The Architecture of Judicial Power

Appellate Review and *Stare Decisis*

By Hon. D. Arthur Kelsey

Perhaps no other nation has been more concerned about the segmentation of governmental power than America. We have fractured it in innumerable ways. Asserting that all power derives from the consent of the governed, the federal and state constitutions act as distribution grids—apportioning authority between the federal government and the fifty states, and then even more so among the separate states and their various localities. At both the federal and state levels, an additional tripartite division of authority separates legislative, executive, and judicial power.

The organizing principle of this architecture is not efficiency or consistency, but a profound distrust of concentrated power. The constitutional draftsmen openly advocated distrust as the principal rationale for the diffusion of governmental power accomplished by their blueprints. Obvious methods of consolidating decision-making authority were ditched for the comfort of knowing that surge protectors were wired throughout the highly engineered system to safeguard against dangerous concentrations of unchecked power.

The separation-of-powers and federalism doctrines illustrate their handiwork better than any other examples. As James Madison explained: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the *very definition of tyranny*."[1] Even in a democratic republic, Thomas Jefferson agreed, concentrating these powers would be "precisely the definition of despotic government."[2] Similar concerns underscored their insistence on creating a republic, not a pure democracy, to harness the power sharing implicit in federalism. Prescient in their fears, the constitutional architects believed the principal benefit of power diffusion (protection against tyranny) far outweighed its costs (inefficiency, redundancies, factionalism, and internal power struggles, to name but a few).

One systemic cost of segmenting governmental power is the added burden of determining which among competing subsets of power has the rightful authority to exercise it. So, before any serious legal question can be answered, another a priori question must first be asked: Who decides? We cannot say *what* the answer is until we know *who* gets to make the call. This who-decides question necessarily stems from the comprehensive devolution of power inherent in the American system of government. It is the question that precedes every other. And it is the one question that, if overlooked, will put in doubt all answers to all other questions.

The American instinct for subdividing power worked its way into the design of the judiciary. James Wilson, one of the principal drafters of Article III and an inaugural member of the U.S. Supreme Court, pointed out that the "essential elements of judicial architecture" include the "broad distribution of jurisdiction among inferior tribunals at the base of the judicial pyramid and one supreme tribunal [to] superintend and govern all the others."[3] This pyramiding was accompanied by two companion sets of rules: the appellate standard of review and the doctrine of *stare decisis*. Both involve crafted principles that provide order and stability to the judicial process. Because of this, they are sometimes treated as mere housekeep-

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ing rules—more concerned with the tidiness of the decision making than with the decision itself. But underlying both, I believe, is a deeper premise: the need to create a principled diffusion of decision-making power and thereby to limit the risk of creating dangerous nodes of power within the third branch of government. Just as separation of powers and federalism purposefully segment governmental power, so too do the principles of appellate review and *stare decisis*.

Appellate Review—The Vertical Segmentation

Consider first the hierarchical standards of appellate review. These standards at the most basic level divide courtroom contests into two discrete categories: law and fact. As a general rule, appellate judges get the last word on the former; lower-court fact finders (whether juries or trial judges) decide the latter. Which of the two is more important depends entirely on one's vantage point. To expand upon Justice Wilson's illustration: a two-dimensional side view of the pyramid shows the highest court at the apex of law. But a three-dimensional view from directly above shows the factual base of the pyramid, the exclusive province of the lower courts, to be the larger and weightier aspect of the same structure.

The normal apologetics for the law-fact division of labor focus on the fact finder's direct observation of the witnesses and the corresponding distance between the appellate jurists and these same witnesses. Separating truth tellers from liars is much easier, it has always been thought, when the storytelling is accompanied by nonverbal (and sometimes involuntary) communication. Another common reason for the standard of review is the differing structure and operation of trial and appellate courts, as well as the unique capacities of each.

