Do We Trust Judges Too Much? Did the Framers?

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David Forte*: We have just had another Justice confirmed to the Supreme Court. The vetting process for possible nominees to the Court is now familiar to all of us. At the center of the process is the President. You will notice, and it is now become part of our political environment, that one of the reasons why we elect Presidents is because of whom he or she may appoint to the Supreme Court. It is a strange development in our constitutional structure. Our Presidents have themselves become electors, electors of the kinds of people who will actually make policy over us. If that sounds like a strange constitutional development, it was in fact the sort of thing that was predicted by the Anti-Federalists who opposed the Constitution.

The Anti-Federalist, who went by the *nom de plume* of Brutus, wrote in 1787 just before the New York Ratifying Convention, "Those who are to be vested with the judicial power are to be placed in a situation altogether unprecedented in a free country." He was right. "They are to be rendered totally independent both of the people and the legislature, and because they are in such an unchecked position, they will naturally aggrandize power to themselves and to the central government. This power will enable them to mold the government into almost any shape that they please." He seems to have been correct there also.

Some of you, in your undergraduate education or here, may have come across Hamilton's famous argument for judicial review and in defense of the courts in *Federalist* 78. He actually wrote that in response to Brutus, for Brutus's argument stung. In his response, Hamilton tried to assure those that might have been swayed by Brutus's argument that the courts are going to act differently from what Brutus predicted. Hamilton declared that judges are not political actors in the normal sense of the word. Hamilton went on to describe the different *natures* of the political institutions in the new government. The legislature is empowered with WILL, the executive with FORCE, but the judiciary only has JUDGMENT. And so he agreed that the judiciary was and should be unchecked. What does "unchecked" mean? It means that the courts are genuinely independent. Without being constrained by the checks and balances placed on the other departments of the government, they are free to act as they see fit. Will their acts be based on WILL? Or will their acts be based on JUDGMENT?

Did Hamilton reflect the Framers' own beliefs about what the Court should be? Absolutely. The Framers wanted the courts to be independent. One of the arguments against King George in the Declaration of Independence was that "[h]e has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." Both of those defects were cured in the Constitution.

Why did the Framers believe the courts could be trusted? They thought so for two reasons. The first came from their own experience with courts. Our forefathers were an extremely litigious group; documents show that they were in court as a nearly habitual activity. And yet, if you go through the records, one finds that the Founders would sometimes win, and they would sometimes lose, but one almost never see a litigant blaming the judge, as we seem to do today. There was a culture of judging that the founding generation experienced first-hand. They counted upon judges to be neutral, that is until the King started appointing his own judges, judges who were not independent of the King, and who could act at the political behest of the King.

So when Hamilton said that the legislature is empowered with WILL, he and the Framers meant that there's a moral danger in the nature of self-governance. It is in the nature of man. Destructive and factional WILL could be put into law, so let us split the legislature. Let us leave the legislature with only limited powers. The executive, Hamilton said, was to be invested with FORCE; that is why we have to make sure that the legislature can check the executive. But, he said, the courts are by nature different. They are to be invested with JUDGMENT. What Hamilton meant was that there was a "sense of public virtue": virtue that goes with judging that is not present in the same manner in which decisions are reached by the executive or by the legislature.

Where does this judicial virtue come from? Well, it is by training. It is by temperament. It is by having, as St. Thomas Aquinas said, an inclination to do justice that has been socialized into the work. It is the manner in which they reach decisions. Judges are to retire from the case and deliberate. Legislatures argue; judges deliberate. Deliberation is the rational process that Aristotle taught as being essential to make a virtuous act. Deliberate before you act was his moral command. It is a more internal way of making decisions. It relies upon character, and the Framers believed that they could trust the judges to do that.

Within the whole judicial process, there is a real structure of judging, with which all of you are familiar, which becomes part of, skin, flesh, and tissue of our lawyerly bodies. The structure is made up of respect for statutes and statutory interpretation, a respect for precedent, and a respect for judicial process. All of these constrain the judgment of the judge in a way that they do not constrain a legislature. The rules of statutory interpretation; res judicata; judicial ethics; stare decisis; the substance of legal doctrine, of process, of respect for the words and intent of the Constitution, and most importantly, of reason and accountability, are the material elements of the rule of law. They are imposed, not by parchment barriers, or by the mechanics of checks and balances, but by the moral culture of judging itself.

