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Judicial
Dictatorship

By Patrick J. Buchanan



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Ending Judicial Dictatorship

By Patrick J. Buchanan

All just powers, Thomas Jefferson wrote in the Declaration of Independence, derive from the consent of the governed. Governments are republican, he later said, “in proportion as they embody the will of the people and execute it.”

But in America today, the power that stands astride this country like a colossus is not the power of the majority; it is not the power of the governed; it is the power of the judiciary. The Supreme Court, not the majority, decides what is right or wrong in America. The Supreme Court has final say on criminal justice, education, voting, employment and promotion, taxation, immigration and deportation.

In these areas, as in all others, the majority can pass a law or make a proposal, but it is always up to the Court to make the final decision. It may find a “constitutional right” and decide the majority’s plan violates it: End of majority plan.

To revise Lincoln’s words, we today have a government of the judiciary, by the judiciary, and for the judiciary.

Now, someone must determine what a child will learn, how a criminal shall be treated, and what kind of society we will live in. Who shall it be? The judiciary—or the majority?

Traditionally, in America, middle-class families controlled most of the things central to their welfare. They decided them at the state and local level—education, crime, spending, taxation, public health and welfare, including abortion. The values of the governed prevailed because, if government officials weren’t responsive, they were kicked out of office.

As the judiciary takeover took hold, however, the power to throw the bums out became almost pointless because elected officials had less and less power. The middle class had lost the ability to control the things that mattered to it. Its power had been taken away from it by the Supreme Court. The Court centralized power in Washington and exercised that power without democratic consensus. Led by the Court, the country set off on a 30-year experiment with non-democratic government.

We get one kind of society when decisions are made by the majority. We get another kind when decisions are made by judges, what Jefferson called the “despotism of an oligarchy.”

The majority has never asked government to do anything brilliant or unusual—just educate a child, defend the nation, and keep the streets safe. Civilized society had been doing those things for a long, long time, and we were even doing them at reasonable cost, in the much-maligned 1950s. But the Court took them over and made itself morally answerable for the safety and welfare of the nation. And the things the Court took over in working order do not work any more.

Today the values of the Supreme Court determine all the issues that make up the quality of life. Unfortunately, the values of the Court differ markedly from those of the governed.

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The Court, by the mid-1960s, began a long period of active opposition to the wishes of the majority. Since then, the Court has been in the vanguard of an intellectual elite that believes that the prevailing social order of middle-class America is deeply flawed, unjust, and irrational.

Traditionally, the Court's function was to decide cases, to interpret the law, to supervise the lower courts, and on rare occasions to declare a federal or state law unconstitutional. But look at how far the federal judiciary has gone.

In 1958, the Court ruled that prayer, commonplace in American public schools, was now unconstitutional. All prayer, Bible instruction, and even the posting of the Ten Commandments was henceforth forbidden.

In 1973, the Supreme Court declared that women had a constitutional right to an abortion, a right undiscovered by the men who had written the Constitution or any of the greatest of the jurists who interpreted it over two centuries.

In 1974, Judge Arthur Garrity ordered the integration of Boston's public schools through court-ordered busing. Result: violence, boycotts, racial animosity. Instead of integration, Judge Garrity produced a school system where 80 percent of the students are minority Americans.

In 1987, a Kansas City federal judge ordered a doubling of property taxes and a 25 percent increase in income taxes to pay for improvements in the public schools.

In 1988, in Yonkers, Judge Leonard Sand imposed stiff and escalating fines, nearly bankrupting the city, because its elected officials refused to vote as the judge had demanded on a plan to put low-cost housing in white neighborhoods.

In 1995, the Supreme Court threw out term limits on congressional delegations in 23 states.

What we have here is gross usurpation of power by federal courts, which are using that power to rewrite laws to conform with the Court's idea of what is just, fair, and right. What the Founding Fathers intended to be the weakest branch of the federal government has become the most powerful: The Supreme Court has become a superlegislature.

The Court's new role is as adversary to the people.

By defining "individual rights" as it wished, the Court has centralized control over every moral, political, social, and economic issue in the country. The Court says it is acting on behalf of a higher authority, the Constitution, but in fact the Supreme Court has twisted and reshaped the Constitution—as Jefferson said—as an artist shapes a ball of wax.

The Court today derives its powers from its own will and is not subject to correction or reversal. It has become the one branch of government on which there is no check, and for which there is no balance.

Judges, Justice William Brennan wrote in the 1979 *Richmond Newspapers* decision, "are not mere umpires, but, in their own sphere, lawmakers." In 1985, Justice Brennan told a Georgetown Law School audience that the "Majoritarian process has appeal under some circumstances, but I think ultimately it will not do." Justice Brennan added: "Faith in democracy is one thing, blind faith quite another." The Court's role, he said, is "to declare certain values transcendent, beyond the reach of temporary political majorities."

The Court freely uses all the coercive power of the state to enforce its orders. One rule binds all—either there will be school prayer or flag burning or term limits or pornography, or there won't be—and if it is not the majority's rule that prevails, as it is in a democracy, it is the minority's.

The minority, because of the Court's intervention, is no longer just protected; it is put in control. However, the Court, despite the use and threat of force, has not settled anything. Race relations are worse than they were. Abortion is a sorer issue today than when the Court took control of it in the 1973 decision, *Roe v. Wade*. Force cannot bring about a democratically sustainable solution to the culture wars.

Criminal conduct, to the Court, became a form of self-expression, a statement of social protest and criticism. The Court orders that taxpayers must provide lawyers for criminal defendants who cannot afford to pay for one. The Court routinely overrules the actions of local police, of boards of education, and the state laws under which they act.

