

Courts and the Making of Public Policy

The Courts and Social Policy in the United States

REPORT AND ANALYSIS OF A WORKSHOP ON COURTS AND SOCIAL POLICY
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Daniel Butt

The Foundation for Law, Justice and Society
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Introduction

This report is intended to provide both a record of, and a critical response to, the joint seminar held in Aspen in July 2007 by the Aspen Institute Justice and Society Program and The Foundation for Law, Justice and Society (FLJS). The seminar brought together participants from a wide range of relevant backgrounds to discuss issues relating to the role of the courts in the public policy process, with a specific focus on the US judiciary. Accordingly, participants included four members of Congress and three Court of Appeals judges, along with others drawn from the national media, the US army, private law firms, and from a range of different academic backgrounds. Discussion was moderated by Professor Kathleen Sullivan of Stanford University Law School. Following an introductory session led by the

moderator, the seminar considered three specific policy areas where the courts have played a controversial role in policymaking: affirmative action, reproductive rights, and terrorism and national security. In each case, discussion was initiated by an expert in the field, and then opened up to the participants. In what follows, the main points of the introductory presentations are briefly summarized, and a critical report is then given of the subsequent discussion. Each of the three introductory presentations, by Professor Peter Edelman, Professor Judith Resnik and Col. David E. Graham, have been written up as separate FLJS Policy Briefs, which accompany this report. These should be consulted for a full account of the authors' views.

INTRODUCTORY SESSION:

The Courts and Social Policy

Sullivan began her introductory remarks by noting that to question the role of the courts in the field of social policy is to imply that the courts are fulfilling functions which, for whatever reason, others should be performing. The claim that, at various points in time, courts have acted inappropriately in this fashion has been made from both the Left and the Right at different times. For example, the *Lochner* era (roughly the period from 1897 to 1937) witnessed a backlash from the Left against the involvement of the judiciary in social policy matters. The Supreme Court of the Progressive Era struck down a number of efforts to control the industrial economy, in such areas as child labour and employee safety laws. Towards the end of the period, the Supreme Court struck down a range of New Deal legislation that regulated production, introduced industrial codes, and provided relief, claiming that such laws violated rights to property and contract, and exceeded the limits of federal power. Such actions led President Franklin D. Roosevelt to threaten the introduction of his 'Court-packing plan'. Objections to the Court's actions were made on three grounds: relating to the Court's authority to act (as an unelected branch), to its competency, and to the scope of its decision making. Moving forward to *Roe v. Wade* (1973), here the Supreme Court again acted in the field of social policy, moving to secure the right of access to abortion, and striking down state laws which sought to criminalize abortion. Again, the same kinds of objections were raised, relating to authority, competence, and scope; though characteristically, on this occasion, from the political Right.

When considering these two periods, one of four positions can be adopted on the actions of the courts. One might oppose the judicial interventions in both eras. This, for example, is the position of John Hart Ely. One could (though very few do) endorse judicial policy-making in both periods, holding that the courts acted

as bulwarks of liberty throughout. A third position is to oppose the *Lochner* position, but support that of the *Roe* Court, on the grounds that the emphasis on individual rights to privacy in *Roe* makes it an appropriate context for judicial intervention, as opposed to the support for free markets shown by the *Lochner* Court. Fourthly, one could oppose *Roe* but praise *Lochner*, maintaining that the Constitution is centrally concerned with the protection of property, and that its founders could have envisaged the kind of cases dealt with during the *Lochner* era, but would not have anticipated the focus on sexual relations, contraception, and so on, seen in the later period. The conclusion drawn was that one should typically not claim that one likes or dislikes 'activist courts' *simpliciter*: the fact that both Left and Right have had moments of apoplexy concerning judicial involvement in social policymaking means that observers should be careful to specify which forms of judicial activism they support, and which they oppose.

Sullivan noted that courts make social policy both by action and by inaction. Headlines are made when courts are seen to come in and actively interfere with the social policy process. But social policy is also made when courts refrain from acting. An obvious example here concerns segregation following the 1954 *Brown v. Topeka Board of Education* ruling. Compliance with desegregation was far from instantaneous. Movement in the south came about not solely as a result of executive action, but as a result of congressional legislation in 1964 and 1965. Such legislation affected social policy, but the Court chose not to interfere, refraining from striking down the legislation, in contrast to its predecessor's action in relation to the 1875 Civil Rights Act. In such a case, the decision not to strike down legislation can be seen as a way of making social policy.

Sullivan then went on to give more detail of her threefold typology of critiques of judicial policymaking: from authority, from competence, and from scope or technique. The critique from authority holds that courts lack democratic legitimacy. The classical form of this critique sees judges as elite, isolated individuals, who are not forced to run for office or to engage face-to-face with the general public. Such a critique can easily be overstated: legislatures themselves can be criticised from a democratic standpoint, whether with regard to the access and influence of non-elected actors such as lobbyists and campaign contributors, or considering problems with the aggregation of preferences revealed in the academic literature on collective action and public choice. The Brandeis brief industry, moreover, allows a plurality of inputs into the judicial process, incorporating, for example, sociological, medical, and economic data. Such briefs can inform judicial decisions in ways similar to legislative processes. As such, the classical form of the authority critique overstates the democratic character of other political institutions, and understates the significance of democratic inputs into judicial policymaking. It is true to say that there are formal mechanisms, such as life tenure, by which judges are insulated from certain forms of political pressure; this, of course, explains why some Supreme Court Justices have acted in ways which were not anticipated by supporters and opponents alike at the time of their appointment. But this is not necessarily to say that they are immune from democratic pressure in the form of public opinion. One might look, for example, at the extent to which opinions by Justice Kennedy do tend to track opinion polls, and so largely reflect the wishes of a majority of the American public. While he has been criticized, for example, for his decisions on gay rights, they do reflect dramatic changes in public opinion polling, amongst young people in particular.

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The critique on grounds of competence queries the extent to which judges are good at policymaking. Stressing the complicated nature of questions in contemporary social policy, it suggests that even if judicial policy outputs can be defended as democratic, they are unlikely to make good policy. The Supreme Court, for example, has recently been criticized for its actions in policy areas such as patent law, immigration appeals, and prison policy. Justice Thomas, for example, has claimed that he holds the courts responsible for at least two deaths in the aftermath of the Supreme Court's decision in relation to separating prisoners of race. Sullivan suggested that this line may wildly overstate the efficiency of the rest of government, while understating that of the courts.

