The Breakfast Club

Constitutional Minute for 2 August 2022

"Just who do we think we are?"

(Note: this essay is adapted from one I published in September of 2015. It has been updated in light of recent statements by Associate Justice Elena Kagan.)

"*Just who do we think we are*?" stated Chief Justice John Roberts as he dissented from the majority opinion in 2015's *Obergefell v Hodges*, which made homosexual marriage a constitutional "right." I predicted then that Robert's statement would become one of the most famous statements ever made in a Supreme Court dissent, barely edging out his statement later in the same dissent: "[The Constitution] had nothing to do with [today's decision.]"

I was wrong on both counts; apparently no one remembers the statements of justices in their opinions.

Roberts continued: "*Petitioners make strong arguments rooted in social policy and considerations of fairness,"* (emphasis added). Social policy? I thought Supreme Court decisions were to be rooted in the law? "*The majority's decision is an act of will, not legal judgment*," Roberts reminded us.

"The Celebrated Montesquieu" said: *"There is no crueler tyranny than that which is perpetuated under the shield of law and in the name of justice."*

Social justice, the great utopic goal of every Progressive, not jurisprudence, was the goal of the five Justices who formed the majority opinion in *Obergefel vs Hodgesl*.

It was an act of judicial activism.

What do we mean by judicial activism? The Heritage Foundation defines it this way: "Judicial activism occurs when judges write subjective policy preferences into the law rather than apply the law impartially according to its original meaning."

There is no better example than *Obergefell*.

Prior to *Obergefell*, the most famous statement by a Supreme Court Justice which encapsulated the idea behind judicial activism occurred when Associate Justice Thurgood Marshall described his judicial philosophy as: "*You do what you think is right and let the law catch up*." That's simply an amazing statement for a jurist: Ignore the law and rule instead based on your "feelings" of what is right. It's all about feelings to a Progressive; in fact the law is often seen

as an obstacle to PROGRESS. So, if you can get a court to declare its sense of justice as "the law," instead of constraining itself to proper interpretation of the law, all the better.

But judicial activism is often in the eye of the beholder. The perfect example is *Citizens United vs. Federal Election Commission*. The Right saw the decision as an affirmation of unrestrained free speech, the Left saw the decision as the perfect example of judicial activism since it "declared corporations were people," as I heard more than one liberal insist.

Judicial activism is a natural outgrowth of the doctrine of legal positivism, which replaced natural law theory in the late 1800s. Legal Positivism holds that the only relevant law is what man creates. Natural law, if it exists at all, is irrelevant; and revealed law (i.e. as found in the Bible) has no place in a mature society. Since man is constantly evolving (so goes the theory) the law must continually evolve as well. And who guides the evolution of the law? Why, the judges, of course.

In another candid moment, Associate Justice Ruth Bader Ginsburg wondered aloud whether the court went "*too far, too fast*" in its 1973 Roe v. Wade decision; yet another admission that Progressives see the Court as the "seeing eye dog" of a society groping culturally in the dark. So, perhaps the court went "a smidgen" too far in 1973; so what? Fifty million undelivered babies might have a different opinion. Update: make that 60 million undelivered babies.

Compare these previous progressive sentiments with that of Associate Justice Joseph Story, who wrote in his 1833 work: "Commentaries on the Constitution," *"The truth is, that, even with the most secure tenure of office, during good behavior, the danger is not, that the judges will be too firm in resisting public opinion, and in defence of private rights or public liberties; but, that they will be ready to yield themselves to the passions, and politics, and prejudices of the day."* Is that not what we just saw happen in *Obergefell*?

Thomas Jefferson saw the danger during his time, writing to William Jarvis in 1820: *"To consider the judges as the ultimate arbiters of all constitutional questions [is] a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy."*

Besides *Obergefell*, are there other examples of judicial activism? The Heritage Foundation lists these cases (and others) as activist:

Griswold v. Connecticut (1965), in which Justice William O. Douglas, in one of the most famous of judicial DIY projects, constructed a right to privacy from bits and pieces of vague privacy inferences salvaged from "emanations from penumbras" of the Constitution.

Roe v. Wade (1973), building on the "right" of privacy constructed in *Griswold,* the Court then further defined that "right" to encompass the murder of unborn babies, with few restrictions, striking down numerous state laws.

Lawrence v. Texas (2003), building once again on *Griswold*, the Court decided that the by now very useful "right" of privacy should be extended even further to sodomy -- that states would no longer be allowed to decide whether certain sexual acts were immoral and restrictable. Another dose of "social policy."

On July 22, 2022, Associate Justice Elena Kagan opined at a judicial conference in Montana:

> *"I'm not talking about any particular decision or even any particular series of decisions, but if over time the court loses all connection with the public and with public sentiment, that's a dangerous thing for a democracy."* She added *"Overall, the way the court retains its legitimacy and fosters public confidence is by acting like a court, is by doing the kinds of things that do not seem to people political or partisan."*

"[L]oses all connection with the public{?}" Since when is the United States Supreme Court supposed to have any connection whatsoever with the public? Apparently Justice Kagan, who never judged a day in her life before sitting on the high court, thinks the Court works for the people and takes its direction from the people. That's what democracy is all about, right? Kagan seems to have forgotten that the court takes its direction from the law, and when the law was improperly determined in the past, the court has an obligation to set things right.

Obviously, the timing of Kagan's remarks, coming as the dust settles from the *Dobbs* decision which overturned *Roe v Wade*, implies that before rendering an opinion, Justices should raise a moistened finger above their heads to determine which way the wind is blowing, and then rule accordingly. To take Justice Marshall's example, the "trendy" judicial philosophy is now: "*You do what you think the most vocal of the people want you to do and let the law catch up.*"

The Constitution does not begin with "We the Judges," "We the Congress" or with "I the President." As I tell all my classes, it is the peoples' document and "We the People" need to take individual ownership of it. But let us not loose sight of the fact that we live in a constitutional republic not a democracy, particularly not a democracy where a "faction" (as James Madison would call it), even a highly vocal one, can hijack the power of the Supreme Court and use it to enact their favored social policy.

The Supreme Court is not a court of public opinion.

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