Yet these explanations, while certainly true as far as they go, do not go far enough. Underneath the appellate standard of review lies a more basic rationale. "The principle that the jury were the judges of fact and the judges the deciders of law was stated as an established principle as early as 1628 by Sir Edward Coke."[4] The best explanation underlying this principle came more than a century later from William Blackstone. He feared that professional jurists—or, in his words, "the magistracy, a select body of men, usually chosen by the prince, or by parties holding the highest offices in the state"—would have a natural "involuntary bias towards those of their own rank and dignity."[5] Although this feared bias could manifest itself in outright favoritism, it could also involve the judicial imposition of elite values and culture on those outside the privileged strata of society. "On the other hand," Blackstone cautioned, "if the power of judicature was placed in the hands of the multitude, their decisions would be wild and capricious, and a new rule of action would be every day established in our courts."[6]

The common law, Blackstone concluded, shrewdly divided judicial decision-making power between them. "It is therefore wisely ordered," he explained, "that the principles and axioms of law, which are general propositions flowing from reason, and not accommodated to times or to men, should be deposited in the breasts of the judges." Determinations of fact, however, should be left in the hands of "a competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank," whom Blackstone described as "the best investigators of truth, and the surest guardians of public justice."[7]

The Blackstonian justification for the law-judge/fact-jury dichotomy became particularly relevant during the ratification debates over the U.S. Constitution. To many of the Framers' generation, the jury was "'the lower judicial bench' in a bicameral judiciary" and "the democratic branch of the judiciary power—more necessary than representatives in the legislature."[8] To them, the jury was "no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."[9] The "common people," John Adams wrote, "should have as complete a control . . . in every judgment of a court of judicature" as in the legislature.[10] Jefferson was even more emphatic: "Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative."[11] As the "democratical balance in the Judiciary power,"[12] the jury system secured to the citizenry "a share of Judicature which they have reserved for themselves."[13]

Because the jury served as a core aspect of popular sovereignty, both Federalists and anti-Federalists alike greatly feared the possible usurpation of the jury's fact-finding role by judges. These sentiments were so strong that five of the required nine states would not have ratified the U.S. Constitution without the understanding that their proposed amendments, which included the right to trial by jury and a prohibition against appellate fact-finding, would be submitted to the states during the first Congress.[14] Their concerns, voiced during the state ratification debates, stemmed from Article III of the Constitution, which guaranteed trial by jury only in criminal trials and provided that "the supreme court shall *have appellate jurisdiction, both as to law and fact*, with such exceptions, and under such regulations as the Congress shall make."[15]

As Justice Story later explained, an appeal at that time was "a process of civil law origin, and remove[d] a cause

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entirely, subjecting the fact, as well as the law, to a review and a re-trial."[16] While appeals existed in Britain's chancery system, they were unknown in common law, which used a "writ of error" that "remove[d] nothing for re-examination, but the law."[17] Many of the founding generation, therefore, regarded the Constitution's grant to the Supreme Court of appellate power "both as to law and fact" and its failure to provide specifically for civil jury trials to be dangerous concentrations of power in an aristocracy of judges.[18] As Virginia delegate Richard Henry Lee passionately argued, "every tribunal, selected for the decision of facts, is a step toward establishing aristocracy—the most oppressive of all governments."[19]

These concerns gave rise to the Seventh Amendment to the U.S. Constitution, which guarantees the right of jury trial in civil matters and incorporates into the Constitution principles of appellate review. The Seventh Amendment provides in part that "no fact tried by a jury shall be otherwise *reexamined* in any court of the United States, than according to the rules of the common law." Because the common law permitted no appellate review of facts, the Seventh Amendment effectively put to rest "apprehensions" of appellate court evidentiary trials by insisting upon appellate deference to trial court fact-finding.[20] Only by doing so could the law achieve the Blackstonian balance between the elitist preferences of the judicial "magistracy" and the "wild and capricious" decisions of the "multitude."[21]

