

Notes:

America's Judicial System

The Ruling Oligarchy

By Dave Racer

How it was supposed to be

America's legal system during the time of the writing of the United States Constitution sat on a strong foundation of more than 1,000 years of tradition. England had been governed by a patchwork of tradition, Common Law, Magna Charta and the checks and balances offered by the tension between Parliament and English Kings. They did not have a written constitution and, in fact, still do not.

The English traditions had well served the first Americans. Legal disputes could be settled by Common Law courts, relying on precedents that were hundreds of years old. Judges could appeal to local traditions that did not conflict with Common Law, and they could look to the Bible for guidance. A jury of one's peers would, more than likely, consist of people who might actually know the accused, or the litigants.

Guided by tradition, Biblical injunctions and its admonitions, and the writings of Locke, Montesquieu, Rutherford, Blackstone Coke, and others, the founding fathers set out to write the rules of government into documents that could be accepted by the 13 colonies. Their first attempt, The Articles of Confederation, lacked the strength to succeed. They met again in 1787 to fix it, and instead, produced our United States Constitution.

In the new Constitution, the founding fathers enumerated (that is, they defined and specified) the rights of the federal government. That document told the federal government what it could do, and in some cases, what it could not do. The 13 colonies, henceforth called states, then ratified the new Constitution.

Notes:

By ratifying the new Constitution and creating the United States of America, the 13 states did not cease to be sovereign over their own affairs. Rather, the states, like the people, gave up some of their rights to the new federal government. In return, the federal government agreed to perform certain functions for the 13 states, and it was granted sovereignty in certain areas of concern, mostly having to do with defense, coinage of money, international trade, and trade between the states. The new federal government was severely limited by the Constitution, yet it had the power requisite to perform the functions deemed necessary by those 13 states.

So there were two checks on the power of the federal government at our nation's beginning. First, We the People, who gave our consent to the form of government, still retained all other rights not specified in the Constitution, or that had been granted to the various states. Secondly, the states provided a check on the federal government through their own forms, traditions and Constitutions. We the People and the various states checked the power of the federal government.

Three-headed protector

The founding fathers organized the federal government around three separate, but interlocking branches. The Constitution assigned specific tasks to each branch, but gave each branch certain methods to check the power of the others. Most historians credit Montesquieu for this innovation, as well as various Biblical passages that spoke of these separations.

Article I of the Constitution granted rights to and placed

Notes:

restrictions on the legislative branch to make law, and carefully described its duties. With a House elected every two years, the founding fathers believed that those representatives would best informed to carry to Congress the prevailing sentiment of We the People.

The Senate, on the other hand, was to be elected every six years, and as such, be less prone to over-reacting to crisis or passing fancy - being more contemplative.

With the House and Senate checking themselves, then, law would not be made in haste, but only after careful debate and consideration, and then only by consensus of the majority. In this manner, the founding fathers hoped that the laws would continue to represent the best interests of We the People. And ultimately, the people still held the most power because they could elect someone else to Congress if they did not like the laws.

Article II assigned the executive role to the President, and gave the President specific rights and duties. The President's primary duty is to serve as the nation's Chief Executive Officer, thereby carrying out the duties required by the laws that Congress passes. As well, the President would be Commander in Chief, the nation's chief diplomat to foreign nations, and use his appointive powers to fill the jobs required to staff government infrastructure.

The founding fathers knew that the President, in a unique sense and unlike the Congress, represents the best interests of all the people. Therefore, they gave him the power to veto laws passed by Congress. As well, they gave the President the power to appoint federal judges, yet even here, the founding fathers added one more check - the Senate had to consent to the judicial appointments made by the President.

Supreme Court to be limited and weakest branch

Article III of the Constitution, plus one section of Article I, enumerates the powers of the Supreme Court, inferior courts and the role of Congress in judicial affairs. It completed the three-legged stool of checks and balances, of the separation of powers that would help to ensure that no single government entity would become all-powerful or dominant. The Constitutional language is very clear:

Article III.

Sect. 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated time, receive for their services a compensation which shall not be diminished during their continuance in office.

And in Article I, Section 8, in a list of the duties of Congress, the Constitution says:

To constitute tribunals inferior to the supreme court;

These articles make it clear that from the beginning, the federal courts consisted of two entities: 1) the Supreme Court, which had its own Constitutional duties defined, and 2) inferior courts which Congress could create by law. Since Congress created the inferior courts, and the Constitution provides no enumeration of their power, it follows that Congress also had to define those powers in the laws it passed. That

Notes:

Notes:

means that inferior courts must answer to Congress, while the Supreme Court provides a check on Congress and the President.

