Zeszyty Prawnicze
20.2 / 2020, s. 281-302
DOI 10.21697/zp.2020.20.2.15

David F. Forte

Clevand State University

THE JUDGE AND THE RULE OF LAW*

1. The Lawyer's Prayer

"May it please the Court."

That is what an American attorney says when he stands before an appellate tribunal to begin his argument. "May it please the court." It sounds like a prayer. What is it that the advocate prays may please the court?

Of course, the advocate wishes the court to decide in favor his client. But that's what pleases the advocate. But what pleases the court? What pleases a legislator is having enough votes. What pleases a president is having his orders obeyed. What, then, should please a court?

This: what pleases a court is being convinced of the rightness of the cause before it. The court wants reason, reason that persuades. Why? Because a court's task is to make reasoned judgments. Not an intuitional guess. Not an emotional or ideological preference. In fact, a judgment, by definition, must be reasoned. A true *judgment* must be the product of deliberation, of dialectical discernment, and with particular foresight

---

* This essay is drawn from an address to the Supreme Court of Poland on June 14, 2019. Some elements of the article were drawn from David F. Forte, *The Morality of Positive Law,* in Francis Beckwith, et al., eds., *A Second Look at First Things: A Case for Conservative Politics: The Hadley Arkes Festschrift* (St. Augustine's Press, 2013).

as to its application. A true judgment is not an arbitrary decree. That is why reasoned judgment is the basis for the rule of law. Arbitrary decrees are not.

In the Anglo-American scheme of justice, which is the example I speak of today, courts must give reasons for their judgment. It is difficult intellectual work. They have to justify their conclusions before all, usually in an extensive opinion. They are obliged to be transparent in reaching the conclusion that will change the lives or fortunes of those before them. If it is an appellate court, it knows that it will establish a binding ruling to be followed by the lower courts. It must justify its ruling. Having enough votes is not a sufficient justification for the judiciary. Having the prerogative of executive decision is not enough for the judges. As Alexander Hamilton noted, judges have no power of the purse[1]. They have no army. Their only weapon is the reasons they proffer.

2. The Case

Although "reasoned judgment" is an essential attribute any properly constituted legal system, it has a particular salience for the common law system. The hallmark of the common law system is the case, the dispute between two individual persons, or corporations, or between the state and the individual system. The common law system grew up, not as a derivation of rediscovered Roman Law, but around whether farmer John or farmer Paul owned that particular cow. The common law judge is focused primarily on the dispute before him, on who wins and who loses, and why. For example, the notion of a *title* to property – an abstract idea – came late to the common law. Instead, the common law judges were more interested in who had lawful *possession*, which is a question of fact.

From the time of the Magna Carta, the issue was whether some individual person's property – or libertycould be taken with legal

---

[1] Alexander Hamilton, *Federalist* No. 78, in *The Federalist Papers*, ed. Clinton Rossiter (Penguin Books, 1961), p. 464.

justification; and that one's claim had to be judged by one's neighbors as a jury[2]. It is the intimate involvement with facts that has always constituted the common law proceeding. John Adams said, "Facts are stubborn things." That is why common law system looks more to impact than theory. One of Justice Oliver Wendell Holmes, Jr.'s most famous aphorisms is "The life of the law has not been logic: it has been experience"[3]. Of course, the Civil Law system is sensitive to impact, and the common law system develops coherent explanatory theories, but the point of departure is still from different directions. In the main, the common system developed from the ground up, not the top down.

Of course, In the United States, statutory law often merely codifies substantive law rules, for example, in law of inheritance, or negligence. Sometimes, statutory law displaces common law rules, but even when statutory law displaces common law rules, the adjudication under the statute is still in a common law mode. American students learn nearly all their law through individual cases. When the American lawyer or the judge thinks in legal terms, he imagines how to pursue a case, or how to avoid a case. Even appellate judges, when they fashion a rule, do so first in relation to the particular case that has come to them, and second, to how the rule will impact on similarly situated individuals in the future. They are looking forward to the next case. It is a circular process: case, to appeal, to rule, to the next case.

3. The Debate over the Constitution: Brutus

But we now turn to the more difficult question. Granted that the common law judge looks primarily to the case, and to justifying his decision on the case by a open judicially pronounced opinion, did the United States Constitution preserve that mode of adjudication, or did

---

[2] Archives.gov. (2015). *Featured Document: The Magna Carta*. Available at: http://www.archives.gov/exhibits/featured_documents/magna_carta/ [Accessed 8 September 2019].

