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What's The Point of the Courts?

BY CHARLES JACKSON PAUL ON DECEMBER 16, 2020 • (LEAVE A COMMENT)

In the wake of the contentious confirmation (https://www.washingtonpost.com) of Justice Amy Coney Barrett to the Supreme Court, the usual suspects in their media bubbles have been accusing their respective political opponents of wanting to turn the Supreme Court into a partisan super-legislature. From the way many partisans talk, one might conclude that "Conservative" judges were those who ruled in favor of whatever the Republican Party wanted, and "Progressive" judges were those who ruled in favor of whatever the Democratic Party wanted. But why, you might ask, could we not just have

judges who fulfill the role of the court, and judge cases fairly, without respect to their personal biases?

While that sounds nice in theory, the issue is more complex than requesting unbiased judgment. There is a multitude of legal and philosophical questions on which reasonable people can disagree. However, the fundamental problem with this question is that it never defines what the "role of the court" is, which is perhaps the biggest philosophical divide in judicial practice. The question can be reframed thus:

Is it the role of a court to achieve a just result, or to apply the law?

It is apparent from this question that achieving a just result and applying the law are not inherently the same. Our legal codes are certainly not perfect, and there will be times when following the law produces an unjust result. Of course, sometimes this is because the law is unconstitutional, but the Constitution does not forbid the government from having unjust laws per se, only from having laws that violate certain parameters. The exact nature of these parameters, incidentally, is another subject of debate between conservatives and progressives, but that is a topic for another day. So, if a perfectly constitutional law produces an unjust outcome, what is the court to do? Should it ignore the law and achieve justice, or follow the law and inflict an injustice?

This is the fundamental philosophical divide between the two dominant schools of thought on legal interpretation. The first school is called Originalism or Textualism (there are differences (https://www.mahoningmatters.com/community-columns/your-legal-rights-what-are-the-differences-between-an-originalist-and-a-textualist-2781301) between the two, but for this discussion, they are synonymous). Textualism believes, essentially, that what the law or the Constitution means is the public meaning, defined as what the words were generally accepted to mean, at the time of creation. They further believe that this "plain meaning," once found, is binding on the courts and must be followed, even if it produces a result with which the judge disagrees.

However, this way of legal interpretation can, by definition, produce results that are manifestly unjust. The textualist would respond that, in this case, the burden lies on the elected branches of government to fix the injustice by fixing the law. Incidentally, a good example of this is Kelo v. City of New London (https://www.oyez.org/cases/2004/04-108), where a particularly egregious yet technically constitutional example of eminent domain resulted in 43 states changing their laws (https://ij.org/case/kelo/) to prevent such outcomes in the future. But the gears of government turn slowly, and it can take years to change the law to remedy injustice, assuming political inertia doesn't prevent it entirely.

Thus, a second school of judicial thought arose, which believes that it is the role of a judge to find the just result and to interpret the law to reach that result. This school, commonly called Living Constitutionalism

(https://lsolum.typepad.com/legaltheory/2018/11/legal-theory-lexicon-living-constitutionalism.html), believes that the meaning of a law changes in tandem with evolving societal norms. As such, a law written 100 years ago would have a different interpretation today if the culture regarding that issue has changed. Living Constitutionalism follows inevitably from a justice-based interpretation of the law because if the judge is to achieve a just result from an unjust law, they must be able to interpret it loosely. Since much of the tension between our laws and our ideas of justice stems from our changing understanding of justice over time (https://blogs.kent.ac.uk/lawandthehumanities/2019/02/15/the-ever-changing-notion-of-justice/), Living Constitutionalism is an ideal paradigm for the reinterpretation of laws for the sake of justice.

This is not a new debate. The Greek philosopher Xenophon, writing two and a half thousand years ago, discusses whether a judge ought to make the fair or the lawful decision in the context of a mock court case. "The case was like this: A big boy with a little jacket took the jacket of a little boy with a big jacket, and (gave the little boy) his own jacket … Now I, judging it for them, recognized that it was best for each to have the fitting jacket. Upon that the teacher beat me… saying since the lawful is just and the unlawful violent, the judge must always cast his vote with the law." (The Education of Cyrus, 1.3.17). Here, the young judge makes a decision that leaves both parties better off but is still held to be in the wrong because his decision contradicted the established law.

