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The Interpretive Authority of Consensus in the Lower Courts

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The interpretive authority of consensus in the lower courts

Following up on my [earlier post](#) on today's Supreme Court decision in *Fowler v. U.S.*, here is a post on another of today's cases: *U.S. v. Tinklenberg*. The case concerned how to calculate time under the Speedy Trial Act. Justice Breyer wrote for the Court, and it was a characteristically Breyerian opinion: The text could be read this way, but then again it could also be read this other way; and here are several (in this case, six) considerations that, taken together, lead us to adopt one interpretation rather than the other one.

Let's focus on his second consideration. The opinion tells us that, over the course of the last few decades, every circuit has answered the question at issue and, until the Sixth Circuit's decision here, every circuit ruled the other way. Breyer then states that "[t]his unanimity among the lower courts about the meaning of a statute of great practical administrative importance in the daily working lives of busy trial judges is itself entitled to strong consideration, particularly when those courts have maintained that interpretation consistently over a long period of time."*

Concurring in the judgment, Justice Scalia (joined by the Chief and Justice Thomas) concludes that the text is clear and so there is no need to consider anything else. In particular, he writes: "The clarity of the text is doubtless why, as the Court's opinion points out, every Circuit disagrees with the Sixth Circuit's conclusion. That is the direction in which the causality proceeds: Clarity of text produces unanimity of Circuits -- not, as the Court's opinion would have it, unanimity of Circuits clarifies text."

I'm not 100% sure what Breyer has in mind, but let's take a strong reading of his position, according to which the lower-court consensus has more than the evidentiary value of shedding light on the best interpretation of the statute. The consensus, instead, has force by virtue of its mere existence. That is, the fact that all the lower courts have adopted one interpretation is an independent reason (not conclusive, to be sure) to agree with them -- due to the interest in avoiding disruption, etc.

I am inclined to think that the strong view of the value of lower-court consensus, whether or not Breyer is actually embracing it here, states a normatively desirable principle of law. Cf. Eskridge & Frickey on "Law as Equilibrium."

* Note: I corrected a typo that appears in the current version of the opinion on the Court's website. (I'm not sure I corrected it the right way, though.)

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