We continue to live in that balance today. By atomizing decisions into findings of fact and conclusions of law, the standard of review leaves neither the appellate court judge nor the lower court fact finder with completely unchecked decision-making power. An appellate judge, anxious to move the law in one direction or another (whether for good or ill, depending on one's point of view) may find it difficult to do so without an alliance with the fact finder. Without it, he may go only so far. Likewise, a fact finder who wishes to monopolize the decision by manipulating factual findings will soon discover some dispositive aspect of his decision recharacterized by his appellate overseer as a question of law—for which the appellate judge has the last word. In the end, an appellate judge or fact finder wanting to break new ground is impeded from doing so because the final decision only partly belongs to each of them.

Appellate judges sometimes assert decision-making power over facts and inferences, essentially substituting their impression of the factual record for the contrary interpretation adopted by the trial judge or jury. When this happens, the safety limits engineered into the judicial power grid break down—concentrating power in a single, unchecked decision maker. In any particular case, that concentration of power may produce a good decision or a bad one. Since the beginning of our nation, however, the American instinct is to fear the worst.

The anomaly can also occur in reverse, as when a fact finder manipulates the decision of which historic facts to declare true in a deliberate effort to nullify the legal consequences that flow from that declaration. This bastardization of roles, called "jury nullification" when practiced by lay jurors (no similarly emotive phrase has been coined to describe its practice by professional jurists), vests the fact finder with decision-making power over both the facts and the law. Here again, the nullification may produce a result we think right. We certainly have historic examples of such, the most famous being the acquittal by a colonial jury in 1735 of Peter Zenger of seditious libel even though he confessed to printing a journal containing articles critical of British authorities.[22] Still, the uniquely American fear of concentrated power counsels against permitting fact finders to decide on their own which laws they will follow and which they will ignore. It is entirely understandable, therefore, that most judicial responses to jury nullification have been laced with overt condemnation of the practice as little more than ad hoc lawlessness.

Stare Decisis—The Horizontal Segmentation

Similar observations can be made of *stare decisis*. In contrast to the appellate standard of review, which operates vertically one case at a time, *stare decisis* applies analogous power-segmentation principles horizontally over the course of many cases. Though some now consider *stare decisis* to be "little more than a joke,"[23] I believe it has atrophied from selective disuse by being decoupled from its most basic rationale: the diffusion of decision-making power over time, across a long line of jurists—each deferring when she can, where she should, whenever she must, to those ahead of her in the jurisprudential queue.

At a bare minimum, *stare decisis* means a court of last resort should not change its mind on a settled legal principle simply because it produces a result the court dislikes.[24] Though a dose of cynicism might explain some of the reasons for deferring to our judicial predecessors (recall Justice Cardozo's observation that "the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case," and thus, judges must sometimes "stand by the errors of our brethren the week before, whether we relish them or not"),[25] the more enduring apologetic rests on resisting the arrogation of power to those judges who by happenstance preside over the most recent case.

It is often said that *stare decisis* places a high value on juristic tradition. And so it does. That traditionalism, however, means considerably more than postulating that the jurists of prior generations were smarter and wiser than those who now sit in judgment. The tradition protected by *stare decisis* has a

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higher goal: spreading judicial power over time along a linear series of decision makers. As G.K. Chesterton put it, "Tradition means giving votes to the most obscure of all classes, our ancestors. It is the democracy of the dead. Tradition refuses to submit to the small and arrogant oligarchy of those who merely happen to be walking around."[26]

Sharing judicial power with our predecessors recognizes, as Justice Holmes observed, that a "well-settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest it is to resist it at every step."[27] At every appellate court decision conference, *stare decisis* reserves an empty seat for those many minds. Their vote represents the views of a silent multitude of jurists. Calibrating their vote with the appropriate weight has a democratizing influence on the modern judiciary.

