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Appealing to the Judge's Better Angels

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In January of 1788, the Anti-Federalist with the *nom de plume* of Brutus was mightily troubled with the proposed Constitution that had come out of Philadelphia. His particular vexation was over the federal judiciary. To the New York State Ratifying Convention, he wrote these words:

> Those who are to be vested with the judicial power are to be placed in a situation altogether unprecedented in a free country. They ought to be rendered totally independent, both of the people and of the legislature.... Because they are in such an unchecked position they will naturally aggrandize power to themselves and to the central government. In their decisions, they will not confine themselves to any fixed or established rules. This power will enable them to mold the government into almost any shape they please.

The words of the faction that lost the battle of the Constitution sound prophetic to us today. At the time, however, the writers of *The Federalist* thought the concerns over the judiciary overwrought. In answer to Brutus, Alexander Hamilton, as Publius, wrote in his famous *Federalist* 78 (emphasizing the principles of governance in capitals), "[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution." In the Constitution's tripartite division of powers, Hamilton ascribed "FORCE" to the executive, "WILL" to the legislature, and "JUDGMENT" to the judiciary. The judiciary, he confidently declared, would exercise judgment, not will.

Talking Points

- The Constitution made judges independent precisely to give them the power to limit the executive and legislature. The very independence of the courts was to protect liberty.
- Judges cannot fulfill their role without a sense of public virtue by which they limit their own will in favor of reasoned judgment.
- Of the highest order in our democratic republic is respect for the law of the Constitution. In other words, originalism is an essential element of judicial virtue, which the Framers intended and trusted would be the self-regulating mechanism of the independent judiciary.
- Originalism and its moral values will not be lost. Public virtue wedded to the idea of judging has been part of the Western tradition from Aristotle, from Cicero, from Aquinas, from Marshall, and from the Framers. And it is much closer to realization in this generation than it has been for over 100 years.

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Did Hamilton truly believe that men in robes would act differently from men in frock coats? Was not Brutus's assessment of human nature more realistic? What was Hamilton thinking?

The last thing we can attribute to Alexander Hamilton is naiveté. He was a brilliant, hard-boiled politician. He knew how to run an economy, and he understood how to establish a national government on secure grounds. It was he, partnered by Madison, who did the most to generate support for calling the Constitutional Convention to begin with.

Was this pallid statement of "judgment, not will" the best he could do in answer to the Anti-Federalists? Did Hamilton reflect the understanding of the other Framers?

"An Extended, Firm and Independent Judiciary"

In those extraordinary three and a half months in 1787 when the charter of our government and of our liberty was being drafted, the Framers spoke relatively little about the judiciary. True, there is little doubt but that they expected the courts to exercise judicial review of legislation, and certainly the Anti-Federalists agreed that there would be judicial review—that's what worried them. But compared to the Framers' concern with the legislative branches, with the executive, and with the states, the men who wrote the Constitution were not much bothered about the judiciary.

Brutus was certainly correct in that there were almost no checks of any significance on the judiciary in the Constitution, for the fact is that the Framers simply did not believe that the courts needed much external checking. On the contrary, they took pains to remove external checks. The lack of judicial independence was one of the bill of complaints in the Declaration of Independence. In the Constitution, the drafters—in contrast to King George's actions—made the judges independent for their whole tenure through the Good Behavior Clause. They gave them salaries that could not be reduced.

In *Federalist* 78 and *Federalist* 81, Hamilton took aim at the Anti-Federalist suggestion that the courts, as in England, should be folded into the legislative branch. Mixing judges and legislators would be placing irreconcilable public personae in the same institution, he said. No judge could exercise detachment and independence in such company. At the same time as Hamilton declared that the judiciary, in defense of the Constitution, would be a check on the other branches, he celebrated the judiciary's independence from the same checks and balances that the Constitution had so artfully placed on the President and Congress.

Hamilton had history on his side. He was reflecting the Framers' undoubted concern for the independence of the judiciary when they defeated the idea in Philadelphia that the Supreme Court justices should be part of a quasi-legislative "Council of Revision" to review congressional bills before they became law.

