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JUDICIAL INDEPENDENCE, JUDICIAL VIRTUE, AND THE POLITICAL ECONOMY OF THE CONSTITUTION

**Nelson Lund,
George Mason University School of Law**

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Economy of the Constitution

Nelson Lund[†]

Economic theory applies to many things besides the commercial marketplace. Whether, or to what extent, the framers constitutionalized an economic theory of private property and free enterprise, they certainly did employ an economic theory of government. That theory was famously summarized in *The Federalist* by James Madison:

[W]hat is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but

[†] Patrick Henry Professor of Constitutional Law and the Second Amendment, George Mason University School of Law. Research support from George Mason's Law and Economics Center is gratefully acknowledged.

experience has taught mankind the necessity of auxiliary precautions.¹

And how can the government be obliged to control itself? Again, Madison offered a succinct theoretical answer: “Ambition must be made to counteract ambition.”²

We’re all familiar with the practical scheme based on this theory. For the most part, the key is to make each official and each institution *dependent* on others. Enacting a law, for example, requires the agreement of majorities in the House and the Senate, and usually the President as well. The President takes many actions by himself or through his subordinates, but almost all of them require authorization by one or both Houses of Congress, or statutory appropriations, or both. All of these officials, moreover, are dependent on elections by the people for their continuance in office.

But there is one institution that the framers designed in almost the opposite way: the judiciary. In the *Federalist*, Alexander Hamilton argued that this department of government should be made as *independent* as possible from the President, the Congress, and even the people themselves.³

One objection raised by some Anti-Federalists was

¹ FEDERALIST NO. 51.

² *Id.*

³ FEDERALIST NOS. 78-81.

that the power of judicial review, together with life tenure, could lead to profound judicial usurpations of power.⁴ And there was one particularly worrisome objection, which Hamilton described as follows:

The power of construing the laws according to the *spirit* of the constitution will enable that court to mould them into whatever shape it may think proper; especially as its decisions will not be in any manner subject to the revision or correction of the legislative body.⁵

As we now know, this Anti-Federalist objection was not exactly a paranoid fantasy.

What was Hamilton's response? It essentially boiled down to this: somebody has to have the final word on what the Constitution means, and the judiciary is the least dangerous place to put that power. One reason for regarding the judiciary as the least dangerous branch was structural. The judges would control neither the sword nor the purse, and if they did get out of control, there would always be the remedy of impeachment. Unfortunately, as we have seen, that leaves a lot of room for judges to make up whatever Constitution and laws they like, as long as they don't push things far enough to get themselves impeached. And, of course, even the remedy of impeachment is not available when judges ignore the law by permitting Congress itself to

⁴ See, e.g., 2 THE COMPLETE ANTI-FEDERALIST §§ 2.9.138 (Brutus XI), 2.9.188-189 (Brutus XV) (Herbert J. Storing, ed., 1981).

⁵ FEDERALIST NO. 81.

exercise unconstitutional powers.

But Hamilton also suggested another answer to the objection against judicial independence. He assumed that judges would have much more civic virtue than other politicians. Rather than relying on ambition to counteract ambition, he emphasized that special qualifications would be required of those chosen to fill judicial offices.

What would these qualifications be? Most obviously, judges would be scholarly individuals who had engaged in “long and laborious study” of legal precedents.⁶ They would also have the kind of integrity and devotion to law that would render them deeply self-effacing and indifferent to popular acclaim. And they could be expected to be mature individuals, without the youthful fire of ambition, and without the hope or expectation of using their life-tenured offices as a springboard to higher things.

Hamilton didn’t spell all of this out in detail, for the simple reason that he didn’t need to do so. English common law judges had spent hundred of years developing a culture in which these qualities could flourish. They had done it largely through extolling and exercising the judicial virtues of modesty, self-restraint, studiousness, and caution. Not perfectly, of course, but well enough that the founding generation could easily believe that people with the requisite integrity and experience could be found, and that they could be trusted to conform with the traditional ideals

⁶ FEDERALIST NOS. 78, 81.

of judicial duty.⁷

These ideals of judicial rectitude have not been lost. Unfortunately, they now seem to appear most prominently in confirmation hearings, where every nominee — Republican or Democrat — describes himself or herself as exactly the kind of person that Hamilton called to mind. They all just want to be humble servants of the law. They have no personal or political agendas of any kind. Nothing thrills them like the study of mind numbing precedents. And they aspire to nothing higher than the simple duty of deciding each case correctly according to the Constitution or the applicable statute.⁸

Once these Supreme Court nominees get confirmed, of course, we often start to see a different picture. Now they're big shots, treated almost as gods within the legal profession, and as A-List celebrities by everyone else. In recent decades, many Justices have been prominent on the