Think particularly of the obligation of judges to give an account of their deliberations and conclusions. Appellate judges have to give reasons for their decisions. That is quite an astounding institution in our system. They cannot just say, "I have the majority; therefore, I win." They have to give reasons to justify to those who are educated that they are acting neutrally and in a principled way.

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So if you look at, for example, Chief Justice Marshall's opinions, they are the perfect example of the public virtue of judging. He looks to the intention of the Framers. He analyzes words, context, constitutional structure, and history, all of which constrains the way he reaches a decision. And he justifies his decisions by giving public reasons for them.

It is fair to say, therefore, that Brutus was proved wrong at least through most of the 18th and 19th centuries. Judges did not act the way he had predicted. Yet, today on the Supreme Court, we have a different view of what judges do. They do seem to make national policy, whether the national policy is gun control, abortion, prison policy, or gay marriage. Judges preside over national policy that changes our lives, that changes the whole polity, changes the whole culture. Judges no longer seem to have the same limitations. How did they get there?

There was a major intellectual and jurisprudential movement in the late 19th century that ripened in the early 20th century into what became known as legal realism. What the legal realists said was—and I am painting with somewhat a broad brush here, but I hope not inaccurately—judges actually make law, and their decisions have the force of law. They change the way duties and obligations are defined. But the legal realists reasoned that because judges actually do make law, they have the right to make law as they feel is appropriate. In other words, the manner in which a judge makes the decision at bottom does not matter. And that was the legal realists' basic flaw.

In fact, the manner in which a judge makes a decision is to be based, according to the Framers, on the virtue of judgment, respecting statute, constraining reason, and respecting the other actions of government. But the legal realists thought that decision-making was fungible. Because the legislature makes decisions based on will, judges can too. This moral change occurred in the academy, in the law schools, among the professors, then their students, and then their students became judges. Finally, the new ethic seeped into judging, namely, that it was all right to use WILL as a method of reaching a decision, rather than JUDGMENT.

Originally, when the Franklin Roosevelt's legal realist Court came to power in 1938 and later, the judges accepted the principle that politics was WILL, but they deferred to the will of the legislature. They no longer limited Congress in terms of the Constitution with its scheme of limited powers. The will of the political process, they averred, had to be respected. But then, a real change came in the Warren Court and the Burger Court, where WILL became the action of the judges themselves. Thus in 1985, when Attorney General Meese said that it was time to return to a jurisprudence of original intention, he was making a moral argument, not just an interpretive plea.

The key constraint on the judge at the highest level of his decision making is respect for the law of the Constitution. If he does not respect the law of the Constitution, he does not respect the very document that gives him power. But if a judge has a jurisprudence of WILL, his will can be neglectful of the Constitution. Thus, in the 1960s, 1970s, and 1980s, there were very many opinions changing the nature of the way we live, because judges now felt morally empowered to make decisions based on will, on their sense of what ought to be done, rather than within a constrained notion of judicial virtue.

So, when Attorney General Meese said that we must return to a jurisprudence of original intention, he was not just saying that we need a different interpretive method of finding the right answers when we have a constitutional question. He was not only saying, "Look at the Constitution, not precedents, not just current theories of what the good life is, but look at what the Framers said and understood." He was saying much more. He was saying that we should return to a notion of what judicial virtue is.

And Mr. Meese had much to back up his argument because, since the 1980s, there has been more research done on the original understanding of the Constitution by the Framers than any time in our history. I am not exaggerating to say that we now know more—you and I probably know more—than any Justice in the Supreme Court after the time of Chief Justice Marshall of the founding generation as to what the original understanding was. It is now accessible in the extraordinary research into the original understand that scholars have brought forth over the last three decades.

Judges who are not trained in history now receive the best history education in the briefs that are submitted to them. Take, for example, the briefs submitted in *McDonald v. Chicago*, the case in which the Supreme Court incorporated the individual's right to possess arms into the Fourteenth Amendment. The briefs were authored, either directly or derivatively, by the best historians in the world, from Great Britain to here, who studied this issue. All of the opinions in the case, the majority, concurring and dissenting, are full of historical arguments as to what the original understanding truly was. Thus, original understanding becomes not only morally an aspect of judging, but it also becomes a practical aspect of judging once again.