Consequently, in the final document, there were few external checks upon the judiciary. The Framers expected the President's and the Senate's role in the appointment of judges to be used to elevate competency, and not ideology, to the bench. Hamilton expected, and the First Congress bore him out, that the Congress would use its power to make exceptions to the appellate jurisdiction of the Supreme Court primarily for the practical purpose of making the judicial process manageable and efficient.

Hamilton and the Framers believed that the amending and impeachment powers would be instituted only in extraordinary cases. He opined that if, in an extreme situation, the judiciary attempted to supplant the legislative process, the Congress would have the means to defend itself through impeachment. But the Framers knew that Congress's impeachment power was its alone and that Congress would have to make the decision for itself whether a judge should be impeached.

In fact, practice has borne out the idea that judges guilty of crimes and misdemeanors would be impeached, but those attempts, as with Justice Samuel Chase, to impeach and remove judges for their decisions have failed. The one real check exercised by Congress until the 1870s was the limitation of federal court jurisdiction, but that was mainly because there was so little federal law to adjudicate until that time. In their judicial function, therefore, judges enjoy broad constitutionally protected immunity.

The Constitution made judges independent precisely to give them the power to limit the executive and legislature. For without such limitations, along with the many others instantiated in the Constitution, legislative and executive excesses could be corrected only by the awful "appeal to Heaven," with the pain and disruption of revolution. The very independence of the courts was to protect liberty. Hamilton later wrote, "[I]f the laws are not suffered to controul the passions of individuals, thro the organs of an extended, firm and independent judiciary, the bayonet must."

Keepers of the Rule of Law

Thus, the Constitution needed an independent judiciary: "The complete independence of the courts of justice is peculiarly essential in a limited Constitution," wrote Hamilton. But what made the Framers think they could trust an independent judiciary? At bottom, the Framers placed few checks on the courts because there was a presumption that the courts and the judges would simply act differently from the political actors in the executive and legislative branches. What gave the Framers such confidence?

Most of the Framers were lawyers or were educated to know about the law. Most in that litigious society had been to court and had seen firsthand how judges act. Even when they lost a case, these men retained respect for the court. They understood that there was a set of ethical norms integral to being a judge that made a judge a keeper of the rule of law and not a threat to it.

The Framers certainly knew firsthand the venality of many who inhabited other centers of political power—those who used will. It was will that needed to be checked, as Madison so clearly articulated in *Federalist* 10. But the Framers believed that judges, *qua* judges, were different: that the judges possessed public virtue by virtue (pun intended) of their very office. Think of the battles between Hamilton and Jefferson, for example. What drove them to despise each another? If we look carefully at what so incensed Hamilton about Jefferson and vice-versa, it was not just policy differences. It was that each believed that the other man had lost his public virtue and was unworthy to be a leader in a republic.

Thus, in the Constitution, as Hamilton would put it, will needed to be circumscribed, but judgment, the product of public virtue, must be set free. Judgment constrains will, and will must not hamper judgment. It was within the judicial craft—channeled by the techniques of statutory interpretation, of precedent, *stare decisis*, reasoned argument, and respect for the political decisions of the discretionary departments of government, as they are called—that judges exercised their judgment. Judges were not automatons, but sentient men who exercised their individual reason within the constraints of virtue, including a particular set of judicial ethics that their office emplaced upon them.

Hamilton, himself a superb lawyer, understood that each of these elements constrained the judge's will by the craft of judging itself. "To avoid an arbitrary discretion in the courts," he wrote, "it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." The persons who are to be judges are those "selected for their knowledge of the laws, acquired by long and laborious study." These men and women are those who have learned to respect the rule of law in all its manifestations:

- The law of statutes (hence the need for rules of statutory interpretation);
- The law of the court (the rules of precedent);
- The law of process (which limits what a court may or may not hear);
- The law of the case (the finality of *res judicata*); and
- The law of the judge (the norms of judicial ethics).

Most importantly, judges must abide by the law of reason and provide a justification for their decision in an opinion open to the scrutiny and critique of all.

Originalism vs. Legal Realism

Of the highest order in our democratic republic is respect for the law of the Constitution. In other words, originalism is an essential element of judicial virtue, which the Framers intended and trusted would be the self-regulating mechanism of the independent judiciary.