Federal judges enjoy lifetime appointments. The founding fathers believed this would insulate them from political pressures, or succumbing to passions of the moment. They could defy the other branches because they did not have to fear the next election.

This is how the founding fathers intended the balance to be:

Congress, so close to the people, would make laws. The President, representing all the people, would execute the laws he supported and attempt to veto the others. The President would choose justices of the Supreme Court and later, by law, appoint judges to the inferior courts, and the Senate would have to vote to approve each appointed judge.

The Supreme Court was intended to serve primarily as an appellate court. That means it heard cases about Constitutional issues that had been tried in lower courts—inferior federal courts or appealed from the various states.

The Constitution, however, also specifies cases in which the Supreme Court had "original jurisdiction" (meaning they actually try the case in its entirety, not just when it was appealed). These generally include cases where a state sues a state, that involve foreign governments, or American ambassadors and other high government officials, or deal with issues on the high seas. And, of course, the Chief Justice of the Supreme Court sits as the presiding Judge during a trial that results from the impeachment of a President.

Alexander Hamilton wrote about the power of the Supreme Court in *The Federalist Papers*. He expected Congress to use its

"discretion" to make appropriate "exceptions and regulations" to keep the judiciary "the least dangerous" of the three branches of government.

Clearly, the founding fathers believed that the courts would always be a minimal player in the regulation of the lives of American citizens. It would be a last resort for those who had been Constitutionally-wronged, or to protect us from illegal actions of foreign nations. *It most certainly would not be used to restrict the rights of individual citizens, or create its own set of laws*; at least, that is what the founding fathers intended.

In retrospect, it is too bad that they did not include a Constitutional provision such as, "The Supreme Court shall not, at any time nor in any capacity under any conditions take unto itself powers of the legislative or executive branch, or those reserved to the states or the people." Had these words appeared, we could have been saved from our present circumstances.

Destruction of the reign and rule of law

Any essay such as this provides only an overview, not an in-depth study of the evolution of the Supreme Court. It is obvious, however, that from the founding fathers' view of the Court as a weak member of the three branches, it has become in recent decades, the dominant branch. Books have been written on all sides of this issue and would require exhaustive study. Here we consider a few of the factors that influenced this evolution.

Conservative and libertarian historians will somewhat disagree about the factors that caused these changes, but they will be nearly unanimous that, indeed, the Court has become a threat to our liberties—and far more powerful than any founding father ever dreamed in their worst nightmare.

Notes:

Notes:

Justice Antonin Scalia spoke at The Catholic University of America Washington, D.C. on Oct. 18, 1996. He titled his remarks, "A Theory of Constitutional Interpretation." Asked to explain what were the duties of the Court, he answered, "What do you think your judges are doing when they interpret the Constitution? It's sad to tell you after 200 years, there is not agreement on this rather fundamental question: What is the object of the enterprise?"

How can this be? The Constitution seems so clear about the Court's duties. It is because from the beginning, during the earliest cases heard by the Court, a power battle ensued between the three branches. Chief Justice John Marshall wrote the opinion for the Court in Marbury v. Madison (1803). In that case, it was not so much what was decided as *how* it was decided that mattered most. Marshall, in this decision, established the right of the Court to review laws passed by Congress, to determine their Constitutionality. Yet Marshall, in many subsequent decisions, repeatedly reiterated that Congress made law, not the Court.

Several years after Marbury, Marshall found himself in the minority on the issue of the Court becoming lawmakers, issuing a strong warning to the other judges about their insinuating themselves into the lawmaking processes. The Court did this by not only declaring a law to be null and void (unconstitutional), but by requiring certain remedies and actions be taken by government units or citizens. These remedies, then, had the effect of laws, as if Congress has passed them.

How each justice views the Constitution and law is the critical difference in how they interpret it. Scalia calls himself a "textualist" who relies on "original intent."

As a textualist, he means that the words say what the words say. The judge cannot change them simply because he wishes to, or

because of his political philosophy. But textualism by itself can be devastating.

Suppose that Congress passed a law that it knew to be totally unconstitutional, but the Court, dominated by like-minded justices, decided to interpret that law strictly, assigning to it some new constitutional intent—and then ignored the original Constitution. Such a method of interpretation would leave the citizens at the mercy of a radical Congress. It would be dangerous.

