BY ROBERT A. LEVY

Chairman's Message

Executive Hubris, Legislative Extravagance and Judicial Modesty

> "A misguided judicial modesty has prompted the post–New Deal Court to abdicate its responsibility."

Judicial modesty is the latest shibboleth. The key, says columnist Stuart Taylor, is for judges "to have a healthy sense of their own fallibility and to defer far more often to the elected branches." That certainly describes the zeitgeist at the recent confirmation hearings for Supreme Court justice Elena Kagan.

From the left, the *New York Times* admonished Kagan "to keep her pledge and help the court realize that judicial modesty actually means something." Or else, bemoaned the *Times*, "the court's willingness to defy precedent . . . could spell trouble for the national health care law." Never mind that Obamacare may well be unconstitutional.

For her part, Kagan portrayed the Court as a wondrous institution, which "must also be a modest one, properly deferential to the decisions of the American people and their elected representatives." She equated modesty with humility—an odd characterization coming from someone who had declared that it's "not necessarily wrong or invalid" for judges to "mold or steer the law in order to promote certain ethical values and achieve certain social ends."

Meanwhile, from the right, even Clarence Thomas —arguably the justice most willing to overturn questionable precedents—has written that social and economic legislation "comes to us bearing a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it. Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." It's difficult to envision a more modest approach to judging than that.

Regrettably, both liberals and conservatives get it wrong. Judicial modesty is perfectly appropriate—but only if and when a corresponding modesty is evident from the political branches. Otherwise, a one-way ratchet will operate to expand the size and scope of government. Today's political reality is endemic with unchecked legislative excesses and aggrandizement of executive power, which the Framers could never have imagined.

That's why Alexander Hamilton wrote in *Federalist 78* that limited government "can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void." James Madison shared that view: independent tribunals "will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution." Patrick Henry considered it "the highest encomium on this country, that the acts of the legislature, if unconstitutional, are liable to be opposed by the judiciary."

Instead, a misguided judicial modesty has prompted the post–New Deal Court to abdicate its responsibility. Here's a sampling of the perverse results: (a) Congress's power to regulate interstate commerce extends to activities that are neither interstate nor commerce; (b) the General Welfare Clause authorizes redistribution of assets from taxpayers to politically connected special interests; (c) states can rewrite mortgage contracts notwithstanding an express constitutional prohibition against "impairing the Obligation of Contracts"; (d) Congress can authorize the Treasury Department to craft bailouts for banks, car companies, and insurers in the face of a constitutional ban on delegating legislative power; (e) government can limit contributions to a candidate for purposes of political speech, even though the First Amendment prohibits laws abridging freedom of speech; (f) public universities can grant preferential treatment to racial minorities despite constitutionally mandated equal protection of the laws; and on and on.

Conservatives, in particular, need to grasp that judicial modesty—that is, excessive deference to the political branches—is a form of living constitutionalism, which conservatives have railed against since the term was coined. Whenever the judiciary simply rubber-stamps nearly everything conjured up by the legislative and executive branches, that removes the courts from their monitoring role and permits the Constitution to evolve, becoming whatever the politicians currently desire.

The answer, of course, is to appoint judges who have an understanding of the Constitution grounded in the principles that animated the Framers: federalism, separation of powers, individual rights, and limited government. Extreme activism by Congress and the president cannot be met by modesty from the courts. Indeed, close or ambiguous cases must not be resolved merely by deferring to temporal majorities. If the Constitution teaches anything, it teaches that constraining government power and defending personal freedom require that close calls go the individual, not the politicians.

Robert A Levy