The critique from scope can be argued even if one accepts the democratic character and competency of judicial policymaking. It suggests that while there may be a role for judges in the social policy process, they should not be as involved as they currently are. This suggests opposition to managerial judges, who intervene in the day-to-day running of administration, for example, in relation to local school authorities. The competence critique need not maintain that courts do not have a role in drawing attention to problems in social policy fields, but it resists the next step whereby judges themselves take over the management of the policy area in question.

Discussion and analysis

The bulk of the spirited discussion following Sullivan's remarks centred on the critique from authority, with a range of views being advanced as to the democratic legitimacy of judicial involvement in the social policymaking process. On one hand, some participants sought to decry elements of judicial involvement in the policymaking process, noting, for example, the distinction between procedural due process and substantive due process. For some, substantive due process is wholly an invention of the Supreme Court, meaning that decisions which rest upon the doctrine go beyond the intentions of the Constitution's framers, and lead to judicial actors substituting their own policy preferences for those of legislators. One response to such a critique is to suggest that the framers did have a

conception of natural law, and that this can ground the constitutional legitimacy of substantive due process decisions. Some participants sought actively to defend the democratic character of judicial policy, by reference to cases such as *Brown v. Topeka Board of Education* (1954) and *Lawrence v. Texas* (2003).

Two related but distinct approaches were adopted here. One was to query the democratic authority of legislative majorities in certain cases, citing, for example, the use of Committee Chairs and filibusters in preventing the passage of anti-lynching legislation. One could, therefore, defend the *Brown* decision in explicitly majoritarian terms, as bringing about a policy change which a majority in the United States favoured, but which could nonetheless not be passed through the Congress of the time. The second approach employed was to adopt a non-majoritarian conception of democracy, maintaining that liberty and equal respect are themselves democratic values, which need to be protected against the tyranny of legislative majorities. When decisions make explicit reference to questions of right in this way, it may be an open question whether a judicial intervention should even be characterized in terms of policymaking. A key question here concerns the perception we have of judges as political actors. One approach, commonly found in the political science literature on judiciaries, is simply to see judges as political actors like any others, seeking to maximise their ability to translate their own preferences into policy. One way of scrutinizing this approach is to look for cases where judges openly uphold one policy as constitutional, even though it is clear that their own preference is for an alternative policy.

There was some opposition from judicial participants to the suggestion that judgments of constitutionality and unconstitutionality should, in themselves, be characterized as interventions in the policymaking

process. Most judicial activity concerns the interpretation of statutes or the application of the common law; judges typically focus, in their day-to-day activities, not on policy questions but on institutional questions relating to the separation of powers. Judges can only address cases which are brought before them; they are not able to devise a policy programme in the same way as a legislature, which controls its own agenda to a far greater extent. The issue of scope, on this account, only emerges once a judgment of unconstitutionality has been made. Even then, courts face a choice as to how to proceed. Thus, for example, a decision that prison service policy was unconstitutional could proceed in at least two different ways. One would be to intervene actively and formulate a policy which the service was obliged to follow. The alternative would be to give a timetable for when others should act to address the issue themselves. In response, it was noted that there may well be occasions when judges hide behind deference and an exercise of the passive virtues, declining to act on procedural grounds, when in fact their motivation for so doing is substantive. In such cases, a finding of constitutionality could nonetheless be characterized as exercising influence on the policy process. Furthermore, insofar as the Supreme Court chooses its own docket, it is able to exercise a degree of control over its own agenda, which means that it has some potential to create its own programme to influence policy; or, at least, could be perceived as doing so.

Finally, it was noted that a particular issue relating to the critique from authority has arisen, concerning the use by domestic courts of foreign law. In the Supreme Court, Justices Scalia and Thomas have recently criticized Justice Kennedy's use of amicus briefs containing foreign or international law. Do courts overstep their authority in appealing to rules and judgments from legal systems outside the United States?

SESSION ONE:

Affirmative Action

Edelman began his remarks by noting that questions relating to affirmative action policies arise since the professed ideal of equal opportunity has not yet been reached in American society. Thus, the idea of affirmative action is to utilize some conception of affording preference to certain groups to narrow the gap. The most fundamental question here concerns whether we should think about all race-based remedies with great suspicion, regardless of whether they are intended to help or hurt. This is evidently a divisive issue. On the one hand, Justice Thomas has been the most vociferous spokesperson for the position that maintains that all forms of racial classification are dangerous. The claim is that by making race matter in the present day, we run the risk of entrenching the very prejudices that we are seeking to erase. Alternatively, there is a process-oriented way to look at the distinction between invidious and benign discrimination. Racial classification has historically harmed African-Americans, who, as a result, have been weak actors in the political process. Thus, it can be argued that corrective use should now be made of racial classification, in order to engage in representation reinforcement.

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What, then, are the circumstances in which one might see the application of race-based remedies? The classic case is when a court finds that a defendant has violated the Constitution by engaging in discriminatory behaviour. In cases such as *Brown II* (1955) and *Swann v. Charlotte-Mecklenburg Board of Education* (1971), the Supreme Court employed affirmative action in the sense of numerically based

race-conscious remedies, in order to rectify unconstitutional discrimination. There is a good deal of relatively uncontroversial case law, resting on 9-0 decisions, which employs this kind of race-based remedy in relation to education in particular, although the 1980s saw a number of employment cases involving alleged discrimination under the Constitution or under Title 7 of the Civil Rights Act where the Court was divided in maintaining that numerical remedies were legitimate.

A second type of case arises when a race-based remedy is enacted by a public body based on its own well-supported findings that discrimination was historically practised by its own predecessors. Such cases have evoked a more negative reaction from the Court, but have not yet been ruled as totally impermissible. Much more controversial have been instances where affirmative action has been justified by a desire to remedy general historical societal discrimination, or discrimination by entities other than the actors seeking to afford preference to members of particular racial groups. This has clearly been ruled unconstitutional by the Supreme Court.