Scalia, as an *originalist*, believes that the literal text must be interpreted in the context it was written. In other words, what did "Congress shall make no law..." mean when the founding fathers wrote it in 1787? Original textualists would interpret the words of the Constitution as they were defined at the time of its writing.

Scalia, like Justice Clarence Thomas and somewhat, Chief Justice William Rehnquist, hold to the view that the Constitution means now what it meant then—they are originalists. They believe, in that sense, that the Constitution is a dead document—it does not change just because culture or belief or politics change.

On the other hand are the majority of justices who see the Constitution as a living document. By this they mean its interpretation and application must adapt to changing times, culture, belief systems and politics.

The positivists

President Teddy Roosevelt appointed Oliver Wendell Holmes to the Supreme Court in 1902. He served 20 years, and during his term of service, the way the Court looked at its role change dramatically.

Holmes is identified as a legal positivist. A positivist is one who believes, 1) that the meaning of law must change to adapt to modern times, and 2) that the court can insinuate its own opinions into

Notes:

Notes:

their decisions on legal cases, even when their opinion contradicts original intent.

President Woodrow Wilson appointed Justice Louis Brandeis to the Supreme Court in 1916. Brandeis served with Holmes for six years. Brandeis, a brilliant man with a scientific mind, took Holmes' positivism to its next logical step. His influence on the Court began to erode the historical understanding of original intent, Common Law and textualism. The effect of Brandeis' view was to make the separate states instruments of the federal government, and to change the relationship of individual citizens toward their governments. Private rights became subject to the interests of the state or federal government. In a sense, this inverted the original order of things, whereby the people granted the states their power, and then granted the federal government its power; where the states served to protect the rights of their citizens from the federal government.

Justice Holmes also began to erode the principles of government embodied in Common Law, and created new precedents. Under a principle called *stare decisis*, the Court began to rely on previous cases as their authority for deciding new disputes, and often, they added their own views to each case. This produced an evolution of laws that soon looked away from original intent, and toward the most recent decisions of the Court. In other words, the Court wrote what the law meant, and then used their definitions in each succeeding case, all the time positing (using their own beliefs) to continually redefine the meaning of law.

How else can one explain how the 1892 Court could declare without question that America was founded on Protestant Christian principles, and then in 1947 and 1948, declare that it was *unconstitutional* for government to do anything to *encourage religion*?

The Court slowly became its own master, and by so doing, became the master of all.

The oligarchy

Merriam-Webster's dictionary defines oligarchy as:

"1: government by the few, and 2: a government in which a small group exercises control especially for corrupt and selfish purposes; also : a group exercising such control..."

As each new Court took up cases, it began positing its view of the Constitution and law into new cases. It overturned long-held precedents that had been rooted in Common Law and the Bible, and substituted its own new interpretations—new laws. Remember that those nine justices hold lifetime appointment, and answer to no one but themselves (with one, powerful exception). As a gang of nine, or as with the modern Court, a gang of a minority of five, it can do whatever it pleases as it concerns the law of the land.

Since each case is decided by a majority opinion, it only takes five of the justices to decide the law. They do this without regard to the wants of the people as expressed through elected members of Congress or state legislators. They, alone, make the final decision about the meaning and application of law.

Certainly, the modern Court meets the definition of an oligarchy. Perhaps some would argue that accusing it of "corrupt or selfish purposes" makes use of the term a stretch. However, a look at any number of modern cases suggests it is a perfect term.

No case more defines the assumed and corrupt powers of the Court than Roe v. Wade (1973). But Roe could not have happened without Justice Holmes, Brandeis and those who joined in their

Notes:

Notes:

grand scheme to rob the Constitution of its meaning. Their progressive assault on the Constitution made the absurdity of Roe possible.

In the Roe case, seven justices decided that the United States Constitution contained provisions, hidden in its “penumbras” and “emanations” that allowed a woman to kill her unborn child. They called it a right to privacy, based on the precedent set in Griswold v. Connecticut (1965). The decision in Griswold built on the shifting sands of legal positivism, and made Roe even more bizarre.

In 1992, Justice Kennedy, in Casey v. Planned Parenthood, admitted there were flaws in Roe, but said the Court could not address those. To do so would undermine the credibility of the Court, Kennedy said. So the flaws of Griswold and Roe had to be protected against honest legal analysis.

