THE FOUNDATIONS OF THE U.S. JUDICIARY

Eugene Meyer, President, The Federalist Society, and Nelson Lund, George Mason University School of Law


George Mason University Law and Economics Research Paper Series

12-17
The most basic principle underlying our Constitution is the sovereignty of the people. That principle, which justified our revolt against the British monarchy, was respected in every state constitution adopted after our Revolution, and it has never been seriously questioned since that time. As history had shown, however, popular or democratic governments (including our early state governments) had very seldom proved in practice to be good governments. What was needed was a theory of government that would respect the principle of popular sovereignty while putting checks on the tendency of democracies to be swept up in shortsighted enthusiasms and exploitative attacks by self-interested majorities on the rights of minorities.

In Federalist 51, James Madison framed the theoretical problem with unsurpassed clarity.

It may be a reflection on human nature that [certain] devices should be necessary to control the abuses of government. But what 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 experience has taught mankind the necessity of auxiliary precautions.

Madison also offered a succinct theoretical principle according to which these auxiliary precautions should be designed: “Ambition must be made to counteract ambition.”

We are all familiar with the practical scheme based on this theory. We call it checks and balances, or separation of powers and federalism. For the most part, the key is to make each official and each institution dependent on others, so that it is difficult for any individual or special interest group to use the government to oppress other citizens.

Enacting a law, for example, requires the agreement of the House and the Senate, and usually the president as well. The president takes many actions by himself, but almost all of them require either congressional authorization or congressional appropriations, or both. And all of these officials are dependent on elections by the people for their continuance in office.

There is, however, one institution that the framers went to some lengths to insulate from dependence on others. In a number of ways, the Constitution protects the judiciary from being influenced by the president, the Congress, and even the people themselves. The primary device for accomplishing this was the institution of life tenure for federal judges.
The main reason for protecting the judges’ independence was to enable them to be faithful to the law in the performance of their duty, and especially to the Constitution’s limitations on governmental power and protections for minority rights. As Hamilton explained:

[Protections for individual rights] can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing. . . . This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

The Constitution’s provisions regarding the federal judiciary did not provoke major controversies during the framing period. Nonetheless, they did worry a few of the most thoughtful skeptics about the proposed new Constitution. Because the Constitution is a species of law, and one that takes precedence over ordinary statutes, these skeptics correctly assumed that the new Supreme Court would have the power both to strike down unconstitutional statutes and to interpret statutes to make them consistent with the Constitution. They skeptics feared that the Supreme Court would be tempted
to misuse this power by basing its decisions on “the spirit of the Constitution,” which would turn out to be whatever the justices personally favored as a matter of policy.

If this were to happen, unelected life-tenured federal judges could become a kind of oligarchy, contrary to the principle of popular sovereignty. Whoever gets the last word is the effectual supreme ruler, and the Supreme Court has the last word on the meaning of the law on cases within its jurisdiction.

In *The Federalist Papers*, Alexander Hamilton responded to this objection at some length. The core of his response boiled down to this: somebody has to have the final word on the meaning of the Constitution and the laws, and the judiciary is the least dangerous place to put that power.

What made the judiciary the least dangerous branch? The best-known explanation is in Federalist 78, where Hamilton says:

> The judiciary [unlike the executive or the legislature] has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither force nor will but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

History has shown, however, that the Supreme Court can exercise considerable power, effectively commandeering both the strength and the wealth of the society in aid of its own policy preferences. Typically, the justices have done this in just the way that was originally
feared, by finding whatever they wanted to find in the “spirit of the Constitution.” In so doing, especially in areas where journalistic and academic elites agree with them, they have too often substituted laws that they like for the ones adopted by our elected representatives.

What may be at least as bad is that in many instances the Supreme Court’s independence has not prevented it from upholding congressional enactments that are unconstitutional. That kind of irresponsibility can have tremendous and long-lasting consequences. The power of government swells beyond constitutional limits, the legitimate rights of individuals are trampled, and the principal reason for instituting life tenure and judicial independence in the first place is lost.

It is important to keep this last point in mind, especially when thinking about what is called judicial activism. This judicial vice comes in two forms, and it is every bit as improper for courts to uphold unconstitutional laws as it is to strike down or misinterpret laws that are within a legislature’s constitutional power. The double nature of judicial activism should also serve as a warning against simplistic solutions to the problems of the courts. Judicial restraint, which certainly is a virtue, should emphatically not mean passivity in the face of constitutional violations by Congress, or the president, or indeed the state governments.

Hamilton was hardly naive, and he did not rely entirely on the inherent institutional weakness of courts. There is another theme in his defense of the independent judiciary that is less well known, but which may have been more significant for his audience.
When our Constitution was drafted, the nation was heir to a tradition of judicial integrity that had developed in Great Britain over the course of many centuries. That tradition placed a heavy emphasis on the judicial duty to follow the law in every case, even when the judge considered the law unjust or ill-advised. British and American courts celebrated and vigorously defended a judicial ideal that required judges to apply the law, and only the law, in every judicial decision. Judges recognized that this is a lot harder than it may seem. It is not always easy to figure out exactly what a written law means, and it is frequently tempting to cook up an “interpretation” that fits what the judge thinks the law should be, or one that distorts the law to fit the judge’s own views of justice or sound policy. And it can be very hard to resist political or popular pressure, especially when the judge is sympathetic to the views of those who want him to ignore or bend the law.

Nobody could have thought that judges had been, or ever would be, entirely successful in resisting these temptations. To a remarkable extent, however, British and American courts had succeeded in creating a culture in which this ideal of fidelity to the law was taken very seriously by judges, and recognized and respected by the wider public. In his defense of an independent judiciary, Hamilton alluded to the special qualities of integrity, learnedness, and modesty that judges were expected to possess. His audience knew what he was talking about, and they could reasonably believe that the awesome power to determine what the law is would be less dangerous in hands like these than in those of elected politicians.
This ideal of judicial duty has not been lost in our culture, even though it came under sustained attack, especially in academic circles, throughout much of the twentieth century. As popular attention has increasingly focused on this question over the past decade, opinion polls consistently show that substantial majorities believe that Supreme Court justices should base their decisions on what is written in the Constitution and legal precedents and not on their own sense of fairness and justice. In turn, the past four Supreme Court nominees—Democrats and Republicans alike—have pledged absolute fidelity to exactly this understanding of the judicial role. All nominees now say that they aspire to nothing higher than to be humble servants of the law. All of them say that they have no political or policy agendas of any kind. None of them claims authority to override the law in the name of their particular vision of justice, or promises to rule on the basis of their personal sympathies or their ethnic backgrounds. This is as it should be, for this is what the nation was promised by the framers of our Constitution. The challenge for the future will be to figure out which candidates for judicial office mean what they say, and will stick to it after they get their life-tenured appointments.

______________________________

*Eugene Meyer is the President of the Federalist Society for Law & Public Policy. Nelson Lund is the Patrick Henry Professor of Constitutional Law and the Second Amendment at George Mason University School of Law. The views expressed herein are those of the authors, not necessarily those of their institutions.*