



Written by [Selwyn Duke](#) on April 6, 2020

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## Judges Courting Condemnation

With his mouth misfiring worse than any gun he's ever railed against, leftist Senator Chuck Schumer made headlines and hell for himself March 4 when he leveled threats against High Court justices. "I want to tell you, Gorsuch! I want to tell you, Kavanaugh! You have released the whirlwind, and you will pay the price!" he shouted, rabble-rousing and promoting abortion (better termed prenatal infanticide) from the Supreme Court steps before a cheering crowd. "You won't know what hit you if you go forward with these awful decisions!"



Well, what hit Schumer was criticism from all sides. Liberal *Washington Post* writer Ruth Marcus labeled the New York Democrat's words "particularly egregious," for example, while left-wing Harvard Law professor Laurence Tribe called them "inexcusable." But that didn't stop the excuses. Schumer said he used the wrong "words," even though he was reading prepared remarks (though he did look away from his paper during the offending statement, so perhaps he was ad-libbing). He also claimed he was actually speaking of "consequences for President Trump and Senate Republicans." Yet he didn't name Trump — and *senators* Gorsuch and Kavanaugh were unavailable for comment.

But certainly available was Chief Justice John Roberts. "Justices know that criticism comes with the territory, but threatening statements of this sort from the highest levels of government are not only inappropriate, they are dangerous," he said, issuing a rare rebuke of a legislator. "All members of the court will continue to do their job, without fear or favor, from whatever quarter." These are nice words, too. But they're both surreal and sanctimonious given modern courts' usurpative disposition.

A justice's "job" is to rule based on the Constitution, without favor toward party, power, or political position. Yet for at least a century, "activist" judges have been imposing their biases from the bench — without consequence.

To illustrate the point, consider that the U.S. Supreme Court was asked to hear a faux (same-sex) marriage case in 1972 already. While the justices back then likely thought the notion absurd, they voiced no such sentiment but simply declined to take the issue up, citing "want of a substantial federal question."

Fast-forward 43 years and the SCOTUS delivered the *Obergefell v. Hodges* decision, in 2015, which imposed faux marriage nationwide. Dissenting in the case, late Justice Antonin Scalia condemned the opinion as "lacking even a thin veneer of law," while fellow dissenter Justice Roberts lamented that the decision had "nothing to do" at all with the Constitution.

Scalia and Roberts were responding to justifications in the majority opinion, penned by now-retired justice Anthony Kennedy. He wrote, for example, that without "marriage," homosexuals' "children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material



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costs of being raised by unmarried parents.... The marriage laws at issue here thus harm and humiliate the children of same-sex couples." Some could respond that just being raised by a same-sex couple harms and humiliates children or that perhaps the above is an argument for criminalizing divorce, as it leads to children having "unmarried parents." But that's not the point. It is, rather, that the *Obergefell* decision concerned nothing more than five lawyers' judgment that, as Roberts also wrote, "same-sex marriage is a good idea."

*Photo: AP Images*

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Now, if state legislators had promulgated Kennedy's argument in legislating in faux marriage's favor, they could be called wrong in goal but not in role. For it is *legislators'* job to consider what is or isn't a "good idea" when legislating. Moreover, if while making law they also make tragic mistakes, we'd expect them to endure scorn, criticism, and condemnation. After all, if people don't like "the bearer of bad news," imagine how much more they'll hate what an errant lawmaker is: the creator of bad news.

So when Schumer claimed he was actually speaking of "consequences" for Republican legislators, it was a lie that gets at a truth: When justices start acting as legislators, is it surprising when they're treated like legislators? It's the result of ceasing to be just the bad-news bearers — e.g., "The Constitution doesn't allow this" — and becoming bad-news makers.

To add perspective, analogize this situation to baseball, with the players and fans being the people, the rule makers the legislature, and the umpires the judges. Imagine that some umpires, calling themselves "pragmatists," assumed the rule-maker's role and, let's say, stated, "We're going to allow four strikes here because three are too few" or "Now a foul after two strikes will be considered a strike!" If the losing team's fans might be mad if an ump misses a call, imagine their rage when one changes rules and thus orchestrates their team's defeat. Worse still, if that ump couldn't be fired, a vigilante spirit might arise.

This is relevant because Schumer's anti-justice rant *smacked of vigilantism*. Our rogue-ump judges have brought hostility upon themselves by abusing their lifetime-tenure protection and usurping powers falling far outside the clearly defined boundaries of the Constitution — very much including the infamous *Roe v. Wade* decision. And when the "law" behaves lawlessly, vigilantism becomes a recourse. This said, the problem is not with the law itself but with those entrusted to make and enforce it. In fact, the *law* actually provides remedies for reining in rogue judges.

First, the Constitution's Article I allows Congress to impeach judges, with Article III stating that they shall only "hold their Offices during good Behaviour." Though the common view is that errant rulings shouldn't justify impeachment ("Who's to say what's 'errant'!" shouts the relativist), missed is that judges' conjuring up a rationalization, "pragmatism," to justify their ignoring of the law and failure to do their job is the worst of behavior.

Congress can also use Article III to limit the SCOTUS's appellate jurisdiction, meaning, its power to hear appeals from lower courts. For instance, Congress could prohibit the SCOTUS from hearing prenatal-infanticide or marriage cases on appeal from lower courts. Congress could even abolish lower federal courts, since such courts were created by Congress in the first place. This has happened, too, notably under the Thomas Jefferson administration.



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So the legislature could have prevented the SCOTUS from hearing faux marriage appeals and then essentially told the lower federal courts, “You want to rule on marriage, a state issue? Okay, you’re gone.” Knowing that ignoring their jobs may mean their jobs could tame judges’ adventurist spirit.

Yet the flaw here is that the above requires action by politicians, who’d rather pretend they’re powerless against the courts than take controversial stands and court electoral defeat. Thankfully, though, there is another card to play here. It’s what Jefferson called the “rightful remedy” for all federal usurpation and, I’ll add, what should be the executive response to all unconstitutional judicial opinions: nullification. After all, if courts place themselves above the law, why shouldn’t state officials, who like their federal counterparts also take an oath to uphold the U.S. Constitution, place themselves *with the law* and above the courts? Note that judicial supremacy (the theory that Supreme Court decisions become “the law of the land,” superior to and supplanting properly instituted laws) is *not granted* by the Constitution and is instead a standard that Jefferson said would make our founding document a *felo de se* — an act of suicide.

But it’s assisted suicide, with sins-of-omission legislators providing the brew, sins-of-commission judges spiking it, and too many of us drinking the Kool-Aid. So it’s time the courts were reminded, as Justice Scalia put it in his *Obergefell* dissent, of their “impotence.” Let them reap the whirlwind, for sure — not the ill wind the world’s Schumers disgorge with every demagogic breath, but the long-overdue wind of an informed populace demanding that their state and federal elected officials no longer tolerate judicial tyranny.

*Photo: AP Images*



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