

## **“Constitutionalism and Judicial Authority”**

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One well-respected American scholar once wrote that the Supreme Court of the United States, called in *The Federalist Papers* the branch of government “least dangerous to the political rights of the people,” is nevertheless the most powerful court the world has ever known. That might be an exaggeration, but it is generally accepted by Americans that, for better or worse, the Supreme Court has the power to strike down acts of legislation and even executive orders that it finds unconstitutional. Today no practice of American government is more the cause of constitutional controversy at home than the Court’s exercise of this power, and when a vacancy occurs in one of the nine lifetime seats on the Court, political forces line up behind their favorite candidates as though it were an election, though the appointment is in the hands of the president, with confirmation by a majority in the Senate. Curiously, the power of judicial review, allowing the Court to enforce the written Constitution against the other branches of government, is itself unwritten. That our Constitution contains unwritten traditions as well as written texts is one reason why it is so short.

How did this unwritten power become the pre-eminent device for enforcing the Constitution? That is too long a tale to tell today, but I want to outline several episodes. I will talk about our history, leaving to you to decide how it applies in your circumstances today, though I will suggest a few avenues for thought.

Let me begin with the Constitutional Convention. Fifty-five men, and often fewer at any one time, met in Philadelphia in the summer of 1787 to draft the Constitution. A few were senior statesmen – Benjamin Franklin was 90 years old, George Washington was 55 – but most were 40 or younger at the time. They met in secret sessions from late May until mid-September, signing a draft that Congress then sent to the states for ratification by conventions. Nine of the thirteen states had to ratify for the Constitution to go into effect, and only those who ratified could join the reconstituted union. When the new government began in March, 1789, it had only eleven member states.

At least twice during the summer the convention almost broke up, over the question of representation: whether representation would be proportional by the population of the states, or whether it would be equal for each state. The original draft that summer, called the “Virginia Plan,” which was supported by a majority of the states, would have made both houses of the legislature apportioned by population, allowing large state dominance. At the first pause, delegates from the small states withdrew and produced a draft, called the “New Jersey Plan,” that would basically preserve the existing

constitution, the Articles of Confederation, keeping one vote per state in a one-house Congress. This was rejected by the large states, leading to the second crisis, at which point a committee was appointed to forge a compromise: the legislature would have two houses, one apportioned by population, the other (the Senate) by equal votes for states. This insured respect in the federal legislature for the interest of the states in their independence.

Also rejected from the Virginia Plan was James Madison's proposal that Congress have power to reject legislation passed in the states. Instead, from the New Jersey Plan, the framers adopted these words:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. [Article VI, clause 2]

Who are the judges referred to here? They were the ordinary common law judges already in office in the states. Common law was the basis of law in all the states. It was unwritten law, customary law, carried over by the colonists from England. Although customary, it was kept steady by means of the doctrine of precedent, requiring courts to follow past practice in new cases, unless a good reason could be shown why precedent does not apply. Legislatures could modify common law by statute, and the people could modify it by constitutional amendment – and now state judges were instructed to abide by the federal Constitution as well. Since common law was the basic law of property and crime in the states, state judges handled most of the legal business of the country, and still do.

The federal judiciary was created on the model of the state common law courts in some respects: It was expected that federal judges would follow precedent, they were chosen from among lawyers, and they tried facts by jury. The Constitution established only one Supreme Court, leaving to Congress to decide whether to form other courts, which they quickly did. There was little federal law in the early days; mostly the federal courts handled cases between citizens of different states, where the state courts might be thought biased.

Where is judicial review in this story? It is explicit in the Constitution only for state judges, in the clause quoted above. Federal judges have the power only by inference from the duty of a common law judge to consider all relevant law in a particular case and to try to find rational consistency. The crucial point is this: Acts of legislation were struck only when necessary to decide a specific suit already in court. Ordinary courts have extraordinary power, but only when a case is brought before them. Many constitutional issues had to be worked out politically or left unresolved.