Accordingly, a fourth justification for affirmative action has arisen, based not on a backward-looking attempt to rectify historical injustice, but on forward-looking appreciation of the value of diversity. Such an appeal focuses not negatively on how things were, but positively on the kind of society which, looking into the future, we would like to be. The approach took its constitutional justification from the opinion of Justice Lewis Powell in *The Regents of the University of California v. Bakke* (1978). The future of such diversity-based remedies has now been put into considerable doubt, following the ruling of the Supreme Court on voluntary desegregation in the Seattle and Louisville cases of 2007 (*Parents Involved in Community Schools v. Seattle School District No. 1* [2007] and *Meredith v. Jefferson* [2007]). Both

school systems had adopted pupil assignment policies that used race as a tie-breaker in order to further diversity. Four of the five votes of the majority opinion maintained that all racial classifications are invalid other than when remedying judicially determined discrimination; the crucial fifth vote, from Justice Kennedy, accepted that the pursuit of diversity could justify some pro-desegregation policies, but not in the cases in question.

Concluding, Edelman asked a number of open questions to initiate discussion. First, are considerations in favour of, or in opposition to, affirmative action different in the case of race, and in particular in relation to African-Americans, than for other groups, such as women, or lesbians and gays? Second, what should be done in relation to members of minority groups who are not themselves underprivileged? This question is particularly significant in the context of a growing African-American middle class: should Senator Obama's children, for example, benefit from affirmative action in terms of university entrance? Third, for how long should we seek to continue affirmative action policies? If society is ever to get to a point where it is past the arguable need for race-based remedies, what, if anything, can be done to hasten the coming of this day? What role is there for remedies not based on race, policies such as general poverty reduction, which are not directly targeted at specific groups, but which have the practical effect of aiding these groups, insofar as their members are disproportionately poor? Finally, are there continuing ways to take race into account other than by means of the established mechanisms which have become so controversial?

Discussion and analysis

A good deal of the subsequent discussion centred around the Supreme Court's decision in the Seattle and Louisville school cases, which provided, in the view of some, a clear example of judicial involvement in social policymaking. There were some sharp differences of opinion as to whether the Court was right to halt the schools' voluntary desegregation efforts. One participant offered support for the

majority's decision, opposing the use of racial classifications and arguing that while diversity may be a desirable goal, its pursuit is not protected within the Constitution. For some, the use of diversity as a justification for affirmative action was problematic insofar as it ignored the rights and entitlements of particular individuals in its pursuit of a broad, societal goal. As such, the courts are right to point out that while the ends of diversity in particular institutions, and fostering integration in communities and society as a whole, may be valuable ones, they cannot be pursued by means which treat particular individuals unfairly.

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However, the bulk of expressed opinion was hostile to the Court's judgment. One participant labelled the Court's decision 'the ultimate triumph of Nixon's southern strategy', arguing that the Supreme Court was interfering with municipalities' attempts to treat citizens with equal respect, and thus deliberately impeding efforts to desegregate. On this view, the use of racial classifications was justified given the particular history of race relations in the United States. A number of participants objected to the Court's use of briefs on colour blindness submitted in the 1950s in relation to cases such as *Brown*, holding that the point of these briefs had been deliberately twisted by Justice Roberts to serve the opposite ends to those for which they had been originally intended. From this viewpoint, an insistence on colour blindness in the present day acts as if the problems of race in American society have been solved, and so may close off a range of potential policy initiatives rooted in US heritage.

One objection to the Court's strategy deriving from political science was phrased in terms of efficiency. In terms of the competency critique, this portrayed the Court as foreclosing the most efficient way to make policy, by forbidding self-governing institutions from taking race into account, even though these institutions maintain that doing so would best enable them to pursue their goals. To some extent, this might be a consequence of the institutional failings of judiciaries. Insofar as they are confronted with particular cases, courts have no choice but to make policy in relation to those specific parties before them, whereas bodies such as legislatures find it relatively easier to look at the bigger picture. In response, it was suggested that one might defend the Court by arguing that there is substantial cost to seeking to improve diversity by recourse to race-based remedies; as such, the Court may actually be seeking to maximize efficiency in the long run by insisting that this cost be avoided. A related question here concerns the voluntary nature of the schools' actions in Louisville and Seattle: was this really a case of the courts acting to prevent local institutions voluntarily pursuing their own choice of policy, based on their appraisal of the value of diversity? Or were the schools in fact engaging in anticipatory self-defence? If the latter is a more accurate depiction, and schools were acting to head off potential legal challenges rather than to pursue a policy based on a judgment as to their best possible functioning, then the efficiency critique would seem to have less force.

As noted, some participants objected to the way in which the Court's decision had the effect of stopping an ongoing conversation on race. Others, however, suggested that this may not be undesirable, insofar as a new approach to the question was in any case called for. It was suggested that the situation prior to the Louisville and Seattle cases was confused in that two different justifications for desegregation, the pursuit of diversity and the desire to improve educational prospects for disadvantaged children, had become muddled. Justice Kennedy's judgment, it was suggested, actually reflects the bulk of public opinion, since people do indeed want to improve the prospects of the disadvantaged; but also they do not

want children to be denied the opportunity to go to their neighbourhood school due to colour. Kennedy's judgment thus acknowledges the problematic aspects of quotas, but encourages districts to come back with alternative solutions to the problem. This could be seen as reflecting a particular, modest conception of the function of the judiciary, as capable of facilitating the development of social policy and fostering creativity by playing a dialogic role. One approach, therefore, may be to focus on improving the poorer schools in the system, and thus seeking to ensure that children gain good quality educations within a de facto segregated system, possibly by means of creating a federal right to education. This involves a shift away from a civil rights mentality focused on race, which maintains that the only way to improve educational opportunity is through desegregation, to a focus on socio-economic background, regardless of colour.