[3] Oliver Wendell Holmes Jr., *The Common Law* (Boston: Little, Brown, and Co., 1881), p. 1.

it change it for something else? Is the judge in the American federal system still a common law judge?

There was an influential writer in America in 1787 who went by the nom de plume of *Brutus*. *Brutus* had examined the proposed Constitution and was particularly troubled by the new judiciary that the Constitution was to establish and the kind of judge that it would create. He thought that these new judges could not be trusted to make dispassionate disinterested judgments, and that they would be more interested in power than in the rights of those before him, that they would become Caesars.

> [Judges] are to be placed in a situation altogether unprecedented in a free country. They are to be rendered totally independent, both of the people and of the legislature, both with respect to their offices and salaries. No errors they may commit can be corrected by any power above them, if any such power there be, nor can they be removed from office for making ever so many erroneous adjudications[4].

In other words, he in effect claimed, the new judges were to be empowered by the Constitution to make decrees, not judgments.

What was this new proposed constitution that so troubled *Brutus*? Shortly before *Brutus* had issued his warning, the framers of the Constitution had toiled for three and a half hot summer months behind closed doors in Philadelphia. By September 1787, they had produced a plan what they conceived was of a government of nuanced balances. Power was to be divided, one the one hand, between the states and the new central government, and, on the other hand, among the parts of the new central government. As James Madison wrote,

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights

---

[4] Herbert J. Storing, *The Anti-Federalist*, (University of Chicago Press, 1985), p. 163.

> of the people. The different governments will control each other, at the same time that each will be controlled by itself[5].

Mindful that a constitution could only be legitimated by the people, especially a constitution that would establish a stronger central government from that which people had previously experienced, the framers sent the document to the people of the several states for their approval, including the people of the State of New York. It is important to note that the proposed constitution was sent to the people of the several states, and not to the state legislatures, for only the people could legitimize a new government. States, qua states, had no such constitutive or legitimizing power.

It was this Constitution that mightily troubled *Brutus*. In New York City, he began publishing letter after letter in the influential newspaper, *The New York Journal,* decrying the tyrannical dangers in the new scheme[6]. Appealing to the voters who would, in a few months, elect delegates to the New York State Ratifying Convention, he focused his attack on the new judiciary.

What he most feared was how the court would grow to dominate the separation of powers system.

> The opinions of the supreme court, whatever they may be, will have the force of law; because there is no power provided in the constitution, that can correct their errors, or controul their adjudications. From this court there is no appeal. And I conceive the legislatures themselves, cannot set aside a judgment of this court, because they [the judges] are authorised by the constitution to decide in the last resort[7].

Clearly understanding that the constitution was not merely a structure of political governance, but was itself a species of higher law, *Brutus* declared, "The legislature must be controuled by the constitution, and not the constitution by them." Therefore, the conclusion is plain: Congress "have therefore no more right to set aside any judgment [of

---

5 James Madison, *The Federalist Papers*, No. 51, p. 320.

6 H.J. Storing, *The Anti-Federalist*…, p. 103.

7 *Ibidem*, p. 165.

the Court] pronounced upon the construction of the constitution, then they have to take from the president, the chief command of the army and navy, and commit it to some other person"[8]. The framers of the Constitution may have been intent on balance in the government, but *Brutus* saw no balance; he saw only dominance.

The framers were well aware of the Greek understanding of politics as between the one, the few, and the many, and how the government of one – the monarchy – degenerated into tyranny, and the government of the few – the aristocracy – degenerated into oligarchy, and the government of the many – democracy, the most hopeless case of them all, for democracy, was , as Aristotle, saw it, on the needs of the people, and not on the common good[9]. But unlike the Greeks, even Aristotle, who despaired of finding a solution, the American framers sought to build a structure where the one – the President; the few – the Senate; and the many – the House of Representatives; would counterbalance each other and prevent a concentration of governmental power that would be the enemy of the liberties of the people.

But *Brutus* saw things differently. By failing to place checks upon the judiciary, he argued that the Constitution would allow the Court to become a tyrannical oligarchy, overwhelming the other branches of the central government, and unraveling the balance the framers thought that they had created. "In their decisions, [the Justices of the Court] 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"[10]. Judicial supremacy would be the inevitable result.