Originalism is a real form of interpretation because the data is there now. We need not speculate about what the Framers might have thought in 1787. In many areas of the Constitution, we now know it. Judges now have the opportunity to be judges again. They now have the opportunity to earn our trust again. We now can say, Brutus, you have been right for fifty years, but maybe it is now time that you are wrong, and we can go back to the vision of Hamilton and the Framers, where a judge could be worthily trusted to reach his decisions on the basis of JUDGMENT.

Bruce Miller*: I actually do not have much to disagree about with Professor Forte's eloquent account of how judicial review ought to work, and as is often the case, I begin to wonder, why am I here, since I do not really disagree with him? In fact, much of what he said, it seems to me, is essential not only to judicial review but to law. Where I think we probably part company—I know we part company on a lot of different cases—is with respect to how helpful it is when the going gets tough to do what Professor Forte says judges ought to do. It is essential, but I think it is the beginning. Let me try to elaborate a little bit.

First, the legitimacy of judging for all of us has to depend on a distinction between law and politics. If all that the judges do is exercise their political will, we have no reason to invest them with the power that they have under Article III to decide

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cases and controversies because their politics are no better and no worse than our politics are. And if what you might call the progressive legal tradition depends in any way on this idea that what judges get to do, ought to do, or may do is to simply, in the guise of law, express their political judgments, we ought to give up the whole idea. There is no reason for them.

The distinction between law and politics—and here I agree with Professor Forte also—depends crucially on the distinction between judgment and will that Hamilton drew in *Federalist* 78. Judgment is what we expect of judges. Will is something that, you know, is the nature of the human condition, and we try to constrain it through channeling it through democratic political institutions. Will is politics.

In Professor Forte's essay on which his talk is based, which he kindly forwarded to me yesterday, he acknowledges something else that I think is very important, and that is that the exercise of judgment is not easy. It is very hard. And the last thing it is is mechanical. In fact, if deciding what is law were in any way mechanical, why would we have three years of law school for you guys to figure out how to be lawyers? Why would we, in our teaching, emphasize endlessly the hard cases, the indeterminacy? This is because, not that judgment is impossible, but rather, even more cussedly, it is difficult, but everything depends on it. And so you can see we have a broad range of agreement.

One last point that we agree on is that the culture of argument is crucial. The fact that judges must not just decide cases but explain why and how they did it, and put their explanations for what you might call the most important kind of peer review there is, the review of lawyers, the review of other judges, and the review of their informed fellow citizens, is essential to the discipline required to exercise judgment.

Now, here come the disagreements, or at least the modifications. In my opinion, there are not very many judges who would disagree with this on any side of the spectrum. When Justice Breyer was here two weeks ago, he said politics has nothing to do with what we do. That sounded a little naïve to me. But from the internal point of view of being a judge, if you are in the game, if you are acting as a judge, you believe not that you are determined by the legal materials, not that it is mechanical, but that you are doing law, not politics, that you are doing your best to wrestle with the often indeterminate, always complex sources of law that inform the decision that you must reach. The decision is simply the best that you can do with what you have, but you cannot claim for it anything more than that. This does not mean that relativism is true. Everybody is trying their best to reach the right decision.

The only judge I know who has given up the game is a conservative, Richard Posner, who has written and spoken many times to the effect that, inevitably, all judges do is make policy. I think he believes that. And most people from the external point of view looking in at what the judges do believe that that is the case, too, because the judges' decisions so often seem to coincide with what we take to be their political views. So, in that respect, there is a deep and important political impact and political effect of what they do. But from an internal point of view, judges do not think so. This, to me, means that it is very difficult to tell what is judgment and what is will.

Posner, even though he waxes very irreverent in print and on the hustings, he does not write his opinions as expressions of will. He plays what I think he thinks is a game, but what you and I think is real. In fact, there are some kinds of arguments that count and some kinds of arguments that do not count, difficult as it is to find the line.

What can we say more particularly about this problem of judgment and will? One example of judges who think that they are exercising judgment is the plurality opinion in *Casey v. Planned Parenthood,* in which the *Roe v. Wade* abortion right is reaffirmed by a plurality opinion written by Justices O'Connor, Kennedy, and Souter. The entire methods set forth for deciding that case appeal to Hamilton's *Federalist* 78 and reasoned judgment. Does that mean that it is reasoned judgment? Maybe not. I think it is; Professor Forte would think not.

Similarly, in the *Heller* case—this is a case in which it is absolutely true, the first gun-control case and the second, too—the exchange between the Justices is all about originalism and the original meaning. Does this mean that this is about reasoned judgment? It claims to be. But from my angle of vision, and I am one who takes seriously the pre-ambulatory language of the Second Amendment which refers to the militia, it feels to me that the majority opinion in *Heller* is policymaking dressed up as originalism.

The point here is that anybody can talk the talk, and the fact that I recognize the *Heller* decision as policymaking rather than law is not to say that the Justices who were in that majority did not believe that what they were doing is, in fact, law. This is a mystery and a paradox, and this is where our work begins. How do we reconcile the internal point of view of judging, which I think is in very much good faith—everybody believes that they are operating according to the legal materials—with the observations of political scientists to the effect that it is impossible? The legal realists were people who recognized this problem and succumbed to it.

In my opinion, the legal realists were all critique and no program. That is, their argument was not that judges should make policy. It was rather that it was inevitable that they do make policy, that there is simply no other option, and that it cannot simply be desirable to do what is impossible. I think that it is possible to exercise judgment rather than will, but it is difficult.

Howard Kalodner, who is moderating the discussion today, had the good fortune to clerk for one of the preeminent legal realists, in my opinion, and that was Felix Frankfurter. Felix Frankfurter understood probably better than all of us what the stakes are here, and he recognized the grave difficulty of any sort of easy way of saying what the legal sources meant in hard cases and the need for deference to political judgment. In my opinion, and I think probably not Howard's, Frankfurter ended up being crippled by his own insight in the sense that he thought that his own ideas about what things ought to be were illegitimate. He was, for that reason, very deeply restrained in his assessment of what the other branches were doing and maybe gave up more of the checking value that was essential. This was not, I think, because Felix Frankfurter suddenly became a conservative when he got on the Supreme Court. It is rather

because he had grave difficulty figuring out how you could make value judgments in the role of judging.

I think the need for value judgments in the role of judging is inevitable, even if you are an originalist. And maybe it is true, we are all originalists now. Certainly, it is hard to identify the values that underlie the Constitution without some reference to originalism. Without some reference, first, to the text and, secondly, to originalism, we are all unhinged. We would simply be making it up as we go along. But those values are often so abstractly stated—say, for example, the Equal Protection Clause—so indeterminate, that is, susceptible of being argued both ways, especially by able historians (i.e., the Second Amendment), or sometimes effectively silent about the issue at hand that it is often impossible to get far enough by reference to originalism, so that there are inevitably other arrows in the quiver here.

I recommend a book that is about twenty years old by a law professor named Phil Bobbitt, whose work you know well and whom I disagree with on almost everything. Bobbitt says that it is more than just originalism and text; there are questions, as well, of what you might call structure. Are there implications in particular cases from the structure of the Constitution, in *McCulloch*, for example, that states cannot tax a federal instrumentality? Or that discrete and insular minorities need special representation because of their inability to form the alliances necessary to participate in a democracy? These structural ideas, I think, are part of the argument, and they derive from the Constitution.

I think there are also inevitably financial considerations. What can judges actually do and accomplish, and what can they not? I think these inevitably matter and should matter.

The slippery slope matters because we are lawyers, and we always worry about the slippery slope.

And ethics matter. And the reason why ethics matter is that, even for originalists, there are arguments about substantive due process. *Calder v. Bull*, for example, suggested that we may have natural rights, and, of course, substantive due process is a kind of constitutional effort to apply that notion.

None of these things can be ruled out. So our big task is how to reconcile two things that we all experience, and that is, from an internal point of view as lawyers, we think law matters. When we do law, it always seems to us to matter. We always reach a judgment as to what the right or wrong legal decision is. Sometimes we feel like it is a tie, but very rarely. With our political assessment, as Professor Forte says, my God, this all seems so political, and all seems to be based on what the judges' politics are.

Professor Forte Response: Whenever I have spoken at this law school, I am always grateful for the company and responses of Professor Miller, a man who has always been a gentleman in all of our discussions. And once again, he has advanced the discussion enormously. He has made two major points. I will take one because we do not have time for both. The latter of his two points is this: what does actually doing originalism entail? Much has been written about that process, but let us put that off. The first point made by Professor Miller is more pointed: what are judges now doing when they think they are reaching judgments? Are they using will, or are they using judgment? Let me talk about that more specifically.

First of all, there was, for centuries—and it continued after the Constitution—a culture of judgment in the courts. It *is* a culture. The method of reaching decisions, the method of deliberating on decisions, including all of those mechanisms that we study in law school, is a culture of law that helps the rule of law maintain its coherence.

That was contested in the late 19th century by the progressivist movement, which said that all politics is will, including judicial politics, and the only question is whether you come out right, not how you get there. Once you do that, you are on the way to all kinds of problems that we have seen in other political systems. In terms of our legal culture, the progressive formula started to undermine the rule of law.

So it was the legitimacy of will as the way to reach decisions that started to infect the Court, but it came into a culture of judgment. How did the two mix? Let us start with Oliver Wendell Holmes, Jr. Oliver Wendell Holmes, Jr. believed that there was no "there" there. There really was no substantive value in the law. But there was the "game" of the law, so to speak; there was the craft of the law. That was what people called "law in the high tradition." So Holmes's crafting of the law is beautiful to behold, but he was cynical about whether it meant anything more than the craft itself.

After 1938—this is a repetition, but I think it bears on this subject—the judges would come to the court believing that judging was no longer legitimate *qua* judging and that it was a species of will. And so what they did was say that because the legislature is more representative of the people; let them do the willful things. We, the judges, will step back. And then, beginning in the 1950s and 1960s, the judges started saying to themselves—again I am painting broadly—why not us? Why can we not reach some judgments based upon what we think is correct for our contemporary society? Even Holmes' craft of judging became vitiated.

These are the kinds of variations you have. There are those whom I assert will use the language of judging, and the language of the virtue, to express their will. Some are frankly hypocrites. They are pretending to judge, and they are not. Justice Brennan, in my opinion, was the Justice who most exemplified this attitude. He manipulated decisions, he left dicta, case after case, that he could call upon in later cases because he knew what was coming down the path, and he influenced others on the Court, even including Chief Justice Rehnquist, to do the same.

There are other Justices who simply made policy, without Brennan's panache. For example, Justice Blackmun in *Roe v. Wade* asked, "Why is the right to terminate a pregnancy within the liberty interest?" His answer: "We feel it is." That is not judgment. That is not reason.

And then you have those who simply fool themselves, who think that they are using the language of virtue when they are actually—and they honestly fool themselves—when they are actually being very subjective about their will, and that includes Justice Stevens. Look, for example, at Justice Stevens's last opinion a couple of months ago in the *McDonald* case.

It is his valedictory. He meanders all over the place, and the opinion has little coherence, and Justice Scalia, as is his wont, gives him no mercy.

So what is the effect on this, even on good judges? Let me take the conservative opinion, and this is what I will conclude my response with, in *McDonald v. Chicago.* The historical evidence for the right to bear arms is highly persuasive. It is not totally unequivocal, but historians have gone through the Fourteenth Amendment's history for the last twenty years—mostly liberal historians, it should be noted. It is almost unequivocal that by the time the 14th Amendment was passed, a fundamental right of American citizenship was the right to bear arms.

Whatever the Second Amendment said, it was by 1866 contemporaneously interpreted as the right to bear arms, primarily focused on the right of blacks to defend themselves against being massacred in the Southern states after the Civil War. There is reference after reference to the situation of blacks being disarmed and killed in the Southern states as contrary to their fundamental right to bear arms as the basis of the 14th Amendment.

So what did the four-person plurality of Chief Justice Roberts and Justices Alito, Scalia, and Kennedy say, as opposed to Justice Thomas, who almost always says it honestly? They said the evidence is unmistakable that under the Privileges or Immunities Clause, there should be an individual right to bear arms; however, for the last fifty years, we have used the Due Process Clause, and that is good enough for us. So the Justices simply said, on the basis of habit, that because the Court has incorporated rights on the basis of the Due Process Clause, we will go there, and not decide the case based on historically what was understood when the Fourteenth Amendment was drafted. A true originalist who used reason, as Thomas did in this case, would have come out and acknowledged what the historians had discovered.

Virtue, as Aristotle said, is the habit of acting rightly. But judges, in many cases, have developed the habit of acting wrongly. That is the habit we have when we do not practice the virtue of judging the way it has been practiced, and even judges who want to be originalists wind up sometimes giving it the back of their hands.