Three points might be made in response to this proposal. First, it must be acknowledged that some would see the abandonment of the political initiative in favour of desegregation as a defeat. An approach which disregarded integration in favour of raising the level of the poorer schools would seem to signal some form of an acceptance of de facto segregation: a move which is painfully reminiscent of the 'separate but equal' doctrine of *Plessy v. Ferguson* (1896). Second, it should be acknowledged that it rests upon the claim that the problems which disproportionate numbers of African-American children face in terms of educational opportunities are essentially due to their class rather than their race. If this turns out not to be the case, then it may be that shifting the focus to the quality of schooling will do more for poor white children than for their African-American counterparts. An obvious open question here concerns which policy best serves the interests of other disadvantaged racial minorities, who have been, to an extent, disregarded in a political debate focusing on the implementation of *Brown*. Third, it might be noted that both the diversity approach and the socio-economic approach have a particular characteristic in common. Both are essentially forward-looking: they make no particular

reference to historical injustice, but seek to order future society in certain desirable ways. There is much to be said for looking to the future, and refusing to be weighed down by the baggage of the past. But this is not necessarily how American society works in general. History is important in the contemporary United States, as may be evidenced by the extent to which one generation is able to pass on advantages to another by means of (currently untaxed) inheritance. If one believes that African-Americans are entitled to a particular kind of treatment as a result of their particular historical experience; if there is, in short, any kind of debt that remains to be paid, then a focus solely on forward-looking accounts may not be entirely appropriate.

Finally, a question which, in the view of many participants, is yet to be resolved concerns the implications of the Louisville and Seattle cases in non-educational contexts. In particular, opinion was divided as to whether employers would also be restricted from using quotas to pursue diversity in their businesses. As was pointed out, quite apart from issues of social justice, there are increasingly obvious market-based reasons for companies to seek to recruit and retain workforces which are diverse in racial terms. It remains to be seen whether the Court's new position will radiate out from the particular area of education to affect what is potentially a wide range of other policy areas. If so, it may be that different types of alternative policies other than quota-setting will have to be formulated in each of these differing spheres.

SESSION TWO:

Reproductive Rights

Resnik began her remarks by noting that, since 1973, *Roe v. Wade* had served as a shorthand for the proposition that women have a constitutionally protected right to abortion. There is now a new shorthand amongst US constitutional lawyers: *Carhart*, referring to the 2007 decision of the Supreme Court to uphold the Partial-Birth Abortion Ban Act of 2003 in *Gonzalez v. Carhart* (2007). This is the first decision since *Roe* to uphold a statute that limits access to abortion without express provision of an exception for a woman's health (as contrasted with her life). The opinion in *Carhart* disavows the claim that it represents a full frontal attack upon the right to abortion, yet goes on to give graphic detail not only in relation to partial-birth procedures, but also in relation to other forms of abortion. There was, Resnik suggested, in the opinion a sense of abortion as a criminal act, which resonated with the way in which criminal acts are typically detailed in judicial proceedings.

There is a clear legal question at stake in the decision concerning whether the US government has the right to regulate doctors by telling them that a particular form of treatment is now illegal and banned. The standard way of approaching such a question concerning the regulatory role of government would be to ask what kind of power the US Congress has, and then ask if the power in question has been properly exercised. The *Carhart* decision, however, is most unusual in this regard, hardly mentioning the commerce clause, and not making reference to substantive due process. Instead, one might ask whether the decision was fundamentally about women. There is much discussion, in the majority

opinion, of women as mothers, a terminology which is extended even to women post-abortion. Resnik suggested that one might see the requirement that doctors provide women with information as being on a par with the treatment of prisoners, suggesting that the law views women as 'prisoners of their sex', lacking the agency to make their own decisions. Congress has a legitimate interest in preventing sex stereotyping. The equal protection clause protects women as equals, with autonomy and liberty interests. The use of sex stereotyping in the *Carhart* decision works directly against this end. The Court was behaving in a manner more akin to the French Conseil Constitutionnel, acting as a free-standing institution, without regard for the lower courts or for past history.

Resnik therefore posed the question of whether this might be an example of when we might wish for the courts to be silent? Would social policymaking on reproductive rights be improved without judicial involvement? Two broad responses were made to this question. First, in empirical terms, courts around the world are involved in issues relating to health and women's rights. At a national level, examples include Germany, Canada, Columbia, and Nicaragua; at the transnational level, one might look at the role of the European Court of Human Rights and the United Nations Human Rights Committee. So, in empirical terms, abortion is a judicial matter all over the world. But this still leaves the normative question of whether this is a good thing. Might one see the last thirty years of constitutional struggle over reproductive rights in the United States as a pathological failure? Resisting this conclusion, Resnik drew upon Jürgen Habermas's concept of the public sphere to outline a positive understanding of the dialogic role of the courts within modern-day democracies. Rather than seeing their involvement as indicative of pathology, one can see their distinctive methods, which include a commitment

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to hearing both sides of a dispute in public, and to give public reasons for their judgments, as making a valuable contribution to democratic deliberation.

Discussion and analysis

In starting discussion, Sullivan observed that both the Right and Left could criticize the way in which the debate over reproductive rights has been judicialized. For many on the Right, the courts, relying on disputed ideas of substantive due process, have invented a right which has proved very costly to human life. For some on the Left, the *Roe* judgment is actually seen as unhelpful, since it is believed that the same outcome could have been reached more peacefully via more straightforwardly democratic channels. The aftermath of *Roe* has certainly seen considerable conflict. Although the anti-*Roe* movement did not succeed congressionally, it has been very successful at a state level in making abortion more expensive and more costly. This political success was reflected in the Court's jurisprudence, as it permitted legislation (in relation, for example, to twenty-four hour waiting periods) which would earlier have been struck down, enabling the pursuit of 'permit but discourage' policies. It is possible, then, to see the anti-partial-birth abortion movement as part of this general backlash, using the graphic detail of procedures to counter the accounts of back-street abortions given by the pro-choice movement. One perspective on *Carhart* therefore sees it as marking the end of a particular stage of reproductive rights policy, from the 'permit but discourage' position to one whereby abortion can now be prohibited in some cases.

An alternative perspective, however, scrutinizes the actual policy which the Court has now made. Has the Court's intervention saved a single fetal life? The outcome of *Carhart* is the prohibition of intact, not non-intact, D & E (dilation and evacuation) procedures. What is upheld is an attitude towards human life. This may, of course, have indirect policy consequences, but it is at least interesting that this is not, as a matter of direct policy, a life-saving decision. So it is possible to view *Carhart*, in policy terms, as something of a sideshow, insofar as its

practical effect will not be to reduce the number of abortions carried out.