Who are the beneficiaries of the Court's protection? Members of various minorities including criminals, atheists, homosexuals, flag burners, illegal immigrants (including terrorists), convicts, and pornographers. In December 1994, the month after 59 percent of California voters approved Proposition 187 limiting social welfare benefits available to illegal aliens, a single federal judge prohibited state and local officials from following the new law. California taxpayers continue to support the illegals as the case drags on in the federal courts.

But this is only the tip of the iceberg of judicial dictatorship in America.

The Court's power flows to economic as well as social and cultural issues. Since it interprets the antitrust laws, the Court determines the amount of competition in the country. The laws, which Teddy Roosevelt intended to protect small business, have been interpreted to favor big business. The Court has also ruled to encourage the forces of globalism against American workers.

In the 1986 decision of *Zenith v. Matsushita*, the Court ruled against U.S. TV manufacturers—when we still had some—and in favor of their Japanese competitors. The Japanese conceded they had conspired to raise profits in Japan but denied they did so to bankroll a predatory pricing conspiracy in the United States to drive our manufacturers out of business.

The Court agreed with the Japanese that no trial to find the facts was necessary. According to the Court, the Japanese had no “plausible motive to engage in the conduct charged.” The Japanese, the Court said, “had no rational motive to conspire” since it would call for them “to destroy [U.S.] companies larger and better established than themselves, a goal that remains far distant.”

But not so far distant after the Court's decision: The Court, when it could have made a difference, allowed the Japanese to drive the American companies out of business. The middle class, which had lost its political clout, was now losing its well-paying jobs.

Federal courts today supervise and, in effect, administer the operation of the state schools, prisons, and mental hospitals. A consent decree in South Carolina requires the state to provide a recreational program for convicts, including tournaments in croquet, badminton, paddleball, and backgammon.

Justice Ruth Bader Ginsburg, in July 1993, prior to her confirmation hearings, wrote to the Senate Judiciary Committee that federal judges find these “chores” to be “uncongenial and unwelcome.” Had “state and federal legislatures” done a better job, the courts would not have been forced to take over the schools, prisons, and mental hospitals. The majority,

according to Justice Ginsburg's theory of democracy, gets first shot at solving problems to the satisfaction of federal judges. But not the last word.

The Court argues that it is the only institution that will protect the rights of minorities and prevent the tyranny of the majority. But who thinks the majority wants to tyrannize over the minority? The majority changes as the issue changes.

Does the country need nine guardians to save us from totalitarianism? Can it be saved from totalitarianism by nine guardians? Jefferson thought the majority was the only "true guardian" of individual rights. The majority may sometimes err, Jefferson said, but "its errors are honest, solitary and short-lived."

Democracies correct mistakes sooner and more easily than do other systems. Judges with lifetime tenure, like dictators, do not correct—or admit—their mistakes. Majority action corrects, as do safety valves on a steam engine.

Jefferson did not see anything in the Constitution that gave the Supreme Court power "to decide for the Executive, more than to the Executive to decide for them."

The Alien and Sedition Laws were enacted by the Federalist Congress in 1798 to suppress criticism of the government. The federal courts found the laws to be constitutional and convicted and imprisoned newspaper publishers. Upon Jefferson's election in 1800, he released every person in jail, or being prosecuted under the laws, asserting the law "was a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image: and that it was as much my duty to arrest its execution in every stage, as it would have been to have rescued from the fiery furnace those who should have been cast into it for refusing to worship the image."

How do we reign in an out-of-control Court? It is not hard to do; here are several ideas:

One, we could appoint judges for a term of years rather than for life. The term could be renewed if the President and Senate think they have done a good job. We should not delude ourselves that life terms keep judges above the political fray. They have joined the fray and, like other politicians, must be held to some accountability.

Second, federal judges at the appellate and district court levels could be made subject to voter recall and removal.

Third, Congress could use its power, granted in the Constitution, to restrict the jurisdiction of the Supreme Court.

Fourth, we could do what Teddy Roosevelt recommended in his 1912 presidential campaign—have the nation decide at the next election whether to uphold or reject any Court decision creating a new "right" or overturning a state or federal law. "It is the people and not the judges who are entitled to say what the Constitution means," said T.R., "for the Constitution is theirs, it belongs to them and not to their servants in office."

Fifth, we could simplify the way in which we amend the Constitution—to remove Congress from the process.

Right now the Constitution requires Congress to approve proposed amendments before they can be sent to the states for their consideration. Congress, however, obviously won't approve limits on its powers such as are called for in the Balanced Budget and Term Limits Amendments. Congress also naturally protects the Court because the Court is the source of most of its powers. We should allow the states, without the approval of Congress, to amend the Constitution.

Any state should be able to propose an amendment, and if three-fourths of the states agree to the language, the amendment should become part of the Constitution. At the Constitutional Convention, Mr. Madison came close to having such authority put into the Constitution.

The purpose here is not radical change. It is to put an end to radical change being imposed upon a free people by an unelected elite which serves for life and is answerable now to no one. It is to restore the original system of checks and balances envisioned by the conservative men who wrote the Constitution.

Over the past 30 years, the Court has lost any sense of its proper relation to the country and has consequently lost the respect of the people. The people's respect will return as soon as the Court returns to its traditional role—an independent judiciary acting within a democratic Republic.

Majority rule is not perfect, and a democratic Republic will not always be just, or incorrupt, or provide a completely rational social order wherein all wants are satisfied. A majoritarian society is imperfect because man is imperfect. But it is the faith of the democrat that self-government provides the best way of assuring freedom for the individual to live as he wishes, and to develop his talents to their fullest.

In a judicial dictatorship, you get a government and society designed by the Supreme Court to conform to its intellectual vision of America. The public, however, does not share the Court's vision. With democracy, you get, as Jefferson said, not a perfect government, but one as good as the people.