I do not mean to denigrate the concerns usually advanced in support of *stare decisis*, like the need for reliability in the issuance of legal pronouncements and the potential damage to the judiciary's institutional reputation if it constantly changes its collective mind about important things. Nor do I disagree that *stare decisis* is the "means" by which courts "ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion."[28] But I believe the more persuasive reason for the doctrine is founded on a more base calculation about human nature and, thus, about judicial power.

If the restraints of juristic tradition could be freely thrown off, judicial decision makers would have unparalleled license to reconstruct the law to fit their particular, ever-changing views.[29] This is a bad thing, not merely because its protean qualities would disquiet the settled expectations of society, but because it could be (and quite likely would be) a subterfuge for politicizing the judicial process.[30] The American élan vital, since the earliest stages of the republic, has placed its trust in incremental change far more than in dramatic upheavals. To be sure, even as the American colonies sent their sons into battle for independence from Great Britain, many simultaneously incorporated English law into the corpus juris of the new nation. At least in this one respect, the American Revolution was far less revolutionary than we may now suppose.

Here again, we see these concerns surfacing during the ratification debates over the U.S. Constitution. The anti-Federalist advocate using the pseudonym "Brutus" contended that the proposed Constitution's implicit grant of power to the Supreme Court to construe the "spirit" of the Constitution legitimated the exercise of unbridled authority.[31] In Federalist No. 78, Alexander Hamilton countered that the judiciary, though independent of the legislative and executive branches, would be self-policing through its adherence to "strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." Such inherent self-restraint and respect for precedent, he contended, would make the judiciary "beyond comparison the weakest of the three departments of power" and thus "least dangerous" to the liberties of the people.[32] Hamilton borrowed his view of *stare decisis* from Montesquieu's *Spirit of the Laws*, which described the judicial tribunal as the weakest instrument of government because, among other reasons, its judgments would be "fixed . . . and to such a degree as to be ever conformable to the letter of the law."[33] "Were they to be the private opinion of the judge," Montesquieu cautioned, "people would then live in society, without exactly knowing the nature of their obligations."[34]

The exchange between Brutus and Hamilton implies an agreement in principle that wholly unchecked judicial power would corrode the foundations of a democratic republic. It was not to be feared here, Hamilton argued, because of the inherent weakness of a judicial institution that faithfully subscribes to *stare decisis*. The legitimacy of judicial power and its independence from the elective branches of government, therefore, rests on this Hamiltonian assumption—one that must stand the test of time if either is to remain secure.

In short, the early architects of our legal system, particularly those participating in the drafting of the federal and state Constitutions, feared an aggregation of governmental power that would vest the few with the ability to produce revolutionary societal change for the many. The judiciary did not escape their notice. Owing to its composition and character, the judiciary is the least democratic branch of our tripartite government. By insisting upon a deep respect for *stare decisis*, the blueprints for the judiciary sought to siphon off the decision making power of those who, at any given moment, occupy the bench and redistribute it along a multigenerational line of jurists.

Why It Matters

For some, the thought of an appellate judge not substituting his or her judgment for the fact finder may be an important, but still unconvincing, historical principle. Though unspoken, the nagging question remains: Why not—particularly if the fact finder got it wrong. As for *stare decisis*, a fairly cursory survey of case law from the last decade or two would tempt one toward cynicism and put in question whether the stability-of-the-law and respect-for-the-institution rationales are still up to the task. Maybe they never were. If so, why defer at all to the democracy of the dead? Perhaps the living should unapologetically subject traditional legal doctrine to de novo contemporary reexamination.

If we could put these questions to the architects of our judiciary, I think we would hear this reply: "Take counsel of your fears—not only the fear that you may be wrong and that the certi-

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tude of your views has less to do with their objective merits than the unprincipled mood of your contemporaries, but, more importantly, the fear that aggregating in the present the plenary power to rewrite the past *tends* toward judicial oligarchy. So even if the fear of self-error has no currency with you, fear what could be done if such unchecked decision-making power were left in seemingly less capable hands. For you too will come and go just as we have. The power you concentrate in your office will be bequeathed to another."