A greater part of the discussion following Resnik and Sullivan's comments concerned the Court's ability to act, as a political actor, in pursuit of a particular policy programme. It was argued by a number of participants that the true significance of *Carhart* lay not in the, admittedly slight, practical consequences it was likely to have in restricting partial-birth abortions, but rather in the indications it provided for legislators in relation to its likely decisions in future cases. Some believed that the Court was deliberately signalling that there were other laws restricting abortion that it would also allow as constitutional. In this view, the decision is potentially momentous, and conceivably the start of a chain of events which might end in a decisive overturning of *Roe v. Wade*. Perhaps more cynically, it was alternatively suggested that the Court had no intention of overturning *Roe* (one participant claimed that doing so would provoke a 'firestorm'; and that the Court 'would get written up as if they had decided *Dred Scott*'). Their intention was, however, deliberately to muddy the constitutional waters, creating doubt as to which procedures were and were not legitimate, thus seeking to reduce the overall number of abortions performed.

In opposition to this line, others suggested that the Court was largely acting in response to public opinion. Polling shows overwhelming support for a right to abortion in general, but not in the particular case of partial-birth abortions. It might then be that one should take the Court's ruling at face value, rather than as an attempt to signal its future intentions and prompt the passage of further legislation. Regardless of one's interpretation of the Court's actual intentions, it is nonetheless striking that the Court has indeed been interpreted as signalling its intentions by many of those involved on both sides of the political struggle over reproductive rights. So even if one does not hold that this is a deliberate attempt to encourage legislatures to act, the experience of *Carhart* reveals something of the capacity of the Court to engage in just this kind of

behaviour should it wish to do so. This might lead one to re-evaluate one's view of the competency of the courts in the social policy field, although this increased competency in terms of systematic, programmatic policy affecting power may compromise their particular appeal to authority. However, it was also noted that such signalling can have unintended and perverse consequences if opposition to the Court's decision has a stimulating effect on political activism. Insofar as this does in fact take place, it does serve as a potential limitation on the Court's ability to bring about policy outcomes.

As one might expect, strong views were expressed on both sides of the substantive debate over abortion. Although a majority of participants seemed hostile to the Court's line on *Carhart*, it was observed that in a conservative think tank attention would have been focused not on criticisms of *Carhart* but of *Roe* itself. But apart from the deeply contentious issues surrounding fetal life and the broad issue of the Court's jurisdiction in this area, there was a noteworthy degree of criticism of the form and content of the *Carhart* judgment. A number of participants followed Resnik in both criticizing, and expressing surprise at, the strongly gendered terminology of Justice Kennedy's judgment (which argues that 'respect for human life finds an ultimate expression in the bond of love the mother has for her child'), the emotive references to the procedures used in partial-birth abortions (one participant noting that it would be possible to describe a wide range of medical procedures in such graphic terms that many people would be reluctant to undergo them), and the problematic use the judgment makes of highly disputed empirical data. On this last point, it should perhaps be noted that the Court was, in some instances, citing claims made by legislative bodies without apparently scrutinizing the supporting evidence in question.

It is not therefore clear quite what conclusion one should draw from the claim that much of the data referred to in the judgment is factually incorrect: does this reflect an institutional failing of judiciaries, insofar as their powers of data collection and

scrutiny are limited, or is this rather an example of a particular failing in a given case? It is, of course, interesting that, in this particular instance, it is hard to argue that legislative processes are more effective in this regard, given the provenance of the data in question; and indeed participants familiar with the passage of the relevant laws maintained that the legislative process had been, in a number of regards, cursory and partisan. An open question concerns the role of the courts in such cases. Do they have a responsibility to scrutinize the evidence which legislatures provide in support of their policies? Or is the question of whether or not the policy is a good one beyond their proper remit, which is to determine whether the legislation is constitutional?

A number of participants expressed dismay that the judgment did not provide for a women's health exception, as previously stipulated in *Stenberg v. Carhart* (2000) (with Justice Kennedy instead citing the dissent from *Stenberg* as an authority). This element of the ruling was viewed by some as potentially of great significance in relation to future judgments. An obvious question which this raises concerns the way that the Court communicates its decisions when it appears to change its outlook as a result of changes in its composition. A number of participants suggested that when this occurs, it would be better for the Court openly to state that it believed that earlier cases had been decided incorrectly, rather than, as some allege has occurred in *Carhart*, misrepresenting the true character of their judgment. This may potentially be a significant issue in the future, since there are plausible scenarios where the replacement of a single member of the Court could create a majority opinion which would seemingly be opposed to many of the most important judgments of recent years.

Questions were also raised relating to the authority of the Court given the nature of its composition: two obvious themes being the fact that five of the nine Justices are Catholic, but only one is a woman. In terms of the authority of the Court, it was suggested that it was significant that the only African-American Justice, Thomas, was in the majority in the Seattle and Louisville cases, whereas the only

female Justice, Ginsburg, was in the minority on *Carhart*. Nonetheless, in both cases, the Court was deeply unrepresentative in terms of its composition of those most affected by its decisions. For some, this is deeply problematic; for others, who stress that the role of the Court is to judge constitutionality rather than formulate policy, it is unimportant.

Perhaps the most difficult issue in terms of this topic concerns counterfactual speculation as to where social policy on reproductive rights would now be had *Roe v. Wade* never taken place. For some, *Roe* represented the Court at its best: seeking to uphold basic and essential individual rights in the face of opposition from legislative actors, a project with which the minority in *Carhart* are still engaged. From this perspective, one may see *Roe* in a similar light to *Brown*, as an example of a judiciary seeking to make policy when a legislature was unwilling or unable to do so, and so breaking a political deadlock. For others, *Roe* has been unhelpful, turning what is essentially a moral question, best decided through democratic fora, into a constitutional debate, thus affording an unwarranted degree of authority to unelected judicial actors. The result has turned abortion into a litmus test which has bedevilled judicial appointments and damaged the effective functioning of the courts.

