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# The Constitution Never Had a Chance

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An eminent North Carolina jurist, with whom I served on a Criminal Code Revision Commission, once told me that the law is what the last court that looks at it says it is and even then, its Justices usually disagree. I told him that there must be something very wrong with such a system. Thinking about this issue and attempting to isolate the arguments in Supreme Court decisions for use in my logic classes over decades, I came to the conclusion that so many things were wrong that even selecting the most egregious would be difficult. Perhaps that is why I have not attempted to write this piece until now.

It has been recently HYPERLINK "http://thinkprogress.org/2009/08/17/scalia-actual-innocence/" reported that Justice Scalia said "This Court has never held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a *habeas* court that he is 'actually' innocent. Quite to the contrary, we have repeatedly left that question unresolved, while expressing considerable doubt that any claim based on alleged 'actual innocence' is constitutionally cognizable." In all likelihood, he is right, but that just proves that the Court has never had the establishment of justice as a principal concern even though the Constitution lists it as one of the six goals the nation was meant to achieve. What no Justice has ever been able to claim, however, is that the Court has never issued a bad decision.

The Court's willingness to deny plaintiffs justice was demonstrated as early as 1803 in Marbury vs Madison in which the Court held that Marbury was entitled to his commission as a Justice of the Peace in the District of Columbia but refused to issue a writ of mandamus on the basis of a legalistic claim that the Court lacked jurisdiction even though the Court had issued such writs twice before Marshall became a Justice. No doubt, Justice Marshall wrote this opinion to keep the Court out of a rancorous political dispute between Republicans and Federalists going on at the time, but the Constitution nowhere instructs the Court to act in that way.

Few know that some people engaged in the ratification process anticipated the possibility that the Court would issue decisions that denied plaintiffs justice. The State of New York, for instance, recommended the adoption of the following amendment.

That persons aggrieved by any Judgment, Sentence or Decree of the Supreme Court of the United States, in any Cause in which that Court has original Jurisdiction, with such exceptions and under such Regulations as the Congress shall make concerning the same, shall upon application, have a Commission to be issued by the President of the United States, to such Men learned in the Law as he shall nominate, and by and with the Advice and consent of the Senate appoint, not less than seven, authorizing such Commissioners, or any seven or more of them, to correct the Errors in such Judgment or to review such

Sentence and Decree, as the case may be, and to do Justice to the parties in the Premises.

Unfortunately, this attempt to limit the power of the Court lacked sufficient support to become part of the Constitution.

But decisions that deny plaintiffs justice are only one of many kinds of bad decision the Court has issued. Lists of such decisions are ubiquitous. Dred Scott vs Sandford, Plessy vs Ferguson, Wickard vs Filburn, Korematsu vs United States, and Lochner vs People Of State Of New York are just a few of the most infamous. Some have been overturned. But bad decisions are nevertheless quite common. The question is why they occur?

Consider the implications of any split decision. The most important is that the opinion written for the majority lacks enough cogency to convince the minority. No decision based on an argument that lacks cogency can be good. Such decisions can be likened to using a mathematical procedure based on a theorem with an invalid proof or programming a computer to be used to send a vehicle to the moon with incorrect data. Eventually the result is disastrous. Next, split decisions promote divisiveness. Although a decision ends a specific case, it does not end the controversy; often it increases it. Consider the reaction of both the public and some state legislatures after Palazzolo vs Rhode Island in which the Court's 5-4 decision, written by Justice John Paul Stevens, said the Constitution permits governments to condemn a person's property as part of a broader economic redevelopment plan to revitalize a distressed community. But the Constitution lacks a single reference to economic or commercial development. Other divisive decisions are too well known to need mention.

Jerome Frank in *Law and the Modern Mind* argues that judges decide cases according to their own personal prejudices and foibles, which certainly seems to be true. But is this practice right? Justice Benjamin Curtis, dissenting in Dred Scott vs Sanford writes, "if the theoretical opinions of individuals are allowed to control [the Constitution's] meaning, we have no longer a Constitution; we are under the government of individual men who for the time being have power to declare what the Constitution is, according to their own views of what they think it ought to mean." And Justice Holmes, dissenting in Lochner vs the People of the State of New York writes, "a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."

When justices on the Court discovered that they could decide cases "according to their own personal prejudices and foibles," the Court became the *de facto* totalitarian oligarchic government of the nation from which there is no appeal. The Court's decisions override the Constitution, turn democracy into a mere formal exercise, and betray the people. The Constitution never really had a chance.

The Court has brought this about by employing a number of fallacious practices.

The first is the fallacy of citing English common law. But what does English common law have to do with the United States of America? The only reference to it in the Constitution is in the seventh amendment, where common law suits are restricted in terms of their monetary value. The common law is not enshrined in the Constitution itself. True, the

original States, the colonies settled by Englishmen, did make the common law the basis of their State legal systems, but the United States of America did not.

Some have claimed that the federal courts act only as interpreters of statutes and the Constitution by merely elaborating and precisely defining language. But before 1938, the federal courts acted as common law courts, deciding any issue whether the legislature had acted or not, by looking at what courts had done even when there was no authority for doing so in the Constitution. But since 1938, the Court has began to overturn earlier decisions based on common law principles. Still, much common law is embedded in judicial decisions.

First, the essence of the common law is that it is judicial law—legislation from the bench. The common law can be defined as law developed from the rulings of judges rather than from statutes passed by legislatures or from written constitutions. But the Court, as final arbiter of the law, turns all reviewed law into judicial law. When Justice Marshall wrote in Marbury vs Madison, "It is emphatically the province and duty of the judicial department to say what the law is" he made a mere claim unsupported by argument that gave the Court the final say. The legislature is relegated to the subordinate position of proposer while the Court assumes the position of disposer, and the Senatorial practice of asking those appointed to seats on the Court about their judicial philosophies is pure cant.

Second, the common law was formulated by circuit judges appointed by English monarchs, and as such, always favored the interests of the monarchy and the aristocracy.

Third, precedent, *stare decisis*, is a common law principle which the Court continues to utilize. And since no one can deny that the Court often makes bad decisions, *stare decisis* merely distributes the bad effects of those decisions throughout the legal system. Proponents of *stare decisis* claim that it is needed to provide consistency in the legal system. But consistency *per se* is not a virtue. Machiavelli's *The Prince* is supremely consistent, but it is irredeemably evil.

Argument by precedent (authority) is a mode of reasoning long discredited. It was used extensively during the Middle Ages mainly by theologians. (Interestingly, the common law arose during the Middle Ages.) It was discredited because authorities are often found to be wrong.

An argument must stand on its own or fall. If a precedent is based on a sound argument, that argument can be reproduced in subsequent opinions almost as easily as the precedent's citation can. But reproducing a precedent's argument is almost, perhaps never, done, because often the precedent is itself based on a prior precedent. Often the subject of the precedent is so different from the subject of the current case that the argument in the precedent would be seen to be ridiculous if it were reproduced. Often nothing in the precedent can be identified as an authentic argument. So the Court's practice is to merely cite the precedent's finding, and those findings, when bad, become embodied in the legal system, perpetuating errors and their malevolent consequences—not a good way to make the law that governs a society.

The second is the fallacy of cherry picking the Constitution. Justice Marshall cherry picked the Constitution in Marbury vs Madison when he based the decision to not grant Marbury a writ of mandamus on Article III of the Constitution rather on the goals stated in the Preamble, giving a formal rule more importance than the Constitution's intent even though

he also wrote, “a law repugnant to the constitution is void, and that courts, as well as other departments, are bound by that instrument.” But can a law or decision that hinders a Constitutional goal not be repugnant to it?

The third is the fallacy of figurative interpretation. This fallacy is perhaps the most often used to subvert the Constitution’s aims. “Corporation” becomes “person,” “contribution” becomes “speech,” “speech” becomes “property,” and on and on. Instead of precisely defining language, the Court muddles it. Interpretation by means of figures of speech, especially metaphor and analogy, makes any desired finding possible. If the Constitution’s language is not to be interpreted literally, using the common meanings given to its words at the time they were written, it may just as well have been written in gibberish. Try making sense of Chaucer’s *Canterbury Tales* without being fluent in Middle English! So if one wants to know what the framers meant, one must be fluent in the language they spoke. Their intentions cannot be discerned otherwise.

The fourth is the fallacy of ignored qualifiers. For instance, it can easily be argued that the Constitution prohibits corporations from lobbying (which is nothing more than a way of petitioning the government). The first amendment reads, “Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.” If one reads the Constitution’s language literally, however, the word “people” applies only to human beings; it’s cognates are populous and population. Only human beings are counted in the census. The first edition of Noah Webster’s *Dictionary of the American Language*, published in 1828, as well as the *Oxford English Dictionary* both make this quite certain. Webster’s definition is:

PEOPLE, n. [L. populus.] The body of persons who compose a community, town, city or nation. We say, the people of a town; the people of London or Paris; the English people. In this sense, the word is not used in the plural, but it comprehends all classes of inhabitants, considered as a collective body, or any portion of the inhabitants of a city or country.

But even if this definition is ignored, the amendment clearly states what can be petitioned for— only a redress of grievances. When corporations petition the Congress, they are seeking advantages. Had the framers meant to allow petitioning for anything at all, they would not have qualified the amendment by attaching the prepositional phrase. Anyone who reads this amendment differently is delusional.

Some of these arguments have been made previously by many others. Most of the Justices of the Court have paid them scant attention. They have done so because, as the final arbiter of the law from which there is no appeal, they can do whatever they please with complete impunity. That is the definition of tyranny. The Court has not only annulled the Constitution, it has aided and abetted the corporate corrupting of all the government’s branches, the corrupting of the electoral process, and the destruction of the people’s freedoms and protections. The Court will not reform itself.

A Constitutional amendment could be used to limit the Court’s power, but such an amendment would have to be carefully crafted to not only prohibit the Court from using any of the fallacious procedures discussed above but also require the Court to present a discussion of how the consequences of decisions would affect the lives of common people and show how those consequences promote one or more of the goals of the Constitution enumerated in the Preamble. (Congress should be required to include such discussions in all enacted laws too.) The chances of ever having such an amendment proposed and enacted

by a government already deeply steeped in corruption is anybody's guess.

But perhaps there are other non-governmental ways. Theoretical mathematicians world-wide routinely examine published proofs of new theorems to check their validity. Mistakes are often found and theorems are rejected. The amendment mentioned above proposed by the delegates to the New York ratification convention can easily be altered into a proposal for the establishment of a completely voluntary body of learned people, free of political attachments and ideological biases and selected from all intellectual disciplines, who would pledge to analyze all Supreme Court decisions using principles of critical reasoning. These analyses could then be published on the Internet and syndicated widely. If the Justices of the Court can't be forced, perhaps they can be shamed into fulfilling their obligations to their oath of office.

The nation Americans live in today is vastly different from the nation envisioned by the founders when measured against the goals written into the Constitution's Preamble.

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

The union is not only far from perfect, it is becoming less perfect; even voices of secession are once again being heard. Justice, at least for common people, is rare. Violence is epidemic and people are arming themselves in unprecedented numbers. The vast military and industrial complex and the so-called intelligence community have not provided a credible common defense. Poverty and the gap in income between the rich and poor are increasing. And the blessings of liberty and our protections to privacy are being curtailed. The United States of America needs to be taken back from the politicians, lawyers, and their favored special interests who have usurped it.

Perhaps we need to rewrite the Pledge of Allegiance and define all truly patriotic Americans by those who recite it:

"I pledge allegiance to the Flag of the United States of America, and to the Republic *for which it once stood*, one Nation, indivisible, with liberty and justice for all."

The current pledge is a lie.

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