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Politicians in Robes: The Supreme Court's Smoke Filled Room

By Nelson Lund, J.D., Ph.D.

Summary

When the U.S. Supreme Court disregards the law in reaching its decisions and the Justices substitute their own political judgments for those of the people's elected representatives, one must question the future of the rule of law and democracy.

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If we stop to look at how the Supreme Court made its recent decisions on these issues, we should all be appalled by the Court's cynical disregard for the law.

Lots of perfectly reasonable people believe that sodomy laws are a terrible idea, and even that racial preference programs are worth the costs they impose. When people get the policy results they want, it is tempting not to be too fussy about the means that were used to get them. But if we stop to look at how the Supreme Court made its recent decisions on these issues, we should all be appalled by the Court's cynical disregard for the law.

In a case involving the University of Michigan Law School, five Justices concluded that discrimination against whites and Asians did not violate the Fourteenth's Amendment's guarantee that everyone will enjoy "the equal protection of the laws." For about the last half century, the Court has interpreted this provision to allow racial discrimination only when it is narrowly tailored to serve a "compelling government interest," like national security or providing a remedy for the victims of the government's own past racial discrimination. But now the Court has said that state universities have a compelling interest in giving special preferences to selected minorities, which requires discriminating against white and Asian applicants. If this is a "compelling government interest," then the Court could just as easily decide that there is a compelling interest in having fewer black and Hispanic students, if five Justices happen to think that is a good idea.

Even if one believed that "the equal protection of the laws" is vague enough that it could mean "anything that judges think is a good idea," the Civil Rights Act of 1964 is much more specific than the Fourteenth Amendment. Its words are crystal clear:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Michigan's law school receives federal funds, and you may wonder how anyone could think that this statute allows the school to discriminate against students of any race. Where is the exception that allows discrimination against whites and Asians? The Court's answer is that Congress included a huge exception, which must have been written in invisible ink when the statute was enacted in 1964, for any kind of racial discrimination that the Supreme Court

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might decide was permitted by the Fourteenth Amendment in 2003.

While you're scratching your head over that one, consider the Court's new ban on laws against homosexual sodomy. This decision was based on another provision of the Fourteenth Amendment, which forbids states from depriving people of liberty without "due process of law." In the *Dred Scott* case in 1857, Chief Justice Taney claimed that the Constitution's reference to "due process" contained an invisible ink provision giving new substantive rights to slaveowners. Lots of slaveowners no doubt liked that result, and later Courts found more of these invisible ink provisions in the words "due process," including a ban on certain kinds of economic regulations. The Justices later used their invisible eraser to get rid of the invisible ink in which that ban was written, but then discovered some other previously unseen provisions, including one dealing with abortion.

A few years ago, the Court finally recognized that the Taney doctrine gave judges too much discretion to make up new constitutional rights anytime they got the urge. In a case involving state prohibitions against assisted suicide, the Court held that "substantive due process" would henceforth protect only those specific rights that are both deeply and objectively rooted in American history. That legal test has now been chucked out the window: nobody believes that the right to homosexual sodomy is deeply rooted in American history. Instead, the Court relied largely on subjective musings about the nature of liberty and on an "emerging awareness" (especially in selected foreign countries) that greater tolerance for homosexual conduct is a good idea.

Justice Benjamin Curtis, dissenting in *Dred Scott*, warned the country against letting judges make up new constitutional provisions:

> When a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its 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 it ought to mean.

Justice Curtis' point is as valid today as it was in 1857. A majority of the Supreme Court has defied the Constitution and the laws because the Justices think their own political judgments are better than those of the people's elected representatives. Maybe they're right. But when we like the policy results they give us, and decide to overlook the illegal way they produced those results, we're saying a lot about what we think of democracy and the rule of law.

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(Nelson Lund is the Patrick Henry Professor of Constitutional Law and the Second Amendment and Foundation Professor of Law at George Mason University, and a member of the Board of Scholars of the Virginia Institute for Public Policy, an education and research organization headquartered in Potomac Falls, Virginia. **Permission to reprint in whole or in part is hereby granted, provided the author and his affiliations are cited.**)

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John Taylor
Virginia Institute for Public Policy
20461 Tappahannock Place
Potomac Falls, Virginia
20165-4791

Phone: (703) 421-8635
Fax: (703) 421-8631

www.VirginiaInstitute.org
JTaylor@VirginiaInstitute.org

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