One might argue that unforeseen policy consequences have resulted from the issue being framed in terms of rights, in fields such as sex education, and research into post-conception contraception, for example. Participants were accordingly unable to agree on what would happen were the Supreme Court to overturn *Roe*. For some, the judiciary is all that prevents a number of state governments from outlawing abortion. Others maintain that while there would certainly be political initiatives in favour of such an outcome, the issue would ultimately have to be settled electorally. It is possible then, given a certain view on the likely outcome of such contests, to be both pro-choice but anti-*Roe*. One interesting observation here concerns the comparative extent to which abortion is politicized in the United States, compared to most European countries, where the issue features far less prominently in political discourse, and where abortion is often more readily available. Is the politicization of reproductive rights in the United States a function of American exceptionalism, as a result of high levels of religious affiliation, for example? Or might this be a direct consequence of the historical judicialization of the issue?

SESSION THREE:

National Security and Terrorism

In his introductory remarks, Graham outlined the background to the Supreme Court's 2006 decision in *Hamdan v. Rumsfeld*, where it declared unlawful the Military Commissions set up by the US administration following the al-Qaeda terrorist attacks of 11 September 2001. This case, which has been followed by further indications by the Court that it intends to render decisions favourable to Guantanamo inmates in the course of 2008, exemplifies a post-9/11 trend, whereby it has been up to the courts to act as a check on an expansionary executive, in a context of legislative acquiescence. The challenge facing the US government is how to put forward a long-term, institutionalized approach to dealing with terrorism.

The question which pervades the entire subject is whether one is dealing with terrorism or with armed conflict. One approach is to argue that those involved in terrorist activity are individuals who have engaged in criminal activity, and who should therefore be prosecuted under criminal law. Others have maintained that existing law is insufficient to deal with the particular threats posed by globalized terrorism, and so have sought to characterize the participants as being engaged in armed conflict against the United States. It is the latter strategy which has been pursued by the US administration. In promulgating its concept of the 'Unitary Executive', the administration has referred to the 9/11 attacks as an 'act of war', and so has sought to cast the subsequent 'war on terror' as falling within the terms of presidential war-making powers. This has become more controversial as events have unfolded. Graham suggested that the intervention of the United States in Afghanistan from October 2001 was uncontroversial under international law, given that the Taliban regime had claimed that it was not only unable but unwilling to act against the al-Qaeda organization within its territory. The Taliban thus presented a willing target. The president initially determined, based on

Department of Justice (DoJ) advice, that the US government would not apply the 1949 Geneva Conventions to the Afghanistan conflict, and in particular would not apply the Third POW Convention to either Taliban or al-Qaeda captured personnel. Following an international outcry, a Memorandum was issued on 7 February 2002, which held that although the president was legally empowered to suspend the applicability of the conventions to Afghanistan, he would not do so. However, it further argued that none of the Taliban captives met the Third Convention requirements necessary to be afforded POW status. Thus, all al-Qaeda and Taliban combatants were instead treated as 'unlawful combatants', who would be treated humanely in a manner consistent with the Geneva Conventions only 'to the extent appropriate and consistent with military necessity'.

The question thus emerged of what law applied to the Guantanamo inmates. The president had already, in November 2001, issued a Military Order establishing Military Commissions to try individuals deemed to fall within the terms of the order by dint of their being deemed to pose a threat to US interests. The DoJ furthermore issued the now infamous 2002 'torture memorandum', which sought to outline (in extreme fashion) forms of interrogation which, it claimed, did not fall foul of the 1984 Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment. The opinion was withdrawn in 2004 when knowledge of the techniques in question became public, at the same time as news broke of the Abu Ghraib abuses in Iraq. 2004 also saw three Supreme Court decisions that served to check the executive, whose 'war powers' actions had not been challenged by Congress, in terms of due process and habeas corpus (*Rumsfeld v. Padilla*, *Hamdi v. Rumsfeld* and *Rasul v. Bush*). Following these decisions, Congress passed the 2005 Detainee Treatment Act (DTA). The DTA prohibited

individuals detained by the Department of Defense from being subjected to 'cruel, inhuman or degrading treatment or punishment', but defined this in terms of the very broad standard that the treatment in question should not 'shock the conscience of the court'. It furthermore exempted personnel from prosecution if a reasonable person would not know that a given procedure was unusual, prohibited US courts from entertaining habeas writs filed by aliens detained in the course of the 'war on terror', and stripped the right of detainees to appeal to anything other than the DC Circuit Court of Appeals.

Soon after the passage of the DTA, the Supreme Court made its decision in *Hamdan v. Rumsfeld* (2006). Ignoring the DTA's limitation on his jurisdiction to review the DC Circuit Court, *Hamdan* ruled that the Military Commission process violated both the US Uniform Code of Military Justice and Common Article 3 of the Geneva Convention, since the commissions had not been directly authorized by Congress. As well as invalidating the presidentially-dictated commissions process, the decision holds that treatment of detainees which contravenes the Article 3 prohibition on 'outrages upon personal dignity' constitutes a war crime. The *Hamdan* decision seemingly came as a genuine surprise to the administration, which had not been challenged by Congress up to this point. The immediate consequence of the ruling was the passage of the 2006 Military Commissions Act (MCA). Amongst other provisions, the MCA reaffirms the prior stripping of the jurisdiction of the federal courts to hear habeas appeals from detainees, sanctions the use of coerced testimony before a Military Commission, and amends the 1997 War Crimes Act to immunize those who violate Article 3 on 'outrages upon personal dignity'. Subsequent judicial developments have seemingly reaffirmed the determination of the Supreme Court to oversee the Military Commissions process, once other sources of appeal have been exhausted. Quite what the Court will rule, in considering appeals from Guantanamo detainees as to their indefinite detention as 'enemy combatants', remains to be seen.

