates guidance for future courts.

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23 This case deals with the owners of a prostitution house who were convicted under the Mann Act for transporting two female workers on a vacation across state lines. Mortensen v. US 322 U.S. 369 (1944)


26 Ibid p.84-86
Constitutional Law

Strong legal reasoning in constitutional law constraints judges from infringing on individual rights when using the abstract framework of the Constitution to expand rights. Judges may interpret the Constitution with the purpose of achieving a decision that produces solutions that address evolving social issues, corrects legislative or executive actions. The role of the judge seizes to be that of a faithful agent of congress, as in statutory interpretation, and in constitutional law becomes a system of checks-and-balance.\textsuperscript{27} This often requires that courts overlook the original meaning in favor of arriving at a more reasonable solution or decision. In doing so the courts are not infringing on the majoritarian rule of democracy but instead fostering democratic conditions of equal membership.\textsuperscript{28} The fear of Justice Scalia and Richard Kay, both originalist, is that the lack of judicial restraint will produce decisions based on idiosyncratic beliefs.\textsuperscript{29} Given the opportunity to expand rights there is nothing that restrains judges from using the same power to contract rights.\textsuperscript{30} In such instance the method of justification through legal reasoning will constrain judges from expanding rights that promote personal or political interests.

The Constitution is similar to statutes because it relies on text, and it is like common law reasoning because most of the constitutional law develops from prior cases. The constitution has vague wording and there are rights that we derive from the constitution that are not enumerated but may be the result of precedent. Justice Scalia, an originalist, warns of the danger for potential

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“run-away judges”: judges who may misuse their power to promote personal or political interests.\(^{31}\) On the other hand, legal pragmatists advocate that judicial decisions should be “small and careful,” and should try to achieve what works in practice.\(^{32}\) However, the level of abstraction involved in interpreting constitutional law creates indeterminacy, and judges may raise the importance and level of abstraction of cases they prefer. Yet, legal reasoning in constitutional law forces judges to produce decisions that promote democratic principles.

In expanding rights not enumerated by the Constitution the Court must provide legal reasoning that justifies their impartial decision. As an example we look to *Johnson v. Zerbst* (1938), *Gideon v. Wainwright* (1963), and *Argersinger v. Hamlin* (1972) which reflect the court’s trend of expanding the right to counsel. In its decision to expand the Sixth Amendment, the Court ignored the original text of the Sixth Amendment which states “in all criminal prosecutions, the accused shall enjoy the right…to have the assistance of counsel for defense.” The original meaning of the Sixth Amendment was to stop government from preventing counsel, but it did not address the inability of a poor man to hire a lawyer. The Courts reasoning harmonized the *social background facts*, and the *widely shared moral values*. The Court understood the social necessity of expanding the original meaning of the Sixth Amendment to provide right to counsel for those accused of felonies or misdemeanors. In the Court’s expansion of the Sixth Amendment rights their legal reasoning provided a clear justification that proved the Court’s purpose was not political or personal, but the purpose was to serve a common good.

\(^{31}\) Scalia, Antonin. *A Matter of Interpretation* (selections) p.38-39

Conclusion:

In such fashion, the rule of law governed by the principle of strong legal reasoning can protect insular minorities. Diversity is a fact of life that makes judging difficult, because it can divide communities.\textsuperscript{33} Judges are challenged to find justifications for their decisions that appeal to the community as a whole.\textsuperscript{34} Critics will argue that legal reasoning is political in nature and people with different political beliefs will judge differently.\textsuperscript{35} However, as I have argued, strong legal reasoning constrains judges from pursuing political or personal interest. It holds true that high level judges, predominantly, are affluent, white, protestant males. In relation to this fact, Critical Race Theorist agree that minorities are not represented within the courts.\textsuperscript{36} Yet, the courts, while not representative of minorities, can provide support for the movements of minority rights. For example, \textit{Brown v. Board of Education} (1954) was helpful because it provided support for the Civil Rights Movement that proceeded. Similarly, \textit{Romer v. Evans}\textsuperscript{37} (1996) the second major gay rights decision by the Supreme Court struck down anti sodomy laws at issue in \textit{Bowers}.\textsuperscript{38} Beyond the Supreme Court decision in \textit{Romer}, the federal and state courts, as a result, have had to resolve a series of disputes involving the rights of the LGBT community. Cases such as \textit{Brown} and \textit{Romer} have resulted in decisions that have sparked social movements or controversy, and the result has been changes in favor of minority rights. Therefore, the courts

\textsuperscript{33} Carter, Lief H. and Burke,Thomas F., \textit{Reason in Law}, 8\textsuperscript{th} ed. (2010) p.144

\textsuperscript{34} Ibid p.144


\textsuperscript{37} Romer v. Evans 517 U.S. 620 (1996)

\textsuperscript{38} Bowers v. Hardwick 478 U.S. 186 (1986)
have provided a necessary structure within a diverse society to protect and promote minority rights.

As we have seen the legal materials in common, statutory, and constitutional law do not constrain judges from pursuing personal or political beliefs. Judges are afforded with a high level of discretion and power. The only “rule of law” is the law of self-restraint achieved through impartial and convincing legal reasoning. The inherent professional and societal expectations associated with the process of legal reasoning constrain judges from pursuing idiosyncratic agendas.