Take Chief Justice John Marshall, for example. In *Marbury v. Madison*, Marshall turned aside his party's invitation to engage in the political wars with President Jefferson. Overtly deferring to the intention of the Framers, Marshall insisted that "The Framers of the Constitution contemplated [intended] that instrument as a rule for the government of courts, as well as of the legislature." In words that judges and academics might well contemplate today, Marshall said:

> Why, otherwise, does the Constitution direct judges to take an oath to support it? This oath certainly applies in an especial manner to their conduct in their official behavior, [their judicial craft]. How immoral to impose it on them if they were to be used as the instruments, and the knowing instruments for violating what they swear to support.

Today's legal realists would have no truck with Marshall's moral sensibility.

Chief Justice Marshall was one of the great practitioners of originalism, a respect for the meaning of the Constitution as drafted, and of the moral constraints that channel a judge's actions so that the judge makes acts of judgment, not acts of will. Under such judges, we would, in Marshall's and John Adams's and Aristotle's words, be living under the rule of law, not the rule of men. St. Thomas Aquinas also made obedience to the written law an essential moral requirement for the judge. Quoting St. Augustine, Aquinas wrote, "In these earthly laws, though men judge about them when they are making them, when once they are established and passed, the judges may judge no longer of them, but according to them."

The legal realists and their predecessors in the early 20th century urged judges to jettison judgment in favor of will. In terms of constitutional fidelity, their words took hold, and for many decades, Supreme Court justices left originalism behind and sought instead to rule by their own lights. Yet the inheritance of the judicial craft still constrained judges. Public virtue remained alive, albeit in diminished form. Even without the guiding light of what we call today originalism, judges could still act nobly. One of those great judges was Benjamin Cardozo.

I doubt that there were any originalists among Cardozo's fellows on the Supreme Court—recall that substantive due process was *en vogue* at the time. The Progressives, with whom Cardozo sympathized, believed that the original Constitution was flawed, so there was no inherent institutional respect or intellectual respect for the Constitution among them. There was, across the intellectual spectrum, a revolt against formalism, including legal formalism. Other writers, such as Oliver Wendell Holmes, Jr., and Roscoe Pound had convinced a generation of academics that judges must bend the law to the felt needs of the times.

Cardozo greatly respected Holmes and Pound, yet this decent, humble, and learned man sought to fashion a standard of moral accountability for judges who had lost their handholds. He even looked at natural law, but natural law was in a state of intellectual decline at the time. Still, he continued to believe that judges were morally accountable for their decisions. In his writings, he sought to show how a judge could practice this morally freighted task in a legal world that had lost its ancient standards.

Revealingly, he was reviled by the leading legal realists of the day, who thought Cardozo a fraud. They said that his moralizing was but a smoke screen behind which he simply implanted his own desires into the law.

Even for this retiring man, that was going too far. Before 2,000 people of the New York City Bar Association in 1932, during the time that he was being considered for the Supreme Court, Cardozo criticized the legal realists for locating judicial decisions "in the visceral reactions of a judge" or, at best, in what the judge thought was good public policy. It was one of the strongest and most principled criticisms of legal realism that had yet been voiced.

Cardozo was saying, along with Hamilton, that it is judgment, the virtue of prudence—in the classical sense of duty—that should guide a judge. Reflecting Cicero, Cardozo believed that "office" and "duty" were, as in Latin, the same word. Judging in that sense is not will, howsoever will might be dressed up. The philosopher Michael Polanyi said it best in referring to how judgments are formed: "The freedom of the subjective person to do as he pleases is overruled by the freedom of the

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responsible person to do as he must." Will yields to judgment.

The legal realists never forgave Cardozo for calling them to account, and that is why I believe modern academics, who are the heirs of the legal realists, do not praise him much anymore—because he was speaking in a different moral voice. But the legal realists, whose views have filtered through the law schools thence through the generations of students, had their day, especially in the appointments of Franklin Roosevelt in his second term and, more particularly, among some members of the Warren Court. By the time of the Burger Court, some justices made no bones about opposing legal and social norms in the country by fiat—by will.