Discussion and analysis

It seems clear that the Supreme Court has sought to exercise real influence on the policymaking process through its decisions in cases such as *Hamdi* and *Hamdan*. In discussion, opinion was divided as to how effective the courts had been in this instance. Some participants, who had characteristically been critical of the recent workings of the Court in the two preceding sessions, expressed support for the Court's position, feeling that it had managed to impose meaningful and significant checks upon an executive which, in asserting the doctrine of Unitary Executive power, was making a claim to near absolute authority. It was argued that its role compared very favourably to that of Congress in this regard, and some discussion related to the institutional failings of legislatures in terms of foreign policy scrutiny, where it seems as if many legislative actors frequently have no electoral incentive to seek to challenge executive action; a problem which is exacerbated in a political context where strong partisan loyalties are brought to the fore. It was even suggested that there was consensus amongst all participants that the response of Congress to the situation had been unsatisfactory. Some participants were broadly supportive of the Court's actions across all three policy areas covered in the seminar, holding that its intervention in this case was substantively different from its role in the other cases since different issues of democratic authority are in play, firstly, in relation to the executive than to the legislature, and, secondly, in relation to foreign and to domestic policy. Thus, it was argued that 'courts are most at home when keeping checks on the executive'.

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For others, however, the fact that the Court's actions have had seemingly little or no effect on the ground, in terms of changing the day-to-day experience of the Guantanamo detainees, meant that they had suffered a serious failure; it being suggested that the 2002 'torture memo' had actually had more effect on the law than the Supreme Court's interventions. The detainees were captured in 2001. The *Hamdi* ruling was handed down in 2004, and yet, as of summer 2007, the prisoners were still to be charged. Whereas states such as Israel and Germany had managed to carry out accelerated trial processes, this had not taken place in the United States. Notably, for example, those accused of complicity in the 7/7 bomb attacks in the United Kingdom had been tried and convicted under existing criminal law in a relatively short period of time. Thus, one might argue that the courts' influence on policy had been too little, too late, and too slow.

To what extent this should be seen as a failing of the Supreme Court, rather than an unavoidable consequence of the reactive character of judiciaries is, of course, a slightly different question which raises the unavoidable issue of the competency of courts in this kind of policy area. Courts must work their way through highly complicated webs of legal provisions, in contrast with other political branches, which are less restrained. Although this does clearly limit their ability to respond immediately to political events,

it may well be seen as constituting a strength as well as a weakness in some policy areas. Particular challenges are posed for both the judiciary and the legislature when they seek to check the executive in relation to foreign policy in general, and in relation to the conduct of war in particular. It is hard, for example, for Congress to refuse to fund military operations once troops have already been committed overseas. Both institutions, then, are restricted to reactive scrutiny of executive action, which clearly seriously limits the extent to which they are able to check executive policy, far less actually pursue their own policy goals. But if the legislature appears to be either unwilling or unable to exercise any meaningful check upon the executive, then it may well be felt that the role devolves to the judiciary automatically, *faute de mieux*. This may not be the role intended by the framers of the Constitution, but it is far from clear that they anticipated the extent to which parties affect the workings of Congress in the present day. Even if it is accepted that the courts have had, at best, a limited impact on actual policy outputs in this case, if one is committed to the principle of the separation of powers and to the idea of checks and balances within government, one ought to be able to derive a certain degree of satisfaction from the willingness of the Supreme Court openly and publicly to challenge the policy of the core executive on emotive matters of national security.

Conclusion

The workshop concluded with final thoughts from Sullivan and Dr Daniel Butt. Sullivan suggested that there were roughly three broad approaches to the question of the court's involvement in social policymaking. The first approach is broadly hostile, and maintains that courts are unelected, and therefore lack democratic legitimacy and/or competence in policymaking, given their deficiencies in fact-finding, and their inability to bring about remedies. From this perspective, the courts should intervene very little, and restrict their role, as far as possible, to interpreting the law.

The second approach holds that courts should be positively counter-majoritarian institutions. Reflecting Posner's assertion that, 'I am not a potted plant', this approach assigns the courts a responsibility and duty to look after minority rights. It is therefore desirable that the courts should be insulated from public opinion, should base their decisions on precedent, and should be able to take a long-term view, avoiding the myopic, short-term view of other political actors. From this viewpoint, it is a good thing when courts stand up; if anything, they do it too little. Politics, therefore, would benefit from more, not less, judicial intervention.

The third approach is perhaps the dominant view of the contemporary liberal community, and reflects an attachment to popular constitutionalism. This holds that courts should be modest and minimalist, reflecting the truth that judges are policymakers in robes. Judges do well, on this account, when they conceive of themselves as fallible, and temper their actions accordingly.

Sullivan then articulated the reasons why she is troubled by this third, increasingly popular view. In the past, there was a partisan bias lying behind one's adoption of one of the three approaches: whereas the Right was historically suspicious of the

courts intervening in the social agenda, the Left in the United States used to be much more supportive. Today, however, there is far more antipathy from the Left which, following the rise to prominence of conservative judges, fears judicial activism on conservative rights issues. The result is immense scepticism from the Left, which increasingly views judges as being essentially just the same as other political actors. Such a mentality, however, misses the transcendent, transsubstantive value in having a judiciary able to stand up to the excesses of the political branch. In Sullivan's view, even when one does not like a given incidence of intervention, we should still be glad, at some level, that judges are intervening.

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Butt began his remarks by noting that it is often assumed that judicial involvement in social policymaking comes at the expense of elected legislatures. Courts are seen as intervening in the policy process when they substitute their own policy preferences for those of legislative actors. Opinions vary as to whether such actions are best characterized as courts acting impartially to uphold individual rights against tyrannous majorities, or as judges seeking to translate their own policy preferences into practice, insofar as they can do so whilst still retaining their authority, stemming from public acceptance of their legitimacy. In both cases, there is an obvious objection to courts assuming this role, which rests upon their lack of democratic

legitimacy, as opposed, in particular, to democratically elected legislatures. Much of the contemporary discussion of judicial policymaking makes reference to this perceived democratic deficit.

However, it was striking that many of the cases discussed in the course of the seminar did not fit straightforwardly into this classic legislature versus judiciary typology. In all three policy areas – affirmative action, reproductive rights, and terrorism and national security – it was possible to argue that the courts had, at some stage, been drawn into the policymaking process as a result of legislative withdrawal; by the unwillingness and/or inability of democratically elected legislative institutions to play the policymaking role which classical theories of legislative functions attribute to them. This occurs either in cases where the legislature does not play an active role in the policymaking process, leaving a political vacuum due to either deadlock in the legislature on an unwillingness on the part of elected representatives to take unpopular decisions, or does pass policy affecting legislation, but does so at the behest of other political actors, notably, the executive, without assessing and scrutinizing the legislation in the way that advocates of the separation of powers would recommend. In such cases, the role of the courts is complicated and difficult. It is not readily assessed by simple assertions that the courts' responsibility is simply to interpret the Constitution, or to uphold individual rights against legislative majorities. Instead, the ends of good policymaking seem to require that the courts adopt a more active role in the governmental process, at times scrutinizing the grounds for executive and legislative decision making, and at times act as a check on these institutions.

A number of participants at the seminar sought to defend judicial activism explicitly in democratic terms, commenting that judges' involvement in the policymaking process can serve deliberative ends of fostering and improving public debate over, and scrutiny of, public policy. This approach does not make much sense if one clings to the traditional notion of the courts as simply acting to prevent

constitutional abuses, constraining other political actors when they act in particular ways which exceed their constitutionally allotted powers. But, putting it bluntly, none of the branches of the US government currently act in the manner in which the framers of the US Constitution intended. The framers could not and did not anticipate the nature of modern government, characterized by highly complex technical management of the economy, a massively expanded role for the federal government in regulating the welfare of individual citizens, and a transfer of legislative initiative from the legislature to the executive. The modern political terrain, whereby congressional activity takes place within a particular context of party politics and special-interest influence, is very different from that of the late eighteenth century. This being the case, it is certainly possible to argue that the spirit of the Constitution is better served by the courts adopting an interventionist attitude to social policy and thus fostering democratic debate and activity than by, for example, sitting back and allowing the executive untrammelled authority, as Congress appears to have done in recent years in relation to the treatment of terrorist suspects.

However, supporting the general principle of judicial intervention is not to support each particular instance of judicial policymaking. In particular, the question of scope which Sullivan raised at the start of the seminar is key. Claiming that the Supreme Court should act as a check on other political actors, for example, leaves open the question of whether it should be insisting that these other political actors reformulate their policy (by reference to some timetable by which they have to act, for example), or substituting its own policy for that of the political actors in question. The latter policy does of course raise issues as to the democratic authority of the Court so to act, but it surely must also be justified in terms of the competency of the Court. This central issue, the extent to which courts make good policy compared to other political institutions, is one which political scientists are still trying to evaluate. Previous workshops of the Foundation for Law, Justice and Society have stressed the extent to which

there is potential for much more work to be done in this area. One remarkable aspect of the debate in Aspen, however, concerned the extent to which the current institutional structures of the US judiciary were taken for granted in this debate. This is striking from a comparative perspective: debates as to the role of the judiciary and the legislature in British politics, for example, are often characterized by proposals for institutional reform.¹ Obviously, this is due in part to constitutional differences between the two states: the supremacy of Parliament and absence of a written constitution makes amending the constitution much easier than in the United States. But if the interventionist role of the US courts is to be defended in competency terms, then some kind of consideration of their institutional strengths and weaknesses is unavoidable. Consider, for example, the Supreme Court. Does it have sufficient institutional resources to carry out a policymaking role? If not, can changes be proposed which would better enable it to act in such a way? Is the optimum number of Justices on the bench nine? Is the current process of executive appointment and legislative approval the best way to appoint Court personnel? Should the life tenure of Supreme Court Justices be reviewed? Similar questions can, of course, be asked of the judicial system as a whole. It is not that such questions are not raised at all in the United States.² But it is striking that, in comparative terms, they do not feature prominently in political discourse. If we believe both that the role of the courts in contemporary society has evolved, and that this is, on balance, a good thing, then we should surely consider whether its current levels of competency can be improved.

If we believe that the role of the courts in contemporary society has evolved...then we should surely consider whether its current levels of competency can be improved.

The level of discussion throughout the seminar was extremely high. On behalf of the Foundation for Law, Justice and Society I would like to thank all participants for their valuable contributions. Special appreciation is, of course, due to the Aspen Institute Justice and Society Program, and to Alice Henkin and Mary Holland in particular.

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Participants

John W. Adams, Chairman, the Foundation for Law, Justice and Society

Dr Daniel Butt, Programme Director, the Foundation for Law, Justice and Society, and Fellow of Oriel College, Oxford

Timothy G. Cameron, Cravath, Swaine & Moore, LLP

Professor Dennis Edward Curtis, Yale Law School

Richard W. Clary, Cravath, Swaine & Moore, LLP

Paul Dodyk, Cravath, Swaine & Moore, LLP

Professor Peter Edelman, Georgetown Law School

Rep. (ret.) Mickey Edwards

Rep. (ret.) Donald M. Fraser

Professor Denis Galligan, University of Oxford and member of the board of directors of the Foundation for Law, Justice and Society

David E. Graham, The Judge Advocate General's Legal Center and School, US Army

Alice Henkin, Aspen Institute Justice and Society Program

Mary Holland, Aspen Institute Justice and Society Program

Rep. (ret.) Robert Kastenmeier

Adam Liptak, National legal correspondent, *New York Times*

Rory O. Millson, Cravath, Swaine & Moore, LLP

Judge Jon Newman, US Court of Appeals, 2nd Circuit

Professor Judith Resnik, Yale Law School

Judge Judith Rogers, US Court of Appeals, DC Circuit

Rep. (ret.) Pat Schroeder

David Sciarra, Education Law Center, New Jersey

Professor Kathleen Sullivan, Stanford University Law School

Judge Patricia Wald (ret.), US Court of Appeals, DC Circuit

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Daniel Butt is the Programme Director of the programme on *Courts and the Making of Public Policy*, Foundation for Law, Justice and Society, University of Oxford. He is fellow and tutor in Politics at Oriel College, Oxford, and a member of the Centre for the Study of Social Justice, affiliated with the Department of Politics and International Relations at Oxford University. His first book, *Rectifying International Injustice: Principles of Compensation and Restitution Between Nations* will be published in 2008 by Oxford University Press.

For further information please visit
our website at www.fljs.org
or contact us at:

The Foundation for **Law, Justice and Society**

Wolfson College
Linton Road
Oxford OX2 6UD
T · +44 (0)1865 284433
F · +44 (0)1865 284434
E · info@fljs.org
W · www.fljs.org