Both philosophies make intuitive sense. On the one hand, what could be more straightforward than interpreting the law to mean what the people who wrote it said that it meant. Albeit, it is not always easy because sometimes there will have been disagreement about the meaning of a law even among its writers. However, in those cases, Textualism tells the judge to use their best judgment or follow court precedent to determine which interpretation is the most reasonable. On the other hand, humans have an innate sense of justice and having a court make a decision that goes against that innate sense, in the service of something as exoteric as the law, just feels wrong.

At first, justice would seem to demand that we use the Living Constitutionalist system of interpretation. After all, a judge making an unjust decision is, by definition, unjust. But this poses a question that we have so far ignored: what exactly is "justice?" And here we run into a problem because there are as many definitions of "justice" as there are people who have tried to define it. Now, this is not to say that there is no objective definition of justice (that is a debate for another day) but that there is no agreement on what this standard is. Most standards of justice, from the Ten Commandments to Confucianism, agree on the broad outlines — keeping one's word, not taking what does not belong to you, etc. — but those are the easy cases. On subjects in which there is almost universal agreement, the law is almost certain to track with this understanding of justice since laws tend to reflect a consensus in society. But there are much more complex cases in which reasonable people can disagree about what the just result is. Even after rigorous examination by the court, many cases will

still remain divisive with two or more sides passionately, and reasonably, feeling that they are in the right. How is a judge supposed to decide in these cases?

Under the justice-based legal interpretation, the judge would vote for what they feel is the just side. This means that whichever faction lost the case will feel cheated. After all, the only reason they lost the case was for the arbitrary reasons that the judge happened to have a personal theory of justice that agreed with the other faction. And they will be right. In a Living Constitutionalist world, the judiciary is no more than a football over which different factions with different ideas of justice fight to make their moral theory the most powerful one. This is exactly what we have seen happening over the past decades to our judicial system. To make things worse, Conservatives and Progressives have systematically different ideas about justice, and this means that, in a controversial case, there will more often than not be a "Conservative" side and a "Progressive" side. Thus, both parties will fight tooth and nail to stack the courts with judges who agree with their perspective of justice. There is no sense in asking them to act fairly because the prize for winning this political fight is defining fairness for the rest of the county. Meanwhile, both parties give up on actually writing laws because the judges will ignore the meaning of their laws if it disagrees with their ideas of justice anyway. The worst part is that this will happen not due to any partisan corruption, but as a result of judges logically following their sincerely held beliefs.

The last paragraph is not hypothetical; it is exactly what has happened to our judicial system. Wherever judges have attempted to put aside the law to achieve what they viewed as a just result, chaos has followed. In the Dred Scott decision, the Supreme Court ignored the original interpretation (https://www.ourdocuments.gov/doc.php?flash=false&doc=8) of the Constitution because they believed it was unjust that the Federal Government could limit slavery. This decision was one of the immediate causes of the Civil War. In the early 20th century, the court antagonized the labor movement by ruling (https://www.oyez.org/cases/1900-1940/198us45) that (admittedly unfair) laws limiting the working hours of business owners violated the 14th Amendment, despite the 14th Amendment saying no such thing. (This is a case of Libertarian Living Constitutionalism, which is rarer than its Progressive counterpart but has its share of defenders (https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/).)

While judicial activism has always (https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1180&context=nulr) been with us, it became a large problem in the Post-Civil Rights Era. During the 1950s and 1960s, the court finally got around to applying the original meaning of the 14th Amendment, which resulted in a series of sweeping decisions that catalyzed the civil rights movement. While they were both morally and legally justified, these decisions got the court in the habit of making sweeping rulings

that aligned with current social causes, which would serve it in ill stead over the coming decades. After the civil rights movement, however, the court ran into a problem. Their desire to legislate a just society no longer found sanction in the Constitution. Thanks to Living Constitutionalism, however, the court pressed on undaunted. To be fair, they came up with some extremely creative and clever interpretations of the Constitution to do it, such as penumbras (https://constitutioncenter.org/blog/10-huge-supreme-court-cases-about-the-14th-amendment), which are the "shadows" cast by various clauses in the Constitution. These "shadows" contain rights not explicitly enshrined in the Constitution but are extrapolated from the rights that are, along with a healthy dose of consultation with modern ideas of justice, of course. While there is not enough room here to chronicle all of the judicial activism of the court during this time, the interested reader is encouraged to learn more at the This Day in Liberal Judicial Activism (https://www.nationalreview.com/bench-memos/this-day-in-liberal-judicial-activism-july-9/) blog.