Every appellate judge must decide whether these fears are real or illusory. Few openly acknowledge or disparage them, but all betray their true views in the decisions they make. As for me, I believe the fears of our forefathers give a sense of proportion and perspective. More than that, they serve as a warning: Do no less than your oath requires, but no more than it permits.

This article is an edited and annotated manuscript of a speech given by Judge Kelsey to the Virginia State Bar Professional Development Conference held at the University of Virginia in March 2004.

Endnotes

1. THE FEDERALIST No. 47 (Madison) (emphasis added); *see also* THE FEDERALIST No. 48 (Madison).
2. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 196 (1787); *see also* JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES § 60, at 68 (1859) [hereinafter Story, Exposition].
3. James E. Pfander, *Federal Courts: Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1456 (2000) (internal quotation marks omitted) (paraphrasing 2 THE WORKS OF JAMES WILSON 149 (1896).
4. Jones v. United States, 526 U.S. 227, 247 n.8 (1999) (citing 1 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 155b (1628) ("*ad quaestionem facti non respondent judices; ad quaestionem juris non respondent juratores*")).
5. 3 WILLIAM BLACKSTONE, COMMENTARIES *379-80.
6. *Id.*
7. *Id.*
8. AKHIL REED AMAR & LES ADAMS, THE BILL OF RIGHTS PRIMER 137-39 (2002) (quoting JOHN TAYLOR, AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES 209 (W. Stark ed., 1950) (1814), and *Essays by a Farmer (IV)*, *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST 36, 38 (Herbert J. Storing ed., 1981)); *see also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 11, 81-118 (1998) [hereinafter AMAR, THE BILL OF RIGHTS].
9. Blakely v. Washington, 542 U.S. 296, 306 (2004).
10. *Id.* (quoting John Adams, Diary Entry (Feb. 12, 1771), *reprinted in* 2 WORKS OF JOHN ADAMS 252, 253 (C. Adams ed. 1850)).
11. *Id.* (quoting Letter from Thomas Jefferson to the Abbé Arnoux (July 19, 1789), *reprinted in* 15 PAPERS OF THOMAS JEFFERSON 282, 283 (J. Boyd ed. 1958)).
12. AMAR, BILL OF RIGHTS 95 (quoting Essays by Hampden, *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 8, at 198, 200)).
13. *Id.* at 94 (quoting Wythe Hold, *"The Federal Courts Have Enemies in All Who Fear Their Influence on State Objects": The Failure to Abolish Supreme Court Circuit-Riding in the Judiciary Acts of 1792 and 1793*, 36 BUFF. L. REV. 301, 325 (1987)).
14. ALPHEUS THOMAS MASON, FREE GOVERNMENT IN THE MAKING: READINGS IN AMERICAN POLITICAL THOUGHT 309 (3d ed. 1965). Article VII required nine of the thirteen states to ratify the Constitution. Six of the ratifying states called for amendments and five of those "put forth two or more jury-related proposals." AMAR & ADAMS, *supra* note 8, at 130.
15. U.S. CONST. art. III, § 2 (emphasis added).
16. Story, Exposition § 379, at 272.
17. *Id.*; *see also* Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 447-48 (1830) (Story, J.); 3 WILLIAM BLACKSTONE, COMMENTARIES *405; 1 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 213-14 (7th ed. 1956).
18. *See generally* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 236, 265-67, 294-98, 299-300, 304-09 (Ralph Ketcham ed., 1986); 3 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 525, 540-41, 544-46 (2d ed. 1836) (Virginia ratifying convention). Hamilton devoted The Federalist 83 to the jury trial issue, characterizing it as "[t]he objection to the plan of the convention, which has met with most success in [the State of New York], and perhaps in several of the other States . . . ."
19. Letter from Richard Henry Lee to Virginia Governor Edmund Randolph, Oct. 16, 1787, *reprinted in* 1 ELLIOT'S DEBATES 503 (loosely quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *379).
20. United States v. Wonson, 28 F. Cas. 745, 750 (U.S. Court of Appeals 1812) (Story, J.); *Parsons*, 28 U.S. (3 Pet.) at 447-48 (Story, J.).
21. *See supra* notes 5-7 and accompanying text.
22. *See generally* JAMES ALEXANDER, A BRIEF NARRATION OF THE CASE AND TRIAL OF JOHN PETER ZENGER (1963); Jones v. United States, 526 U.S. 227, 246-48, 252 (1999).
23. *See* CHARLES E. FRIEND, THE LAW OF EVIDENCE IN VIRGINIA § 1.6(b), at 32 (5th ed. 1999) ("As American law has become more and more politicized, many appellate courts, most notably the Supreme Court of the United States, have begun virtually to ignore *stare decisis*, until today it is, in many courts, little more than a joke.").
24. "*[S]tare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). However, although *stare decisis* is not an "inexorable command," the "careful observer will discern that any detours from the straight path of *stare decisis*" occur only "for articulable reasons." *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986). When asked to abandon precedent, a court must distinguish between statutory and constitutional questions. A party "advocating the abandonment of an established precedent" bears a greater burden where "the Court is asked to overrule a point of statutory construction." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989). The reason is that, "unlike in the context of constitutional interpretation, the legislative power is implicated," and the legislature "remains free to alter what we have done." *Id.* at 172-73; *see also Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986); *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977).
25. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921).
26. GILBERT KEITH CHESTERTON, ORTHODOXY 85 (1909).
27. Oliver Wendell Holmes, *Codification and Scientific Arrangement of the Law*, *reprinted in* OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 63 (1936). Though the reasoning of the prior precedent "be not obvious at first view, yet we owe such a deference to former times as not to suppose they acted wholly without consideration," cautioned Blackstone. 1 WILLIAM BLACKSTONE, COMMENTARIES *70.
28. *Vasquez*, 474 U.S. at 265.
29. A distinction must be made, however, where a court overrules a more recent case that, itself, violated *stare decisis* and thus represented a divergence from settled precedent. In such matters, the court does not flout *stare decisis*