Not only that, even the other division of governmental power, between the central government and the states, would collapse under the authority of the Supreme Court, *Brutus* argued. He predicted that the federal court would inevitably expand the reach of all federal powers to the detriment of the states. He declared that because the judges are

---

[8] *Ibidem.*

[9] In its deviant form, "democracy [is] for the benefit of men without means." Aristotle, *The Politics*, (London: Penguin Books, 1992), p. 190.

[10] H.J. Storing, *The Anti-Federalist*…, p. 165.

in such an unchecked position they will naturally aggrandize power to themselves and to the central government. And he concluded,

> [I]t is easy to see, that in proportion as the general government acquires power and jurisdiction, by the liberal construction which the judges may give the constitution, will those of the states lose its rights, until they become so trifling and unimportant, as not to be worth having[11].

4. The Debate over the Constitution: Hamilton

Who could contend against such a powerful critique? One man thought he could. One man thought he needed to defeat *Brutus*. It was Alexander Hamilton. Alexander Hamilton, who became General George Washington's close aide-de-camp during the Revolutionary War[12]; Alexander Hamilton, who led his soldiers with unloaded muskets in a desperate charge against seasoned British troops at the Battle of Yorktown to assure victory and American independence[13]; Alexander Hamilton, who would later fashion America's economic future as Secretary of Treasury under President George Washington[14]; Alexander Hamilton now took on *Brutus*.

In six essays that would soon become part the collection known as The Federalist Papers, Hamilton, under the name of *Publius,* schooled *Brutus* on the nature of judicial power. Where *Brutus* had worried about the *formal* powers of the judiciary under the Constitution. Hamilton looked instead about what about what judges and congressmen and presidents actually *do*. Knowing what the function of judging actually is (Hamilton, himself, was a superbly gifted lawyer)[15], confidently predicted,

---

[11] *Ibidem*, p. 172.

[12] Ron Chernow, *Alexander Hamilton*, (New York: The Penguin Press, 2004), pp. 85-129.

[13] *Ibidem*, pp. 160-165.

[14] *Ibidem*, pp. 319-333.

[15] *See* Julius Goebel, Jr., ed., *The Law Practice of Alexander Hamilton* (New York: Columbia University Press, 1964).

"[T he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution"[16].

In the Constitution's tripartite division of powers, Hamilton ascribed "FORCE" to the executive, "WILL" to the legislature, and the seemingly more circumspect "judgment" to the judiciary[17]. There it is again: the word "judgment."

Hamilton not only agreed with *Brutus* that the judges were without significant formal checks on their authority, he asserted that they *needed* to be independent of the other branches. 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 only be corrected by the awful "appeal to Heaven," with the pain and disruption of revolution. 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"[18].

Thus, the Constitution, to protect against tyranny, needed an independent judiciary: "The complete independence of the courts of justice is peculiarly essential in a limited Constitution," he declared unflinchingly[19]. *Brutus* was worried about tyranny. *Publius* was worried about chaos and revolution, and only an independent judiciary and the rule of law could prevent that. Hamilton declared, "liberty can have nothing to fear from the judiciary alone"[20].

5. Position of Judiciary

But was Hamilton's view of the judiciary in harmony with the attitude of the other framers? The historical record affirms that it was

---

16 Alexander Hamilton, *The Federalist Papers No. 78*, p. 464.

17 *Ibidem*.

18 Harold Coffin Syrett, *The Papers of Alexander Hamilton*, XXV, (Columbia University Press, 1977), p. 526.

19 Alexander Hamilton, *The Federalist Papers No. 78*, p. 465.

20 *Ibidem*, p. 464.

so. *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 Court needed much external checking. On the contrary, they took pains to remove external checks from the judiciary.

There is little doubt but that the Framers expected the courts to exercise judicial review of the constitutionality of legislation in an appropriately brought case, and certainly those opposed to the Constitution agreed that there would be judicial review – that is 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 had little fear of the judiciary.

In fact, the lack of judicial independence had been one of the accusations against the King in the Declaration of Independence. The Declaration charged that the King "has made Judges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries." In response to King's purported malfeasance towards the judiciary, the drafters of the Constitution protected judges in their office during "good behavior," the term of art denoting independence for their whole lives[21]. And the Framers protected judges' salaries from being reduced[22]. The framers awarded the judges lifetime tenure because they believed that judicial independence and the rule of law were indissolubly connected. To have one, one must secure the other.

Let us look, for example, at what the framers did not do. At the constitutional convention, there was a proposal for an institution similar to what has later developed in Europe: a Council of Revision made up of a number of justices of the Supreme Court and the President that would review the constitutionality or bills coming out of Congress before they were formally signed into law. But the framers rejected that proposal because first, as the courts could also review the constitutionality of laws when the issue came up in cases before them, and second, and more importantly, 2) it was contrary to the function of the judiciary to

---

[21] U.S. Const., art. III, § 1.

[22] *Ibidem.*

be involved in the making of law, rather than the application of law[23]. Instead of the Council of Revision, the convention opted to give a veto to the President alone[24].

Of course, in the Constitution, there are provisions for the President and Congress to appoint or legislate on the judiciary, but this was, in fact, to enable a strengthened judiciary. For example, the Framers expected that the Senate's role in approving the appointment of judges would be used to elevate competency and make sure that the nominee was not merely a personal favorite of the President[25]. *Publius* expected, and the First Congress bore him out, that the Congress would use its power to regulate the appellate jurisdiction of the Supreme Court primarily for the practical purpose of making the judicial process manageable and efficient, and not for limiting the power of the Court[26]. Hamilton and the Framers also believed that the amending and impeachment powers would be instituted only in extraordinary cases, one's that would meet standards of criminality for judges, and standards of constitutional rather than political legitimacy for presidents[27]. In their judicial function, therefore, judges were given broad constitutional immunity.

Both *Brutus* and *Publius* were correct, then, that the Framers expected judicial review to be based upon institutional judicial independence. 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 checks and balances that the Constitution had so artfully placed on the President and Congress.

And to *Brutus's* claim that judicial independence meant judicial supremacy, Hamilton rejoined

---

[23] Jeffrey Anderson, *Learning from the Great Council of Revision Debate*, «The Review of Politics» 68.1/2006, pp. 79-100.

[24] U.S. Constitution, Art. I, Sec. 7

[25] John McGinnis, *Appointments Clause*, [in:] *The Heritage Guide to the Constitution*, ed. David F. Forte, (Washington, D.C.: Regnery Publishing, 2014), p. 271.

[26] Judiciary Act, 1 Stat. 73 (1789).

[27] *See* Michael Gerhardt, *The Federal Impeachment Process: A Constitutional and Historical Analysis*2, (Lexis Publishing, 2000).

> Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former[28].

The one element that Hamilton truly believed would be a check on the judiciary was the legislative power of impeachment. 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[29]. But as history demonstrated, here he was wrong. Impeachment has turned out to be an impractical method of limiting an a judiciary that strayed from its constitutional role.

6. Judicial Virtue

Nonetheless, it might seem that *Publius* may have walked into *Brutus's* trap. Having conceded that the intent of the Framers was to establish an independent judiciary, just as *Brutus* had charged, how could Hamilton as *Publius* answer the more trenchant accusation: with so much unchecked power, will not the judges turn to power, not law, in making their decisions? *Brutus* had described the passions and the motivations of judges as being no different from that of legislators. Do not judges in long robes have the same passion for power, the same self-interested desires as do congressmen in long coats? Was it a conceit of Hamilton that judges would not, in their role as judges, utilize WILL? With an essentially unchecked judiciary, what security will there be that the judges will remain common law judges, wedded to deciding cases, and not become political actors?

Hamilton had an answer: it is virtue. *The particular kind of virtue that inheres in the function of being a judge*. He wrote:

---

[28] Alexander Hamilton, *The Federalist Papers No. 78*, p. 466.

[29] Alexander Hamilton, *The Federalist Papers No. 81*, pp. 483-84.

> It has been frequently remarked, with great propriety, that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, 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[30].

Everywhere a judge turns, he is bound by the instructive moral limits of his craft. In other words, Hamilton argued that judges have a special calling, a vocation, if you will. The essential attribute of a vocation is that it sets limits. It has boundaries, for I in wry humor, "I don't deal with policy – that's not my business. I gave it up when I took the veil"[31]. Although they were not Catholics, the framers of the Constitution understood the notion of vocation and of the Ciceronian duties that vocation encompasses.

George Washington understood the limits involved in a public calling. He understood it when he gave up command of the army to civilian control when, like so many successful generals before and since, he could have taken all political power to himself [32]. In his first Thanksgiving Proclamation, he prayed,

> and also that we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations and beseech him to pardon our national and other transgressions – to enable us all, whether in public or private stations, to perform our several and relative duties properly and punctually – to render our national government a blessing to all the people, by

---

[30] Alexander Hamilton, *The Federalist Papers No. 78*, p. 470.

[31] Margaret Talbot, *Supreme Confidence: the Jurisprudence of Justice Antonin Scalia*, «The New Yorker» 28/2005, https://www.newyorker.com/magazine/2005/03/28/supreme-confidence (accessed September 6, 2019).

[32] John Ferling, *The Ascent of George Washington: The Hidden Political genius of an American Political Icon*, (New York: Bloomsbury Press, 2009), pp. 232-235.

> constantly being a Government of wise, just, and constitutional laws, discreetly and faithfully executed and obeyed…[33].

The same is true for judges. Through the moral matrix of the law that binds a judge *as judge*, he learns the art of public virtue, literally the Aristotelian habit of acting rightly[34]. Let us consider those elements that binds the judge as judge.

There is, to begin, the *law of statutes*, of administrative regulations, and of executive orders. Quoting St. Augustine, St. Thomas Aquinas writes that "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"[35]. Thus, the courts are bound by rules of statutory interpretation. Justice Antonin Scalia was famous for emphasizing the art of textualism, and he has had great influence in this on other members of the Court. By respecting the authority of the legislature and the executive, the courts affirm the political legitimacy of those branches that have a closer accountability to the people. Courts that are faithful to the positive law of statutes thereby strengthen the legitimacy of the polity.

A second element in the moral matrix of the *law of the court*, or the rules of precedent or *stare decisis.* Precedent operates as a form of judicially created statute, which, like a legislative statute, is binding but which still must be interpreted.

There is an additional parallel between the law of statutes and the law of precedents: both direct a judge's attention to what has gone before. Both testify to the fact that the law that comes to the judge is *de lege lata*, something already laid down, as opposed to *de lege ferenda*, law as it ought to be. Thus do both the law of statutes and the law of the court

---

[33] George Washington, *Thanksgiving Proclamation, 3 October 1789*, *Founders Online*, https://founders.archives.gov/documents/Washington/05-04-02-0091 (accessed September 6, 2019).

[34] Aristotle, The Nicomachean Ethics, II, i, (1103b), (London: Penguin Books, 1953), p. 32.

[35] Thomas Aquinas, *Summa Theologiae*, trans. Fathers of the English Dominican Province Part II-II,Q. 60, New Advent, at http://www.newadvent.org/summa/3060.htm

channel the judge away from subjective preferences. We should mention here also that part of the law of the court is the law of judicial system, by which lower courts follow the rules laid down by superior courts within their jurisdiction. The system provides consistency and coherence in the law throughout the country in its thousands of applications.

A third element is *the law of process*, which limits what a court can hear, what evidence may be admitted, and how a court may dispense legal justice. As every American law student learns – and what every lawyer and judge knows – courts may not choose what issues to decide. They are limited to cases, which means that there must be a plaintiff (or petitioner), a defendant (or respondent) and a legal cause of action. The parties must have standing, that is that they must show how they stand to gain or lose something tangible in the dispute, the issue must be ripe, that is, other routes of settlement are not available; it must not be moot, that is, no outside event has overtaken the dispute, and the court must have jurisdiction. Each of these elements must be shown in every particular case, and the law behind each element is voluminous.

A fourth element of the law is the *law of the subject,* or legal doctrine. Every legal dispute is brought in one or more subject areas, each of which has its own complex concepts, standards, and history. Each subject – whether it be contract law, tort law, anti-trust law, tax law, bankruptcy law, divorce law, corporation law, or any of the other myriad substantive subjects taught at law school and continued on in the practice of lawyersb – has a coherent and definable content, known in legal studies as "doctrine". The vast detail and the motivating principles in every area provide a positive law of direct relevance to the resolution of each particular legal dispute, and a limiting context to how a judge can decide the case.

A fifth element is the *law of the case*, or *res judicata*. Once a case has been fully and completely decided, no court may revise or reopen the litigation. Although the legislature may change the underlying law and affect the legal rights of the parties even in an ongoing case, once the dispute has been resolved judicially, not even a legislative act can change the rights and duties of the parties decisively determined by the court.

A sixth constraint is the *law of the judge*, or judicial ethics. The appropriate behavior of judges has been part of Western legal concern for centuries. In the United States, the American Bar Association first adopted Canons of Judicial Ethics in 1924. In 1972, the Canons were revised and redacted into a Code of Judicial Conduct that served as the basis for nearly all state codes of judicial conduct[36]. The Code covers such areas of judicial conduct as compliance with the law, diligence and impartiality, conflict of interest, and electoral activities. In addition, federal statutes cover disqualification and recusal of judges.

A seventh element is the *law of law*, or what makes an enactment truly binding. For law must have certain internal elements for it to be law, and not just an arbitrary or absurd act. The principle of legality was helpfully illuminated in the famous Hart-Fuller debate of a half century ago. Although Lon Fuller referred to his theory as "internal natural law," his view is more of a delineation of the nature of positive law, qua law, and the outer moral limits of what a judge can enforce as true positive law. For positive law to be legal, argues Fuller, it needs have certain internal attributes: the rules must be general, publicly promulgated, prospective, clear and understandable, consistent, capable of being complied with, relatively stable, and administered faithfully. Without these elements, an enactment would be void for vagueness, or for arbitrariness[37]. It simply would not be law, and a judge would be without power to enforce it. The principle was announced in a case as early as 1610 by Lord Coke: "And it appears in our books, that in many cases, the common law will controul acts of parliament, and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void"[38].

An eighth ingredient of the moral fabric of positive law is *the law of reason*, or more exactly, *the law of reasons.* As noted, the Anglo-American

---

[36] "Model Code of Judicial Conduct," *American Bar Association*, April 18, 2018, https://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/mcjc/ (accessed September 8, 2019).

[37] Lon Fuller, *The Morality of Law*, (New Haven: Yale University Press, 1964).

[38] Dr. Bonham's Case**,** 8 Co. Rep. 107a, 114a C.P. 1610 (1610).

legal system's hallmark is the moral accountability of the judge for his decision, particularly at the appellate level. He must give reasons, publicly stated, justifying his decision, open for criticism and rational impeachment. It is not enough for the judge to follow the various elements of the positive law, as outlined above. He must demonstrate to the people and the polity that he has been faithful to the positive law. Not only, therefore, is the judge bound by the moral constraints of the positive law, he must be transparently bound.

The law of reason as an internal element of the craft of judging brings to the threshold of the question of natural law. As Cicero put it, "For there is but one essential justice which cements society, and one law which establishes this justice. This law is right reason, which is the true rule of all commandments and prohibitions. Whoever neglects this law, whether written or unwritten, is necessarily unjust and wicked"[39].

All of the above impels a judge in the American legal system to adhere to *the law of the Constitution*, which provides the moral basis for originalism. The Framers did not think that the Constitution was just a magnificent political edifice; it was law, and enforceable as law by the courts. When Chief Justice Marshall contemplated what the Constitution meant to him as a judge, he declared, "The Framers of the Constitution contemplated [i.e., intended] that instrument as a rule for the government of courts, as well as of the legislature. 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 [i.e., 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"[40].

All these elements taken together form a matrix of duties that directs a judge away from himself towards the law and the rule of law. These are the guides through which a judge can make a reasoned judgment. They provide the ground for self-discipline and detachment. The philosopher

---

[39] Cicero, On the Laws (De Legibus), in *The Treatises of Cicero*, tr., C. D. Yonge (London, 1853). „On the Laws," Book I, chaps. 10-16, available at http://pirate.shu.edu/~knightna/westciv1/cicero.htm

[40] Marbury v. Madison, 5 U.S. 137, (1803).

Michael Polanyi put it well, *The freedom of the subjective person to do as he pleases is overruled by the freedom of the responsible person to do as he must*[41]. Will yields to judgment.

7. The Independent Judiciary

Today, we see how the United States Supreme Court is talked about as a partisan political institution. We see what happens to Supreme Court nominees before the Senate Judiciary Committee. Was it always this way? No, it wasn't.

Though the framers sought an independent judiciary to check the executive and the legislature, they also tried to inoculate it from acting in a political fashion itself. To protect the rule of law, in his professional function, a judge must be a judge and nothing else.

For its part, the federal courts early on also insulated themselves from the political process. In 1792, Congress authorized the federal circuit courts to disburse pensions to veterans, their decisions subject to approval by the Secretary of War. The circuit courts refused to do so, saying that these were non-judicial duties and that in any event, their decisions could not be subject to a veto from another branch. In response, Congress changed the law, relieving the judges of that executive duty[42].

The next year, in 1793, with war raging between Britain and revolutionary France, President George Washington asked the Supreme Court give him advice on the interpretation of treaties that the United States had with Britain and France. The Supreme Court refused, basing its view on its sense of its judicial role, and a textual interpretation of the Constitution.

---

[41] Michael Polanyi, *Personal Knowledge: Towards a Post-Critical Philosophy*, (London: Routledge, 1958), pp. 208-09.

[42] Wythe Holt and John Blair:, *Safe and Conscientious Judge*, [in:] *Seriatim: The Supreme Court before John Marshall*, ed. Scott Douglas (New York: New York University Press, 1998), pp. 173-76.

> The lines of Separation drawn by the Constitution between the three Departments of Government, their being in certain Respects checks on each other, and our being judges of a court in the last Resort, are Considerations which afford strong arguments against the Propriety of our extrajudicially deciding the questions alluded to ; especially as the Power given by the Constitution to the President of calling on the Heads of Departments for opinions, seems to have been *purposely* as well as expressly limited to *executive* Departments[43].

Lastly in 1803, in the famous case of *Marbury v. Madison*, Chief Justice John Marshall established the doctrine of political questions, whereby certain issues, not in their nature legal, were to be resolved solely by the political branches.

> By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience…[44].

His acts "can never be examinable by the Courts." On the other hand, he declared, "It is emphatically the duty of the Judicial Department to say what the law is," but when the legislature imposes on executive officials legal duties, "when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others"[45].

In sum, the moral matrix of judging kept the judges in the American legal system true to their craft, and, for the main part of its history, kept them from entering the political decision-making area. When there was an exception, such as the *Dred Scott Case*[46], legitimizing slavery

---

[43] *Letter To George Washington from Supreme Court Justices, 8 August 1793*, *Founders Online*, National Archives, at https://founders.archives.gov/documents/Washington/05-13-02-0263.

[44] Marbury v. Madison, 5 U.S. 137 (1803).

[45] *Ibidem.*

[46] Dred Scott v. Sandford, 60 U.S. 393 (1857).

through the federal territories, Abraham Lincoln could observe, "The candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal"[47].

The Dred Scott exception was ended by the Civil War. Yet today, we all see in the nomination hearings of nominees to the Supreme Court, the bitter political atmosphere that has ensued. Many now think of the Supreme Court's decisions as essentially political. First, I must say that that is only partially correct. The bulk of all federal decisions, including the Supreme Court's, are bounded by the elements of that moral matrix of positive law that I described. But Lincoln's opposition to the Court that decided *Dred Scott* should not be seen as an example to be emulated. That decision so undermined the Constitutional bargain made in 1789, that it was not merely mistaken. It was, rather, an attempt to change the fundamental social compact and destroy the constitutional enterprise altogether. Other mistaken decisions of the Supreme Court can be tolerated until corrected at a later time.

To the extent that the Supreme Court is seen as political today, it is because the Court has strayed out those duties and obligations which the common law system had established. It has moved from judgment to WILL. Cases establishing a right to an abortion or to same sex marriage have no warrant in the structure of the rule of law that has kept that diverse country unified for so long. The true problem with *Roe v. Wade*, for example, is that it did not follow the ethical norms of *positive law* of the court. In that case, Justice Blackmun violated *the law of the court* by ignoring the tradition of cases opposed to such an innovative "right." He violated *the principle of legality* by proposing a rule that had little internal consistency. He violated *the law of reason*, for the opinion was simply a dictat declaring a result that had no colorable reasoning behind

---

[47] Abraham Lincoln, *First Inaugural, March 4, 1861*, *Avalon Project*, https://avalon.law.yale.edu/19th_century/lincoln1.asp. (accessed September 8, 2019).

it with a flippant disregard of the norms of justification and transparency. Blackmun violated the positive *law of the Constitution*, for there was no privacy right encompassing abortion in the original understanding of liberty or in any reasonable application of the original understanding.