Conservatives were understandably annoyed with this Progressive activism, but the final straw came with Roe V. Wade, the case that mandated a constitutional right to abortion. Now, whether or not there should be a constitutional right to abortion is not the point, the fact is that the Constitution says nothing about abortion one way or the other. In Roe, the court took the penumbra argument and used it to reveal a right to abortion lurking in the shadow of the 4th and 14th Amendments (https://www.britannica.com/event/Roe-v-Wade). This, on top of decades of judicial activist decisions, made Conservatives really really mad.

Mad enough to completely revolutionize legal thought for the next half-century.

Decades of being thwarted by the court had made Conservatives leery of judicial overreach. Since they were already ideologically predisposed to elevate the importance of the Constitution, and particularly its traditional interpretation, it was natural that they would rediscover Originalism. While their motives were far from disinterested, Conservative promotion of Originalism stabilized (https://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=2938&context=tlr) the courts and reigned in judicial activism. Such was the Originalist victory that even Living Constitutionalists have begun to accept (https://legaltimes.typepad.com/blt/2010/06/kagan-we-are-all-originalists.html) Originalist ideas. Even many recent progressive "wins" before the Supreme Court have been decided on textualist grounds (https://www.insidehighered.com/news/2020/06/16/landmark-supreme-court-ruling-could-redefine-title-ix).

Yet Living Constitutionalism is not dead. Plenty of dubious yet perfectly constitutional (https://www.wsj.com/articles/supreme-court-blocks-trump-cancellation-of-daca-immigration-program-11592489280) laws and executive actions are struck down for offending the sensibilities of judges. Attempts to strengthen the textualist wing

of the court have been (https://www.npr.org/2017/02/01/512751609/why-gorsuchs-nomination-is-likely-to-play-out-as-an-angry-partisan-battle) met with (https://www.cnn.com/2018/10/09/politics/kavanaugh-confirmation-progressives-midterms/index.html) unbridled fury (https://www.washingtonpost.com). Meanwhile, Textualism is facing new challenges from the right. Flush with their recent victories, many Conservatives are now calling for Textualism to be cast aside and replaced with a more "robust" theory of Constitutionalism. For instance, President Trump's legal counsel Jenna Ellis has argued (https://www.amazon.com/gp/product/B0794M4LTT/ref=dbs_a_def_rwt_hsch_vapi_tkin_p1_i0) that the Constitution ought to be interpreted in line with a particular view of Christian morality. There are legitimate reasons to believe in Living Constitutionalism, and, even if the ideology is defeated in theory, so long as judges are human, they will have a natural tendency to place their own preferences and prejudices over the law.

But this raises the question of what, exactly, the point of having a law is? If you feel confident that judges can, out of their innate understanding of justice, make the right decisions, then why have laws at all? Why not let judges decide things on what they believe is right or wrong? After all, most pre-industrial societies (https://www.amazon.com/Suicide-West-Tribalism-Nationalism-Destroying/dp/1101904933) did not have written laws, but just made decisions based on what they believe is just on a case by case basis. But if we decide to write down laws, then we need to stick with them. If we want the rule of law, then we need to accept the law's ruling, even when it produces an unjust result. And there can be no-nonsense about "changing interpretations" of the law. The only way that a law should be allowed to change is when we democratically decide that it needs to be changed. Otherwise, the law becomes mere wind in the hands of subjective judges, and ultimately in the hands of partisan efforts to ensure that their judges are the ones being subjective. If judges cannot be trusted to rule impartially, then they need to find a new profession.

What is the point of the courts? To faithfully judge based on the laws that we, the people, have decided on, regardless of their personal views of justice.

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