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by overruling the anomalous case. Rather, it "restore[s]" the prior "fabric of law" that the anomalous case departed from. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 234 (1995). Thus, in *Adarand Constructors, Inc.*, the Court overruled its recent opinion in *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990), stating: "*Metro Broadcasting* itself departed from our prior cases—and did so quite recently. By refusing to follow *Metro Broadcasting*, then, we do not depart from the fabric of the law; we restore it." *Id.* at 233-34. To give the aberrant case dispositive effect in the face of well-established contradictory precedent would be to "mock stare decisis." *United States v. Dixon*, 509 U.S. 688, 712 (1993).

30. I acknowledge that, to some, the merger of law and politics is both inevitable and harmless. I could not disagree more, however. *See* D. Arthur Kelsey, *Law & Politics: The Imperative of Judicial Self-Restraint*, 28 VBA NEWS J. No. 6, at 8 (Sept. 2002) (http://www.vba.org/sept02.htm). As Justice Curtis put it: "Political reasons have not the requisite certainty to afford rules of [judicial] interpretation. They are different in different men. They are different in the same men at different times. And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean." *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 620-21 (1857) (Curtis, J., dissenting).

31. Essay by Brutus (XI) January 31, 1788, *reprinted in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 293-95 (Ralph Ketcham ed., 1986).

32. THE FEDERALIST No. 78 (Alexander Hamilton) (citing 1 MONTESQUIEU, SPIRIT OF THE LAWS 186 (1752) (observing that "of the three powers above mentioned, the judiciary is next to nothing").

33. 1 CHARLES DE SECONDAT, BARON DE MONTESQUIEU, SPIRIT OF THE LAWS 186 (G. Bell & Sons, Ltd., eds., 1914) (1752).

34. *Id.*

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