⁷ For a detailed discussion of the history, see PHILLIP HAMBURGER, *LAW AND JUDICIAL DUTY* (2008). Whether Hamilton privately believed that this tradition could be sustained is a somewhat different question. See Nelson Lund, *Judicial Review and Judicial Duty: The Original Understanding*, 26 CONST. COMM. 169, 180-81 (2009). For some of my views on the origins of modern judicial exuberance, see Nelson Lund, *Montesquieu, Judicial Degeneracy, and the U.S. Supreme Court*, in *NATURAL MORAL LAW IN CONTEMPORARY SOCIETY*, Holger Zaborowski ed. (2010).

⁸ For representative statements by each of the last four nominees to the Supreme Court, see Nelson Lund, *Two Faces of Judicial Restrain (Or Are There More?)* in *McDonald v. City of Chicago*, 63 FLA. L. REV. 487, 488-89 (2011).

Washington social scene, and they now promote their books on television, entertain audiences with cameo appearances in operas and by conducting mock trials of literary characters, throw out first pitches at major league baseball games, ride in parades, and receive awards from ethnic groups with which they identify.

By itself, all this flattery and self-promotion might be harmless. Unfortunately, the cult of personality shows up in rather unflattering ways in their judicial work. Nearly all of today's Justices are manifestly consumed with improving the law by moving it in a direction that they personally favor. They frequently think it is more important to remain consistent with their own prior statements than to follow the actual precedents of the Court. At oral argument, they hammer the advocates with questions that aren't genuine questions because they already know the answers. Indeed, the Justices are often just debating among themselves, with the hapless lawyers serving as props, or surrogates, or just victims of judicial bullying.

When the Court's opinions are eventually announced, they tend to read more like exercises in advocacy than like candid explanations of the reasons for the decision, and dissenting opinions frequently outperform the majority in this respect. Perhaps most strikingly, judicial opinions frequently contain extravagant rhetoric that is manifestly designed to catch the attention of the media and the editors of case books. These journalists and law professors are the gatekeepers of judicial reputation because it is they who determine whether individual Justices are seen as being influential. And that word — influential — has become almost a synonym for being a successful Justice.

How did we get to the point where these judges no longer even look like the modest servants of the law that Hamilton described, and that nominees always say they want to be? There are many causes, and the most important ones are probably beyond anyone's control. At the margins, however, there are incentives operating to encourage the wrong kind of ambition in the Justices, namely the ambition to be — and to be seen as — influential. This is almost the opposite of what one would expect from a humble servant of the law, which is both what Hamilton promised our judges would be and what judicial nominees consistently promise they will be.

Congress could change some of those incentives. Here are four examples, which I've written about with my colleague Craig Lerner.⁹

First, Congress could require that all Supreme Court opinions be issued anonymously, just like the *per curiams* that we sometimes still see. Unable to claim credit for the opinions they write, the Justices would come to regard their reputations as inextricably linked with the work of the Court, rather than with their own personal "precedents." This should mean a reduction in the number of unintelligibly splintered decisions that so frustrate the bar, the lower courts, and even members of the Supreme Court itself.

Furthermore, the Justices would have less incentive

⁹ A much more detailed explanation of these four proposals can be found in Craig S. Lerner & Nelson Lund, *Judicial Duty and the Supreme Court's Cult of Celebrity*, 78 GEO. WASH. L. REV. 1255 (2010).

to write sophomoric philosophy or ill-disguised political commentary in a transparent effort to have their names emblazoned in casebooks and the popular press. As the Court's opinions became less frilly and more legal, the media would find it harder to extract a snappy (and often legally irrelevant or tangential) sound bite to explain the decision. This might enhance the Court's reputation as an institution distinguishable from a body of life-tenured politicians.

Professor Lerner and I do not propose to prohibit Justices from filing concurring and dissenting opinions. At least in our legal system, such opinions arguably provide some public benefits. They help show that the decision of the Court was reached through a deliberative process. They can discipline the majority by exposing weaknesses in its reasoning. And they can usefully inform the bar about issues that are not well-settled within the Court. At some point, however, fractiousness simply reflects the self-assertion of the individual members of the Court. We think that this point has been reached, and that the problem can be ameliorated by a rule under which concurring and dissenting opinions are allowed, but all opinions must be issued anonymously.