A complete analysis of Griswold, Roe and Casey, plus later abortion cases, is not intended here. They are used as *prima face* evidence of how corrupt has become the federal Court system. The Court, in these three decisions, changed more than 1200 years of Common Law, and rewrote the Constitution based solely on the whims of their own passions. And by so doing, they destroyed our constitutional system of representative government and checks and balances. The federal government, by the Court Oligarchy, took over.

Where we are headed

Congress, according to Article I, is supposed to make laws. The President, according to Article II, is supposed to execute those laws passed by Congress. In light of the Court's actions during the past five decades, neither of them is quick to take up their assigned duties without first considering how the Court will decide.

Notes:

If We the People decide we want to end abortion using the legislative process, a single federal judge can throw out the new law. If we persist, legislators write new laws that attempt to answer the judges' concerns. Then a single federal judge throws out the new law. We the People lose again.

We the People, through the constitutional legislative process, declared partial birth abortion to be illegal. A single judge put a hold on the new law, thumbing his nose at the hundreds of millions of citizens who support it.

Yet other judges ended centuries' old provisions that made sodomy illegal, and in at least three states, declared that homosexuals had the right to marry. The Courts ruled that public institutions have the right to discriminate based on race, color, creed, gender and the like, when it accomplishes a compelling state interest. Legislators did not make those laws; judges did.

Now foreign cases may decide our law

In recent years, though, a new concern has insinuated itself into our legal system, as the justices have added international law to the mix of precedents they consider. Judge Robert Bork writes eloquently about this in his “National Review” article, “Whose Constitution Is It, Anyway?” Here he shows how Justices Ginsberg, Kennedy and even O'Connor quote court decisions from foreign nations to determine their views on American cases. None of us agreed to live under the laws of Zimbabwe, Jamaica, France, or India. Yet these justices think we should, and so they have declared it.

As well, courts at all levels are assaulting religious freedoms at a breathtaking pace. From banning 10 Commandments memorials in public buildings, to banning prayer in school—or even by private citizens at the United States

Notes:

Capital Building—the Court has declared public display of the Christian religion to be unconstitutional. The Ninth Circuit Court of Appeals even declared the Pledge of Allegiance to be unconstitutional. How absurd. How tragic. How threatening to freedom the federal courts have become.

Actions we can take

We can still vote. We can vote for members of Congress who have the courage to do what is right. Congress can take two powerful actions against the runaway federal courts.

First, Congress, who has the power under Article I and Article III, to create inferior courts, also has the power to define the role of those courts. In other words, Congress can write laws that put certain issues off limits to federal court decisions. For instance, Congress could pass a law stating that the Court could not rule in Pledge of Allegiance cases. The Congress could pass a law that prohibits the Court from ordering that taxpayers fund abortion. Congress has the Constitutional power to limit the jurisdiction of inferior courts. And if push came to shove, Congress could shut down those courts.

Secondly, the House of Representatives has the sole power to impeach federal judges. The House can, therefore, pass a bill of impeachment against any sitting federal judge that it deems to be in violation of the Constitution.

In other words, the House can impeach Alabama Federal Judge Myron Thompson for ordering the 10 Commandments Monument removed from the Alabama Supreme Court Building. If the House had the courage to impeach a handful of activist judges, it would send a chilling message to others who would likewise abuse their judicial office.

Of course, if the House impeaches a judge, the Senate

must vote to convict that judge and throw him or her out of office. But if We the People exert enough political pressure on renegade judges, it could be done.

The sheer act of actually impeaching and removing a handful of judges would send a clear message to the others that they, too, had better shape up.

Both of these actions require immense pressure and the imposition of political will on members of Congress. By so doing, those members who hide behind the Court's rulings would be exposed as frauds and imposters, and likely, could themselves be thrown from office.

For more than 150 years following the writing of the Constitution, We the People, legislators, governors, and members of the federal branch of government—Congress, the President and the Supreme Court—all understood what freedom of expression and the establishment of religion meant. In 1947 and 1948, the Court turned that meaning on its head, and left us all befuddled. For more than five decades since, our Constitution and rights have been progressively savaged by activist federal judges.

To repair the damage done by the Court will likely take a generation of political warfare. It is the new generation of citizens who will have to engage themselves to set this aright. They must be well grounded in "originalism" and "textualism," know their true history, and have the courage of David. This means they must rely on Divine Providence—God—and cover their quest with prayer followed by action. To not do so is to relegate theirs as the last generation of free Americans.

Notes: