GlobalResearch
Center for Research on Globalization

The US Supreme Court and "The Rule of Flaw"

America's ultimate proponent of tyranny

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Global Research, August 17, 2012
17 August 2012

Region: USA
Theme: Law and Justice

"The Supreme Court's only armor is the cloak of public trust; its sole ammunition, the collective hopes of our society."—Irving R. Kaufman

The Supreme Court of the United States is an institution that has failed in every possible way. It is notorious for having issued iniquitous opinions; it has not only failed to resolve but has exacerbated conflicts; and it has consistently negated the ideals the founding fathers wrote into the Preamble of the Constitution. The ultimate consequence is that any American is deluded who believes that America can be changed substantively by using the electoral process.

Identifying failed institutions is not difficult; changing them is. The Supreme Court of the United States, often referred by the acronym SCOTUS in a veiled attempt to personify it, is an institution that has failed in every possible way. It is notorious for having issued iniquitous opinions; it has not only failed to resolve but has exacerbated conflicts; and it has consistently negated the ideals the founding fathers wrote into the Preamble of the Constitution. SCOTUS, as far back as 1803, usurped the Constitution and converted the incipient enlightenment nation into an endarkened reactionary one.

Some, of course, will disagree, who believe that SCOTUS is not a failed institution, but the American people are slowly but surely coming to the conclusion that it is:

"Just 44 percent of Americans approve of the job the Supreme Court is doing and three-quarters say the justices' decisions are sometimes influenced by their personal or political views, according to a poll conducted by The New York Times and CBS News.

Those findings are a fresh indication that the Court's standing with the public has slipped significantly in the past quarter-century, according to surveys conducted by several polling organizations. Approval was as high as 66 percent in the late 1980s, and by 2000 approached 50 percent."

Although a 56% disapproval rating is nowhere near the disapproval rating of the Congress (83%), it is a substantial majority which, I suspect, results from the many issues that have come before the Court that have been exacerbated rather than resolved by the Court's actions. When a large number of people reject a decision of the Court, the legal dispute changes into a social problem that divides the nation and provokes conflict—exactly the opposite of what a legal system should do. The Court, in fact, makes such issues irresolvable. SCOTUS has the last word; there is no other forum the people can turn to, and they lose their respect for the law and its authority. Not even force is a viable alternative,

and overt opposition can easily be interpreted as criminal behavior. No nation with such an institution can ever "establish Justice" or "insure domestic Tranquility." Simply impossible! The only possible consequence is, ultimately, a police state.

Some members of the Court over time have said the same thing: Charles Evans Hughes, in a lecture, claimed "a great chief justice must be able to project an institutional image of non-partisanship. Otherwise, the court will be perceived as just another political branch of the federal government and, as a consequence, lose both its prestige and power," and John Marshall writes, in McCulloch v Maryland, that issues "must be decided peacefully, or remain a source of hostile legislation, perhaps, of hostility of a still more serious nature. . . ." The Court has ignored both of these pieces of advice. It especially ignored this advice when it intervened in the presidential election of 2000. Of course, it is impossible to say why the Court acted the way it did when it in involved itself in the election, but the Court should have known that whatever it did would demolish any respect it had with at least half the electorate. Some, like George Will claim, "the passions that swirled around Bush v Gore . . . dissipated quickly. And remarkably little damage was done by the institutional collisions that resulted," and Justice Scalia has simply said, "get over it!" But Will is simply wrong and getting over it is not easy. Most of the problems today's America faces were caused by the Court's intervention in Bush v Gore. The damage it has done to both the Court's reputation and the nation is enormous and might never be repairable.

But the Court is infamous for its horrid decisions. Numerous lists of them exist. Every group has its own, showing just how widespread the problem has become. Liberals have theirs, so do conservatives, so do libertarians. Newspapers and magazines have published lists; books about bad decisions have been written. Some bad decisions have been overturned, yet they continue to be issued. Nothing ever changes which makes the way the Court acts suspicious. It appears that the Court really settles no issues. What is really going on?

When SCOTUS agrees to review a case, a fixed process takes place: The Court accepts written briefs from the participants and listens to oral arguments (usually limited to 30 minutes). During these arguments, the justices can ask questions. Some time after the oral arguments are held, the Court assembles, each member presents his/her view, and a vote is taken. This vote decides the issue. For all practical purposes, the Court at this point is done. Nothing after this vote really matters; all of it is show and has no legal function.

Nevertheless, the process does continue. A justice from the group that comprises the majority is assigned the task of drafting the opinion, and this justice then invariably assigns the task to a clerk. The clerk then searches past decisions of the Court for things other justices have said that can be used to support the majority's view. These "sayings" are often referred to as "controlling rules," and the search for them can be likened to dragging the gutter for pearl-laden oysters.

This process is justified by a doctrine referred to as *starie decisis* which in English means "let the decision stand." The reasoning behind it is simple: The legal system needs to be consistent. Decisions in cases should not contradict each other, when a decision is being made, past decisions have to be looked at to make sure no inconsistency results. The consistency, obviously, is sought in controlling rules. But the process breaks down and insures nothing. The fact that some decisions have been overturned by finding a different controlling rule proves it decisively. The choice of controlling rules is entirely subjective. In the end, the task comes down to finding one the opinion's writer likes. No more, no less.

Opinions are not based on any law; in fact, the entire process is a gigantic flaw.

Controlling rules are like fish—very slippery. And the places they can be searched for is not limited to earlier decisions. Jurists have found controlling rules in books, legal reviews, legal commentaries, Blackstone, in English Common Law, and even elsewhere. In Laidlaw v Organ, which considered whether a vendor is obliged not to conceal any of the defects of an article, numerous authorities are cited in the search for a controlling rule: Pothier, Florentinus, Cicero, Diogenes, and Antipater. Among these authorities, two controlling rules were presented: That a vendor can conceal defects, and that a vendor is obliged not to conceal defects. How does one choose between these? Well, s/he picks the one that best suits her/his purpose. Which did the opinion's writer choose? Why, of course, the former. Why? "The interest of commerce not permitting parties to set aside their contracts with too much facility, they must impute it to their own fault in not having better informed themselves of the defects in the commodities they have purchased," and the province of ethics and law are not co-extensive. Although the majority of authorities reviewed—Pothier, Florentinus, Cicero, and Diogenes— thought otherwise, , the controlling rule was selected from Antipater because it suited the aims of SCOTUS better. Antipater? How's that for scraping the bottom of the barrel for a controlling rule? Not only is the doctrine of controlling rules completely subjective, historically SCOTUS has always used it to promote commerce over ethics. Veniality suppresses morality. If you want to see just how viscious SCOTUS is, read *Top 10 worst Supreme Court decisions*.

What is called *starie decisis* in American jurisprudence has for centuries been called the method of authority by Scholastic philosophers and was discarded by non-clerical scholars well before the eighteenth century. It is obviously a faulty method when used for intellectual pursuits. Unless the authority is known to be right, the method propagates error, but SCOTUS doesn't care. John Marshall had set the tone for the Court in 1803 in Marbury v Madison. First of all, although he found that Marbury was entitled to the commission sought, Marshall refused to order that it be delivered, thus setting the precedent for the Court's practice of issuing unjust rulings. This ruling made it obvious that establishing justice was not the Court's job even though the Constitution says that it is one goal the nation was established to attain. Second, Marshall writes that "It is emphatically the province and duty of the judicial department to say what the law is" Although apparently never questioned by anyone but Jefferson who writes that because of this ruling the Constitution is "a thing of wax in the hands of the judiciary, which they may twist and shape into any form they please," this claim commits the fallacy of amphiboly. "What the law is" is ambiguous. It can mean either what the law says or what what it says means.

Charles Evans Hughes writes, "We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our property and our liberty under the Constitution." What Hughes fails to see is that although the judiciary should be "the safeguard of our property and our liberty" it can just as easily be their repressor. And that's exactly what SCOTUS has become.

Why would anyone in a nation with a legislature claim that is it the judiciary's duty "to say what the law is"? If the meaning of a law cannot be determined from its diction, the law can be invalidated because of its imprecision. If necessary, the legislature can then redraft the law. What laws and even the Constitution say is apparent; what they mean may not be. But why should a nine member body assume that responsibility and why should its "interpretation" be the last word? Why is it impossible for some other body, say linguists, for instance, to say, "No, you're wrong." Marshall, by making the claim he did, made the Court

into an absolute oligarchy. That apparently was his purpose. No one, not the people, legislators, governors, presidents, priests, or popes can undo the Court's opinions. James Madison envisioned the judicial branch of our government as "an impenetrable bulwark against every assumption of power in the legislative or executive." Unfortunately the Court itself penetrated that bulwark easily enough.

The ultimate consequence is that any American is deluded who believes that America can be changed substantively by using the electoral process. The Court completely controls the American government, including the electoral process. The Court in Citizens United v Federal Election Commission has made corrupting the Federal Government into a Constitutional right held by the affluent. Having suborned the Constitution by making itself the last word's speaker on any Constitutional issue the Court leaves absolutely no opportunity available for the people to effect any change of the government by electing different presidents or representatives. Nothing will ever be substantially different in the United States of America until checks of some kind are placed on the Court's absolute authority. The Court has taken Baron Acton's maxim, power corrupts and absolute power corrupts absolutely, to heart and has been totally corrupted. Justices legislate from the bench by writing into the law their beliefs and biases.

Yet the Court's history does have some lessons the judiciary should take to heart. It is obvious to any objective observer that America is in decline. In spite of its military and economic power, America is falling behind because of the political biases the Court has legalized. Still SCOTUS seeks to cement these biases into jurisprudence. If America collapses, and it seems increasingly likely that it will, what will ensue? Well, consider this:

Roger Brooke Taney, the fifth Chief Justice, had, it is said, a determination to be a great Chief Justice. He is now remembered only for having delivered the majority opinion in Dred Scott v Sandford that ruled that African Americans, having been considered inferior at the time the Constitution was drafted, were not part of the original community of citizens and could not be considered citizens of the United States. This decision was an indirect cause of the Civil War. Taney also held that Congress had no authority to restrict the spread of slavery into federal territories, and that such previous attempts to restrict slavery's spread were unconstitutional.

Just as many of today's Court's decisions are, the Dred Scott decision was widely condemned at the time as an illegitimate use of judicial power. Taney had hoped that a Supreme Court decision declaring federal restrictions on slavery in the territories unconstitutional would put the issue beyond the realm of political debate. What it did, instead, as so many other decisions have, was exacerbate it.

Taney spent his final years despised by both North and South. His decision destroyed the culture of the South, the South physically, and the lives of its male youth. It also cost Taney his Maryland estates: Taney died during the final months of the war on the same day that Maryland abolished slavery. This decision and its aftermath proves that a decision of the Court can destroy a nation.

Taney was punished by abolitionists in the Senate after his death. When the House of Representatives passed a bill to appropriate funds for a bust of Taney to be displayed in the Supreme Court, the Senate rejected it. Senator Charles Sumner said, "If a man has done evil in his life, he must not be complimented in marble" and proposed that a vacant spot, not a bust of Taney, be left in the courtroom "to speak in warning to all who would betray liberty!"

He claimed, “I speak what cannot be denied when I declare that the opinion of the Chief Justice in the case of Dred Scott was more thoroughly abominable than anything of the kind in the history of courts. Judicial baseness reached its lowest point on that occasion.” Well, perhaps Summer was wrong. Judicial baseness may not yet have reached its lowest point. If the Court’s ideological decisions ultimately lead to the collapse of America, the Court will go down in history as the basest of institutions.

In more than two hundred years, the Court’s membership has not displayed any high degree of sagacity. People of strong political and cultural biases who lack open minds are not intelligent. A person who lacks the ability to question his own beliefs is a bigot. That’s what jurists who legislate their own beliefs into law are. Americans someday may treat them all just as Chief Justice Taney was treated—as nobodies remembered only for their bigotry.

John Kozy is a retired professor of philosophy and logic who writes on social, political, and economic issues. After serving in the U.S. Army during the Korean War, he spent 20 years as a university professor and another 20 years working as a writer. He has published a textbook in formal logic commercially, in academic journals and a small number of commercial magazines, and has written a number of guest editorials for newspapers. His on-line pieces can be found on http://www.jkozy.com/ and he can be emailed from that site’s homepage.