Under our proposed regime, the majority opinion would simply be labeled "Opinion of the Court." Concurring and dissenting opinions would have similarly nameless attributions: "Concurring Opinion (for two Justices)," "Dissenting Opinion 1 (for three Justices)," "Dissenting Opinion 2 (for one Justice)," etc. We think that the Justices would probably comply with both the letter and the spirit of such a statute. It is no doubt true that the curious would try

to guess who wrote which opinions. And it would, of course, be easy for Justices who disliked the rule of anonymity to leave unmistakable clues to authorship in their opinions, and even to make extrajudicial statements identifying the author of specific opinions. For two reasons, we are confident that a norm of anonymity is enforceable.

First, if majority opinions were anonymous, those who joined the opinion would have an incentive to demand that the author avoid the kind of self-identifying extravagances that we often see now. Under current practice, there's little reason for a Justice to object to self-indulgent excesses before joining an opinion: most observers will attribute the gratuitous superfluties to the named author, especially when it is egregiously grandiose or sophomoric. But under our proposal, more judicious colleagues could easily say, "Please take this out of the draft because it doesn't reflect the views of the Court." And the author would have less incentive to resist taking it out. Furthermore, once this kind of material started getting left out of majority opinions, there would be less temptation to put it into concurrences and dissents, especially since those, too, would be at least nominally anonymous.

In addition, we have no doubt that Congress has ample means to cause compliance with the spirit of the statute if the Justices were to get cute and begin evading it. Congress controls the budget of the Court, and provides the Justices with many indulgent perquisites that it is perfectly free to withhold from them. A few pointed remarks at budget hearings would surely cause a majority of the Justices to discipline any recalcitrant self-promoters, for example by ensuring that such mavericks wrote no more

majority opinions.

Our second proposal is that Congress limit the discretionary nature of the Court's docket. For well over a century, the Supreme Court had little choice about which cases to hear. In 1925, the Justices persuaded Congress to give them much more discretion over their own docket, and almost all the remnants of the Court's mandatory jurisdiction were removed in 1988. At present, nearly all cases are heard when the Court exercises its discretion to grant a writ of certiorari from a state supreme court or from a federal court of appeals. There is, however, a less well-known statutory mechanism for review:

By certification at any time by a [federal circuit] court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.¹⁰

The Court's hostility to this provision has rendered it a nullity. This is unfortunate. There are many cases in which the decision of one court of appeals conflicts with another, whether because of an ambiguity in a federal statute or in the Supreme Court's case law. And there are undoubtedly many more in which circuit courts are internally divided because of the same sorts of ambiguity.

¹⁰ 28 U.S.C. § 1254(2).

We propose amending the statute to provide that the number of cases taken each term by the Supreme Court pursuant to its authority to grant writs of certiorari may not exceed the number of cases taken pursuant to the provision authorizing certifications from the federal courts of appeals. The Supreme Court's docket would then be driven partly by the perceived needs of the judicial system, as determined by the judges of the lower courts.

The Supreme Court presumably would encourage the courts of appeals to certify certain kinds of cases, and some questions that would in any event be reviewed on certiorari would presumably arrive by certification instead. But perhaps the Court would also be forced to review some cases in which it would not have granted certiorari. It is likely (or at least so we hope) that the circuit courts would mostly certify cases dealing with frequently litigated issues on which Supreme Court precedent is especially unclear. The upshot would be to diminish the Supreme Court's ability to engage in the hit-and-run strategy of announcing a muddled opinion and then leaving others to clean up the mess. The Court would be forced, to some extent, to internalize the cost of its own lack of clarity, which would complement and reinforce the healthy effects that we expect from a practice of issuing anonymous opinions.

Third, Congress could strip the Justices of their personal law clerks. It has long been alleged that clerks exert too much influence on how Justices cast their votes and craft their opinions. A less disputable claim is that clerks play an influential role in determining which cases the Justices choose to decide. By their own admission, many Justices seldom review certiorari petitions, relying instead

on the summaries and recommendations of the clerks.

The effect of the clerk filter is likely to increase the selection of cases in areas most familiar and interesting to recent graduates of prestigious law schools — especially constitutional law. Such clerks, notwithstanding their intelligence and diligence, have little awareness of the issues genuinely vexing the legal community, which are not always the kind of cases that roil the legal academy. That fact, plus a prevailing norm that sternly punishes clerks who “improvidently” recommend certiorari grants, while imposing no tax on errors in the opposite direction, inevitably biases the selection process toward cases whose significance is apparent even to recent law school graduates.

In recent decades, clerks have contributed to the fragmentation of the Supreme Court. Justices rarely communicate directly with one another about the cases before them; exchanges are typically mediated through clerks. Clerks, moreover, do not see themselves as employees of the Court, but of individual Justices. They fuel the cult of celebrity that infuses the Court, and not just through loyalty and gratitude to the Justice who was wise enough to select them from a very impressive pool of candidates. Incredible as it may seem, some clerks cravenly or strategically flatter their Justices in a manner wildly inconsistent with the clerk’s private views.

To address this problem, we propose that Congress reassign the clerks (perhaps in reduced numbers) to the staff of the Court’s Librarian. The Librarian would choose and supervise the clerks, who would not be permitted to draft legal opinions. Individual Justices would submit

research requests to the Librarian, and the results of the research would be shared with all the Justices. Law clerks would thus serve more as servants of the Court than of individual potentates within the Court.

Our purpose is not to punish the Court or its members, but to encourage the Court to operate more like a judicial body and less like an academic faculty cum super-legislature. The job would no doubt become more challenging, not only compared with current practice, but also compared with the job of a circuit judge. We think it should. It might cause Presidents to select their nominees on the grounds of legal ability more often than they do now. It might even encourage some mediocre lower court judges to refrain from campaigning for a seat on the high court. The Justices might revert to an older practice of having open discussions with each other, rather than with their hand-picked votaries. And if serving as a Supreme Court Justice were to become a full-time, non-delegable job, fewer people would insist on staying in the saddle past the time when they can even mount the horse.

Finally, Congress could bring back circuit riding, and give the Justices a little taste of what it means to be a real judge, by which we mean someone who is actually expected to follow the law (not make it up) and who can be reversed on appeal.

Circuit riding made up a large part of the Supreme Court's work well into the nineteenth century, and it remained a salient feature of the Justices' role in the federal government even when circuit riding responsibilities waned in the post-Civil War years. Supreme Court Justices

charged grand juries in New Hampshire, sentenced murderers in Louisiana, determined land claims in Kentucky, and enforced extradition orders in New York. By so doing, they remained connected to the lives of ordinary Americans, and saw first hand how the law operated in practice at the lowest levels of the federal system.

The nineteenth century practice of circuit riding was both a curse and a blessing for the Supreme Court and the American public it serves. Justices lost valuable time roaming the countryside dispensing federal justice on a local, retail basis. Having been spared this obligation, however, the Court has become ever more isolated from the operations of the lower federal courts. The bottom line is that too much circuit riding can hamper the work of the Court and too little (or none) has helped to create an undesirable chasm between the mere mortals of the ordinary federal judiciary on one hand and Supreme Court Justices on the other.

Mindful of these competing concerns, we propose a modest restoration of circuit riding. Every year, the Justices of the Supreme Court would select by lot one of the 108 Article III jurisdictions (94 district courts, 13 courts of appeals, and the Court of International Trade). Once a jurisdiction has been selected, it would be removed from the pool until all other jurisdictions have been selected. Over the course of the year, each Justice would coordinate with the chief judge of the relevant court to ensure that he performs no less than 5% of the average annual workload of a judge in that jurisdiction.

Some cases would carry over beyond a calendar year,

and Justices would continue responsibility until the case's completion. In all likelihood, then, the total circuit riding responsibilities of each Justice would exceed 5% of the workload of a typical district court or circuit judge. Even assuming it is double that, we should recall that Justices are now free to frolic around the world for three months of the year. Assigning them to work for half of that time would hardly constitute an intolerable burden. Given technological developments, moreover, circuit riding would be far easier today than it was in centuries past. In fact, the Court of Federal Claims already exercises a national jurisdiction, and judges of that court frequently hold trials and settlement negotiations throughout the country, without substantial hardship.

Adding circuit riding to the responsibilities of the Supreme Court Justices may give them fewer chances to conduct seminars amidst the grandeur of the Alps, but it would give them new opportunities to hold trials in Tuscaloosa and sit on panels in Topeka. They would thus be forced to cope with many of the bread-and-butter issues that other federal judges confront daily. They would have the experience of being reversed on appeal, and of being outvoted on appellate panels by the same inferior judges who must usually obey their every command. Surely a salutary check on the hubris that naturally develops in people who are otherwise Supreme.

In addition, the Justices would be forced to internalize, at least to some small extent, the cost of ambiguous and airy Supreme Court decisions. No longer would they be completely free to announce a ruling and leave others to worry about how it works. It would be their

problem, too, because they would sometimes have to act as judges obligated to apply the law in cases they are assigned to hear. The experience would do them good.

None of these proposals would solve every problem, and there's no reason to expect that Congress will adopt any of them. But they might actually have some salutary practical effects, unlike the kabuki dramas that Senators orchestrate during confirmation hearings. And they would at least help the Justices to look a bit more like the sober and modest magistrates that the founding generation was led to expect.