"Litigation and Change in U.S. Law"

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My statement perhaps more aptly notes three features of my country's legal system that I think are distinctive rather than identifying the three most important features.

1. The U.S. Constitution and the organization of the U.S. judicial system

2007 will mark the 218th year of operation for the U.S. Constitution.[1] From its beginning, this framework for the U.S. government has been a product of compromise and negotiation that has guided the United States in its development from a fledgling experiment in democracy in the 18th century to the country we have today. This constitutional framework has guided the physical expansion of the United States, the absorption of large immigrant populations, the development of strategies for racial integration, the elaboration of individual civil rights, and the understanding of the relative powers of the federal and state governments in a system of dual sovereigns. The combination of a written, but flexible constitution is basic to the development of law, legal institutions including the legal profession and legal education in the United States.

One of the sources of flexibility in this constitutional system is the judicial system with the U.S. Supreme Court at its apex. Article III of the U.S. Constitution provides for the basic outline of the judicial structure and the nature of issues to come before the courts. Article III of Section 1 provides that: "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The U.S. Supreme Court has played an important (and often controversial) role in expanding and constraining the powers of the government and in shaping the role of law in governing the lives of individuals in the United States. Article III of the Constitution limits the jurisdiction of the federal court system to "cases and controversies" and federal courts do not issue advisory opinions.

The U.S. system of common law relies heavily on court precedent. Known by its Latin rendering, *stare decisis*, this practice "requires that a court follow the rules of law established by the same or higher level courts in the same jurisdiction."[2] The rationale for this practice is given as follows:

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[1] The average age for a national constitution is 17 years according to data collected by the Comparative Constitutions Project directed by University of Illinois Professors Zachary Elkins (Political Science) and Thomas Ginsburg (Law) and sponsored by The Center for the Study of Democratic Governance and the National Science Foundation. See https://netfiles.uiuc.edu/zelkins/constitutions.

[2] Toni M. Fine, *American Legal System: A Resource and Reference Guide* (Cincinnati: Anderson Publishing Co., 1997), p. 13.

> The virtues of stare decisis are well-understood, promoting as it does the stability, the predictability, and the efficiency of the legal system while also limiting the realm of judicial discretion and enhancing the appearance of integrity of the judicial process.[3]

2. U.S. attorneys and litigation

The U.S. legal system is based on advocacy and is an adversarial one that relies on the skills of attorneys to represent the interests of their clients. The judge serves as the arbiter of the law and states what it is. Where a jury is present, citizens who may or may not have legal training are asked to assess the facts they are presented in the course of the trial and in light of the law. Judges in U.S. federal courts are appointed by the President with the advice and consent of the Senate. Many state judges are elected.

Attorneys in the U.S. are permitted to take cases on a contingency basis, that is, they will not receive payment for services unless they win. This has resulted in a litigious society, but has helped to push change in U.S. laws. The development of public interest law practice has also helped to make changes through a system of class actions.[4] U.S. lawyers can choose where to litigate and may gain advantages by choosing a particular state or federal forum.

The principal prerequisites to court review are:

> *Standing*—The parties must have an actual, cognizable, usually pecuniary or proprietary, interest in the litigation.
> *Finality*—In the case of appeals or agency review, the action by the trial court or administrative body must be final and have a real impact on the parties.
> *Exhaustion*—The parties must have exhausted any possible avenues for relief available in the trial court or administrative body.
> *Ripeness*—The dispute must present a current controversy which has immediate rather than anticipated or hypothetical effects on the parties.
> *Mootness*—The dispute must not have been resolved. Nor must the circumstances have changed in any way that renders the dispute no longer subject to controversy.
> *No Political Questions*—Courts will not involve themselves in non-justiciable disputes that are between the other two branches of the federal government

[3] Stephen Markman, "Precedent: Tension Between Continuity in the Law and the Perpetuation of Wrong Decisions," 8 *Texas Review of Law and Politics* (2003-2004), p. 283.

[4] This practice may now also moving into the international realm. "The prominent plaintiffs' firms, their critics say, are in it for the money. And the fact that they have started to embrace international human rights law may be a reflection of the relatively limited opportunities left in domestic class-action suits after legislative and judicial efforts to cut them back." Adam Liptak, "Class-Action Firms Extend Reach to Global Rights Cases," *The New York Times* (June 3, 2007), p. 27.

and are of a political nature.[5]

3. Reconciling the use of precedent and the need for change

This background provides insight into the intense interest that surrounds judicial appointments, particularly of the highest U.S. courts such as the U.S. Supreme Court. Observers of U.S. presidential politics, for example, would recall discussion about the number of appointments that the President elected in 2004 would likely make during his presidential term given the age of the members of the U.S. Supreme Court at the time.[6] Scholars have, however, rightly cautioned against relying too much on the general labeling of individuals, the group or the general direction of a Court because of the changes in the meanings of these labels over time. For example, what comprises the outlooks and actions that describe "conservative," "liberal," "judicial activist," "internationalist," and even "originalist" can be context and/or issue-specific.[7] Part of the labeling may come from a jurist's view of his or her role as a judge. When asked about this during his confirmation hearings to become Chief Justice of the U.S. Supreme Court, John Roberts replied that:

> Judges are like umpires. Umpires don't make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ballgame to see the umpire.[8]

Yet we know that Chief Justices and the U.S. Supreme Court itself have not always held this same view if we think of the profound effect of decisions made by the Court in matters such as desegregation (Brown v. Board of Education, 347 U.S. 483 (1954)), right to counsel (Miranda v. Arizona, 384 U.S. 436 (1966)), reproductive rights (Roe v. Wade, 410 U.S. 113 (1973)), and the death penalty (Furman v. Georgia, 408 U.S. (1972)) just to mention a few. In recent memory, we have had Bush v. Gore (000 U.S. 00-949 (2000)) that effectively decided the outcome of the presidential election in 2000. Even if these decisions are regarded as positive steps, Supreme Court Justices have generally been cautious about "legislating from the bench." Reasons for this caution may differ, but generally include:

> The power to legislate was lodged in the legislative, not the judicial, branch by the U.S. Constitution.

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[5] Toni M. Fine, *American Legal System: A Resource and Reference Guide* (Cincinnati: Anderson Publishing Co., 1997), p. 5.

[6] The death of Chief Justice William Rehnquist in September 2005 and subsequent departure of Associate Justice Sandra Day O'Connor in January 2006 provided President George W. Bush two such opportunities.

[7] See Michael J. Gephardt, "The Rhetoric of Judicial Critique: From Judicial Restraint to the Virtual Bill of Rights," 10 *William & Mary Bill of Rights Journal* (2001-2002), pp. 585-645.

[8] See U.S. Senate, Committee on the Judiciary, Nomination of John G. Roberts, September 12, 2005.

> Since federal judges are not elected, legislating through unelected officials would be contrary to democratic decision-making.
> Federal courts, in particular, may not be well equipped to understand the social and political implications of undertaking change and therefore likely to be unhelpful in advancing the law.
> Rulings that are inconsistent with the law may cause confusion and undermine the legal system.

U.S. Supreme Court jurisprudence over history shows that it has not and cannot resolve the inevitable tension between continuity and becoming an obstacle to necessary change. As Justice Stephen Markman of the Michigan Supreme Court noted, there is a strong presumption that an earlier judicial decision will be observed, but "it is a presumption that can be overturned."[9] Of course, the issue then relies on the criteria used to determine when a presumption of continuity should be overcome. Some criteria to consider might be:

> The durability of the precedent and how disruptive change would be to the overall legal system;
> Whether the error is perceived by more than one judge;
> The effect of a change on those relying on the existing law.

Justice Markman noted the practice of the Michigan Supreme Court:

> Almost without exception, when the Michigan Supreme Court over the past five years has overturned precedents, it has done so with regard to precedents in which the plain language of the law has been ignored or distorted, in which, for example, legislative compromise have been undermined in favor of what some judges have viewed as "better" or more "rational" compromises.[10]

The range of subjects that came before the U.S. Supreme Court in its 2006-2007 term are a sample of issue areas that come before the Court. The 67 signed opinions of the 2006-2007 term touched on subjects including free speech, religious freedom, reproductive freedom, racial equality, attorneys' fees, criminal justice, the death penalty, immigrants' rights, prisoners' rights, antitrust, diplomatic immunity, and environmental protection. It remains to be seen how well the present practice of balancing the need for continuity and necessary change will continue to work into the

[9] Stephen Markman, "Precedent: Tension Between Continuity in the Law and the Perpetuation of Wrong Decisions," 8 *Texas Review of Law & Politics* (2003-2004), p. 284.

[10] Stephen Markman, "Precedent: Tension Between Continuity in the Law and the Perpetuation of Wrong Decisions," 8 *Texas Review of Law & Politics* (2003-2004), pp. 286-7.

21st century as courts face questions growing out of technological advances and the increased cross-border activity promoted by forces of globalization. Related to this is how members of the U.S. judiciary perceive themselves as part of the "global community of courts" and how much regard they might give to the practice of courts outside the United States to test the need for change in the laws of the United States.[11]

[11] See Anne-Marie Slaughter, "A Global Community of Courts," 44 *Harvard International Law Journal* (2003), p. 191 and Justice Michael Kirby, "International Law—The Impact on National Constitutions," in 99 *American Society of International Law Proceedings* (2005), pp. 1-21 who opened with a quote from Justice Anthony Kennedy's opinion in Roper v. Simmons, 125 S.Ct. 1183 (2005): "The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."