

Judicial Legislation: An Oligarchy's Infiltration of the Republic

“When...power is lodged in the hands of men independent of the people, and of their representatives, and who are not, constitutionally, accountable for their opinions, no way is left to control them but *with a high hand and an outstretched arm.*” In his Anti-Federalist Papers, New York judge Robert Yates prophesied the futility of preventing a body of unelected judges from usurping legislative power from the people and the state governments. After nearly 228 years, the United States has witnessed the fulfillment of Yates’ ominous oracle and the degradation of the Founders’ view of federalism. Through a careful examination of the judiciary’s originally enumerated authority, the transgressions of an ambitious collection of pseudo-legislators are revealed, ripe for amendment, so that constitutional equilibrium may be restored.

The Heritage Guide to the Constitution defines the “judicial Power” enumerated in Article III as, “neutrally deciding a case by interpreting the law and applying it to the facts, then rendering a final and binding judgment.” However, judges cannot simply attach their own opinion onto a decision which carries the force of law. In two landmark cases, *Marbury v Madison* and *Cohens v Virginia*, Chief Justice John Marshall stresses the duty of the judiciary to always interpret and apply the law in favor of the Constitution. “It is apparent,” he writes in *Marbury*, “that the framers of the constitution contemplated that instrument, as a rule for the government of the courts...Why otherwise does it direct the judges to take an oath to support it?” In *Cohens*, speaking to the power of the courts to nullify unconstitutional acts of Congress, Marshall notes that, “whenever a particular statute contravenes the constitution, it will be the duty of the judicial tribunals to adhere to the latter, and disregard the former.” Furthermore, he carefully explains, “It can be of no weight to say, that the courts...may substitute their own

pleasure to the constitutional intentions of the legislature... The courts must declare the sense of the law; and if they should be disposed to exercise will instead of judgment, the consequence would equally be the substitution of their pleasure to that of the legislative body.” Prior precedent clearly prohibits judges from ruling contrarily to the “Supreme Law of the Land.” In checking unconstitutional actions of the legislature, the court may not use its authority to subvert the people’s will expressed in the Constitution.

Despite prior precedent that deplores a judge’s use of the bench as an assembly, judicial history is contaminated with blatant violations of Article I, Section I of the Constitution: “All legislative powers herein granted shall be vested in a Congress...” Ignoring original intent, the court has, at times, used its authority not to defend the Constitution, but to advance a political agenda. For example, in *Griswold v Connecticut*, the Supreme Court invented a “right to privacy,” which ultimately led to the legalization of sodomy and abortion. In the intentionally complex opinion, Justice William Douglas reflects the strategy of his partner, ACLU lawyer Melvin Wulf, who advocated for applying, “in a general sort of way,” principles of similar cases which should be “perhaps even *extended* a little bit” to fit the present case. In this way, justices, according to Yates, “mould the government into almost any shape they please.” Other examples of this practice contaminate the Supreme Court’s record. In *Everson v Board of Education*, the court misconstrued Jefferson’s “wall of separation” between church and state to ban “the free exercise of religion” from public places, though it did not cite precedent to justify the decision. Recently, in *Natl. Fed. of Ind. Bus. v Sebelius* five justices interpreted the word “penalty” to mean “tax,” thereby legalizing Obamacare and the intrusion of the federal government into the private sector. The most explicit example of judicial legislation is an infamous successor to *Griswold*, *Roe v Wade*, in which the Supreme Court struck down a Texas statute banning

abortion. At the conclusion of his opinion, Justice Blackmun establishes specific criteria governing abortion in each trimester, essentially writing the abortion laws for an entire nation himself. From the due process clause, the controlling language in *Roe*, Blackmun and six other judges somehow extract detailed rules for conducting abortions and an unfounded excuse to murder innocent children. *Roe* and the aforementioned cases serve to demonstrate the subtle tyranny with which the judiciary controls the lives of US citizens and expose the unconstitutional subversion of legislative power from Congress. Such overreach must be stopped.

The Framers, aware of the lust with which men seek power, provided a remedy for unlawful confiscations of sovereignty—the amendment process, as found in Article V of the Constitution. Mark Levin, a nationally syndicated conservative radio host, in his book appropriately titled, *The Liberty Amendments*, proposes a pragmatic resolution to the judicial tyranny under which the people and their state governments have suffered. The amendment reads, “Upon three-fifths vote of the several state legislatures, the States may override a majority opinion rendered by the Supreme Court.” Under the present constitution, court decisions are unable to be remanded. As Yates warns, “No errors [judges] may commit can be corrected by any power above them...” Levin’s amendment would grant to the state legislatures the ability to check the judiciary and limit federal encroachment. Considering that, in *Griswold*, *Everson*, and *Roe* the Supreme Court struck down *state* statutes, a supermajority legislative override would restore the important balance of federalism between the national and state governments. Levin rightly observes that, “By adding the override, for the first time justices will know that their most significant majority opinions may not solely be judged by history, but by the people who must live under them...”

Influential philosopher and advocate for the separation of powers, Charles Secondat de Montesquieu, said that of the three powers—the legislature, executive, and judiciary—“the judiciary is next to nothing.” Certainly he and the Founders did not expect a branch, whose enumerated purpose is to neutrally interpret the law, to morph into a comprehensive source of power. John Adams famously explained that the American republic is “a government of laws, and not of men.” If this is true, then the Constitution should be the fountainhead of all derived authority, not an assembly of five unelected judges. The people are secure in their rights only when justices rule in favor of the “Supreme Law of the Land.” To maintain such security, a workable check must be installed to curb judicial legislation and eliminate the oligarchy which has infiltrated the republic.