This is important for federalism, because only in this way could acts of state legislation be declared unconstitutional. Not by direct confrontation of governments, but

in the course of settling a lawsuit, often among individuals, might the courts adjudicate the boundary between the federal government and the states. In the early years, to be sure, the Supreme Court, an appellate court of last resort, tended to decide such cases by giving the enumerated federal powers, though few, a broad interpretation. But this simply left to Congress and the people who elected them the decision of what powers to exercise, and how.

How did the Supreme Court grow so powerful in its exercise of judicial review? After our Civil War – when a secession movement was suppressed at the cost of hundreds of thousands of lives (a point to recall when you wonder why Americans viscerally flinch when they hear the word “secession”) – the Constitution was amended to give the federal government a greater role in protecting individual rights against the states, thus eventually involving them in review of many matters of property law, family law, and criminal procedure once left entirely to the states. By slow legal process, most guarantees of rights are now decided by federal courts, and the powers of Congress have generally, but not always, been ever more expansively interpreted. Still, the courts protect the states’ basic sovereignty from lawsuits, and by longstanding tradition they stay clear of foreign policy and the military. When a court exceeds its authority, there are balances that might still be put in play.

What lessons might there be for Iraqis from this tale? Let me suggest a few avenues for thought. First, note that the system of judicial review and the legalized character of federalism resulted from the contribution of the minority at the constitutional convention in 1787. Second, note that the framers of the American Constitution built upon existing ordinary courts of justice and upon existing maxims and principles of justice; even when they innovated regarding courts, they adopted familiar forms. Third, legal development and constitutional development was a gradual process, a task for each generation of Americans. In many ways this was intended, just as it was intended to secure a few basic principles (and not every issue) in writing. Finally, when the Constitution broke, they fixed it – or rather, they used the established institutions and procedures of the Constitution to preserve the union and repair it to prevent future troubles. Even in the beginning, the Americans did not think their Constitution perfect, but they built means of improvement – by written amendment and by legal process – into the original design.

## **“Religious Freedom in a Religious Country”**

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From the earliest years of American independence, Americans established “religious freedom in a religious country.” We have that freedom still today, and we are a religious country still today. In the latter respect, America stands out in contrast to other Western democracies. By the measure of Church attendance, religion seems almost dead in many such places, as fewer than 10% of the population attend church weekly, while in America the number is over 50%. Our majority religion is Christian, while yours is Islam, and as these religions differ, perhaps there will be some difference in how religious liberty is seen. Still, I think the American experiment in religious freedom is worthy of your attention. Let me make three points.

First, at the time of the American Founding, there was extensive religious diversity among Christians in America, and it was geographically based. In the northeast (called “New England”), the people were mostly Puritans, following a strict moral code, reading the Bible, worshipping simply without priests or many sacraments, but with extensive sermons every Sunday on Biblical texts. In the south, most whites belonged to the Church of England, which was less strict on matters like drinking and smoking, but more elaborate in worship. Puritans and supporters of the Church of England had fought a civil war against one another in England a century and a half before, and their American counterparts shared many of these passions. In the middle states, between New England and the South, there was a mix of different ethnicities and different religious groups, including Catholics and Quakers. When the First Amendment to the American Constitution was written in 1789, saying Congress shall make no establishment of religion, we meant principally no establishment of a *national* religion.

Second, from the 1780s to the 1830s, there was a movement to end religious establishments where they existed in the states. Thomas Jefferson took the lead on this in Virginia, and in the reader accompanying this conference a copy of his “Statute for Religious Freedom” is included. As you can see, too, from the letter of George Washington to the Jews in Rhode Island, there was broad consensus on a number of points:

- (a) Freedom of conscience was seen as a natural right. By this, they meant that the human mind is such that people cannot be made to believe by political force. You might coerce profession of belief, but not belief itself – so coercing religion was seen as deeply wrong and also foolish, for all you could do was force people to lie, that is, to break the command of truth in every faith.

- (b) Freedom of worship was to be permitted to all, provided they don't violate the laws of the state. All who fulfill the duties of citizens could worship as they pleased, but there need not be tolerance of those who offend their civic duties on a claim of faith.
- (c) Government would not favor one religion over others. There is no religious test for office allowed by the Constitution, and no government aid would be given to religious groups for religious purposes. No religious authority held political authority by virtue of his religious office.