Roe v. Wade is not just censurable because it violates natural law, as some people assert, with reason. It is censurable because Justice Blackmun violated the most fundamental moral norms of the positive law, prompting the famous observation of John Ely, "It is…a very bad decision…because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be"[48].

That is why, irrespective of the substantive issue of abortion, I think it would be of great benefit to the judicial and Constitutional system in the United States if *Roe v. Wade* were overruled. It would return the Court more fully to its task of making reasoned judgments and confirming the rule of law.

For what seems to be exceptions are exceptions. If the political based rulings were the rule, then *Brutus* would be right. But the result would be that we would not have the rule of law or a legal system worthy of the name. As Hamilton put it, laws are a dead letter without courts to expound and define their true meaning and operation.

The judges I know – and I know and give seminars for many – know their vocation. They ply their craft with integrity, with the discipline of detachment and neutrality. In the positive law of their craft, they too practice natural law.

The Judge and the Rule of Law

Summary

In the American system of justice, based on the common law method, the judge enjoys greater independence than do the judges in Civil Law

[48] John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, *Yale* «Law Journal» 82/1973, p. 920.

systems. Independence of the judiciary is essential in a system of checks and balances where the more powerful elements of the legislature and the executive must be limited by legally enforced principles. At the same time, judicial independence is constrained within moral limits by a system of positive law rules that direct the judge to make reasoned judgments that he must justify by open opinions.

Sędzia wobec rządów prawa

Streszczenie

Sędzia w amerykańskim systemie *common law* cieszy się większym zakresem niezależności, niż sędziowie funkcjonujący w ramach kultury prawnej opartej na legislacji. Niezawisłość sądownictwa jest niezbędna w systemie opierającym się na mechanizmie równoważenia się władz. Równocześnie zaś, moralne ramy dla niezależności jaką cieszy się sędzia przy orzekaniu względem legislatywy lub egzekutywy tworzą unormowania wymagające, by wydany przezeń wyrok był uzasadniony w publicznie dostępnym wywodzie.

Keywords: rule of law; judicial power; accountability.
Słowa kluczowe: rządy prawa; sądownictwo; kontrola społeczna.

Bibliography

Anderson Jeffrey, *Learning from the Great Council of Revision Debate*, «The Review of Politics» 68/2006.

Chernow Ron, *Alexander Hamilton*, (New York: The Penguin Press, 2004).

Coffin Syrett Harold, *The Papers of Alexander Hamilton*, XXV, (Columbia University Press, 1977).

Ferling John, *The Ascent of George Washington: The Hidden Political genius of an American Political Icon*, (New York: Bloomsbury Press, 2009).

Forte F. David, *The Morality of Positive Law,* in Francis Beckwith, et al., eds., *A Second Look at First Things: A Case for Conservative Politics: The Hadley Arkes Festschrift* (St. Augustine's Press, 2013).

Fuller Lon, *The Morality of Law*, (New Haven: Yale University Press, 1964).

Gerhardt Michael, *The Federal Impeachment Process: A Constitutional and Historical Analysis*2, (Lexis Publishing, 2000).
Goebel Julius, Jr., ed., *The Law Practice of Alexander Hamilton* (New York: Columbia University Press, 1964).
Hart Ely John, *The Wages of Crying Wolf: A Comment on 'Roe v. Wade'*, «Yale Law Journal» 82/1973.
Holt Wythe and Blair John, *Safe and Conscientious Judge*, [in:] *Seriatim: The Supreme Court before John Marshall*, ed. Scott Douglas (New York: New York University Press, 1998).
McGinnis John, *Appointments Clause*, [in:] *The Heritage Guide to the Constitution*, ed. David F. Forte, (Washington, D.C.: Regnery Publishing, 2014.
Polanyi Michael, *Personal Knowledge: Towards a Post-Critical Philosophy*, (London: Routledge, 1958).
Storing J. Herbert J., *The Anti-Federalist*, (University of Chicago Press, 1985).
Talbot Margaret, *Supreme Confidence: the Jurisprudence of Justice Antonin Scalia*, «The New Yorker», 28/2005, https://www.newyorker.com/magazine/2005/03/28/supreme-confidence (accessed September 6, 2019).