September 5, 2007

Extract from Michael J. Gerhardt's Non-Judicial Precedent (UNC Legal Studies Research Paper No. 1011505, 2007), citing Tillman's A Textualist Defense

Seth Barrett Tillman, *None*

NON-JUDICIAL PRECEDENT

by

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This Article attempts to re-envisions constitutional law through the perspective of non-judicial precedents. Most constitutional scholars equate precedents with judicial decisions, particularly those of the Supreme Court, and ignore the constitutional significance of precedents made by non-judicial actors. Using a wide range of examples, Professor Michael Gerhardt shows how shifting our perspective from the Court to non-judicial actors allows us to see constitutional law in new ways. First, he suggests the feature common to all non-judicial precedents is their discoverability – the public efforts made to invest past non-judicial activities with normative force. To illustrate how discoverability makes non-judicial precedents recognizable, Gerhardt compares three easy cases for spotting non-judicial precedents with three practically impossible ones. Second, non-judicial precedents have other distinctive features -- they are more extensive than judicial precedents, enduring, designed largely to exert binding or persuasive authority, and have limited path dependency – weak force to dictate outcomes over time. Third, they perform many functions besides constraint -- serving as a mode of constitutional argument, settling constitutional conflicts, implementing constitutional values, and shaping structure, national identity, and culture. The greater the network effects of non-judicial precedents – the more functions they perform and thus the more often they are cited – the more secure their meanings and values become. Fourth, non-judicial precedents are instrumental to solving some classic conundrums in constitutional theory, including "the counter-majoritarian difficulty." Because so much judicial doctrine is grounded in non-judicial precedents in such forms as historical practices, customs, norms, and traditions, few judicial decisions can credibly be called "counter-majoritarian." The less firmly grounded judicial decisions are in concrete expressions of majoritarian preferences the more they are open to political attacks. The Article concludes that shifting perspective on precedent from courts to non-judicial actors enables us to see how non-judicial actors are actually supreme in making constitutional law.

INTRODUCTION

This Article proposes a new paradigm for analyzing the role of precedent in constitutional law. The conventional perspective equates precedent with judicial decisions,

Similarly, Presidents Reagan, George H.W. Bush, and George W. Bush did not just under-enforce Roe v. Wade[343] but they instead tried to undermine it. They refused as much as they could to block any federal support for *Roe*. They used all their prerogatives, including issuing executive orders withdrawing abortion services for military personnel, vetoing bills, supporting bills withdrawing financial support for abortion services, and appointing judges and justices, to implement *their* judgment *Roe* was a mistake.[344]

Non-judicial responses to *Brown* and *Roe* illustrate how non-judicial authorities, through the precedents they make, democratize the implementation of the Constitution.[345] Non-judicial precedents are, in other words, the essential means through which the public is allowed some say over the implementation of constitutional values.

An example of this dynamic is Congress' response to INS v. Chadha,[346] in which it struck down the legislative veto – an arrangement in which one or both chambers of Congress or a legislative committee may override an executive action, is illustrative. Constitutional and administrative law scholars for 20 years have emphasized this aspect of Chadha – that the Court on that day struck down parts of more statutes than it had previously in its entire history.[347] Yet, immediately after *Chadha*, an angry Congress began finding other ways to reassert its contrary views about the relationship between the executive and legislative branches, and in time turned

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[343] 410 U.S. 113 (1973).

[344] *See* NEAL DEVINS AND LOU FISHER, THE DEMOCRATIC CONSTITUTION (2004) (discussing how political leaders have influenced the doctrine on abortion rights and several other constitutional matters).

[345] 462 U.S. 919 (1983).

[346] *See generally supra* note 345.

[347] *See, e.g.*, Seth B. Tillman, *A Textualist Defense of Article I, Section 7, Clause 3*, 83 TEX. L. REV. 1 (2005); Peter L. Strauss, *Was Legislative Theory and the Rule of Law: Some Comments on Rubin*, 89 COLUM. L. REV. 427 (1989).