In the extreme, such judges lost the moral standing of what it is to be a judge. They no longer possessed that public virtue, that ethic of judging that men like Marshall, or even non-originalists like Cardozo, had. Finally, particularly with *Roe v. Wade*, prominent liberal academics had enough. John Ely, Louis Lusky, Archibald Cox, and, yes, even Laurence Tribe urged the Court to get back to constitutionally based decision-making: to move, to paraphrase Hamilton, "back from will towards judgment."

"Back from Will Towards Judgment"

But it was Attorney General Edwin Meese in a 1985 speech before the American Bar Association—a speech that paralleled Cardozo's speech a half-century earlier—who called for a return to a jurisprudence of original intention and turned the dismay of liberal and conservative academics into a movement. His speech was, of course, attacked by those whom he had exposed. One sitting justice actually took personal aim at Meese, accusing him—as Cardozo had been accused—of harboring a political objective. It was a case of projection. But Meese did not reply in kind. He held seminars in the Justice Department as to what an ethic of originalism would mean in practical terms. One of the lawyers in the Department who attended the seminars was a young John Roberts.

What Meese was calling for was not just a better mode of interpretation. At bottom, Meese was asking judges to reassume the kind of public virtue that the Framers had so trustingly believed of them, trusting in that virtue so much as to let judges be substantially free of the checks that constrained the other departments of government.

What Edwin Meese began has grown fruit. Today, originalism is the most written-about mode of interpretation, so much so that being an originalist is the "in" thing among academics of all stripes, even those who are not truly originalists. Originalism as a theory has now gone through many redactions and modifications. It is today a coat of many colors, but it is now the dominant mode, in one form or another, of theorizing about the Constitution.

Scholars, since Meese's speech and even before, have opened up the original meaning of clause after clause of the Constitution, something that Cardozo or his generation did not have at hand. We now know more about the original understanding of the Framers and the generation that approved the Constitution than any generation since the Founders themselves. We have it in our hands now, and it has had an effect on the Supreme Court.

Most important, originalism has returned to the members of the Court and offered them a common, normative grounding of their craft, even affecting judges who a decade or so ago were not or would not have been originalists. Thus, Justices John Paul Stevens and Clarence Thomas can debate the original understanding of the Qualifications Clause in the *U.S. Term Limits* case. Chief Justice William Rehnquist and Justice David Souter debate the Framers' understanding of the Establishment Clause.

Even among originalists, there have been fruitful debates. Justices Antonin Scalia and Thomas debate how the history of our struggle with England informs whether the First Amendment was designed to protect anonymous political speech. Justices Anthony Kennedy and Thomas debate the original understanding of the Twenty-First Amendment. (And in that case, Justice Stevens actually concurred with Thomas on the grounds that Thomas had the better argument regarding original understanding.)

The entire set of opinions in the *Heller* case on the Second Amendment—the entire set—is a treatise on the original understanding. True, some Senators still want judges who will exercise friendly policy *will*, not morally grounded judicial *judgment*. But across the country, from lower court judges on

up, because of educated briefs on what original understanding is, judges now can rise above the politician—thanks to Alexander Hamilton and John Marshall and Edwin Meese and the Framers. Thanks to originalism, judges can now celebrate their craft without apology. And despite the bad decisions still being issued because we have not won the day entirely, that is still awfully good news.

Advancing the Cause

True, the next four to eight years may see some setbacks, but those of us wedded to the rule of law can still advance the cause.

First, we can continue a vigorous defense of originalism as a coherent theory, as a practical method of interpretation, as morally obligatory, and as historically correct.

Second, in our briefs, arguments, and commentaries to and about judges, we can draw on the other aspects of judicial virtue—such as respect for statutes, for precedent, for procedure, for ethics—and by our affirming demeanor sustain the better guardian angels, if you will, at the judge's side. As Judge Michael McConnell has stated, a judge operates with a number of narrowing constraints: text, history, past democratic practice, and precedent. Judges still respond to that vocabulary of argument.

Originalism and its moral values will not be lost. Public virtue wedded to the idea of judging has been part of the Western tradition from Aristotle, from Cicero, from Aquinas, from Marshall, and from the Framers. And it is so much closer to realization in this generation than it has been for over 100 years. There is, despite the problems, much to celebrate.

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