Now between Washington and Jefferson, and between the parties that admired them, there were some differences on the proper extent of separation of church and state. Washington thought that government should sponsor public days of thanksgiving – to this day Thanksgiving is our one religious-like national holiday – and that government should pay military chaplains. The aim was not to make people religious, but to acknowledge the religious lives of the people and the role of religion in promoting moral virtue. Jefferson and Madison hesitated to pay military chaplains or to proclaim thanksgiving days. Even today there is some difference among Americans over the degree to which government in its actions should acknowledge the religious activities of the people, but all agree that no particular religion can be favored or suppressed.

In the Constitution there is allowed no establishment of religion and no religious test for office – but the Constitution exempts Sundays when it counts the days the president has to veto a bill; it requires oaths (or affirmations) before people assume office; and it gives the Constitution a Christian date. In brief, the Constitution acknowledges the religious character of the country, but does not make it the business of government to make the country religious.

My first point was to mention the religious diversity of early Americans; my second point was to discuss the consensus that developed among them about religious freedom. My final point is simply this: Americans think that religion is strong in America precisely *because* it is largely separate from the state. Government, we think, should not suppress religion. But government must also not corrupt religion, by making it its tool.

## **Some Additional Comments and Concluding Remarks**

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### On the question of international guarantees of sovereignty

I think we Americans would all agree that we were very fortunate that at the time we sought our independence, there was no United Nations. Our Declaration of Independence promises a “decent respect to the opinions of mankind,” but we asked no permission of an international body. If there had been a U.N. then, either it would have opposed us, or it would have tempted those Americans most jealous of their independence not to form a union big enough for the common defense. In America, we have an expression, “Do it yourself.” I think this applies both to the attitude of a self-reliant middle class, and to questions of international security. Freedom requires both a willingness to fight for freedom, and a willingness to compromise for freedom. Freedom is in both of these, and they go together.

### On representation by geographical districts rather than by group membership

Americans don't deny the reality of social groups or that they have meaning for people's identity. We don't deny that ethnicity, religion, profession, or educational background is important in making people who they are or in influencing how they vote. What we refuse to do is to specify these classifications in our Constitution or to have a quota or slate system that encourages people to vote only on the basis of a single characteristic or a simple doctrine. For example, Senator Hillary Clinton of New York wins many votes because she speaks for women's rights – but she would never win a majority in New York if she spoke for this alone. Similarly, Senator Rick Santorum wins votes in Pennsylvania because he is a strict Catholic, but he would never win enough votes to win his state for that reason alone. Candidates have to reach out to people who are different in order to win, and this means they must moderate their message to build a winning coalition.

### On Islam and democracy

At the time of the American Founding, it would have been easy to claim that Christianity was not compatible with democracy. Almost every Christian country had been a monarchy, and there are passages in the Bible cited to prove that Christians ought to obey kings. The American Declaration of Independence asserts that God is the source of our rights, but it denies that God gives us government. What form of government to have is something we have to figure out for ourselves, precisely because we think that God, not government, gives us our rights – in other words, because God, not government, gives us the basis of our law.

### On why Americans decided so quickly to separate church and state

In fact, there was nothing new about the aspiration for religious liberty in America, although it was established when the country was founded. Christians had been engaged in an on-going civil war of religion in Europe for two hundred fifty years, and the American experiment was designed to try a different way. In other words, we observed the experience of others and were not ashamed to learn from it.

### Concluding Remarks

Let me say just a few words about what I have learned over the past few days. First, I have been impressed by your love of liberty and your passion for self-government, as Kurds and as Iraqis. Second, I have learned something about America. I have been reminded of the passions that lay behind our own civil war and our other ancestral enmities. Though Americans sometimes speak of these passions as though they belong only to the Old World, we had them, too. Our Constitution had not only the positive aim of peace and prosperity, but the negative aim of leaving ancient enmities to memory, not seeing in them a pattern for the future. Third, I have become more convinced than ever of the contribution that American constitutionalism can make in the world. It is easy for us Americans to think of ourselves as unique – we speak from time to time of “American exceptionalism” – but our constitutionalism is in fact based on insights into human nature. This is what makes it a part of the heritage of mankind.