New American

Written by **Selwyn Duke** on July 8, 2019

Published in the July 8, 2019 issue of the New American magazine. Vol. 35, No. 13

# Save Babies and Abort Judicial Supremacy

## With U.S. judges usurping the power to make or revoke laws — and Congress sitting idly by — it's time to nullify extra-constitutional judicial supremacy.

Abortion is a rare contentious issue where it appears our nation has moved "right," rather than leftward, in the last 30 years. This is evidenced by the many states that have recently enacted abortion restrictions — which would more accurately be called prenatal infanticide restrictions — such as "heartbeat" bills. This pro-life shift is good news. Yet federal judges, overstepping their bounds, are wont to strike down pro-life laws and have recently done so. Given this, and that Congress refuses to tame the courts, is it time for states to simply ignore unconstitutional judicial rulings and enforce their duly enacted laws, a phenomenon known as "nullification"?

The prenatal-infanticide battle certainly is heating up. On one side there are states such as Illinois and New York, the latter of which's euphemistically named Reproductive Health Act became law earlier this year and allows prenatal infanticide up to birth for any reason whatsoever. (Meanwhile, Empire State lawmakers recently passed a ban on cat declawing, with bill advocates calling the procedure "cruel and barbaric … convenience surgery.") On the other side are states such as Mississippi, Georgia, Louisiana, and Kentucky, which have enacted measures banning prenatal infanticide once a heartbeat is detected (six to eight weeks of development); Alabama has gone even further, prohibiting prenatal infanticide at all stages unless the mother's life is threatened.

The court battles are now heating up, too, with leftist judges proving reliable allies for the culture of death. In May, Judge Carlton Reeves of the Federal District Court in Jackson, Mississippi, an Obama appointee, temporarily blocked his state's law. It "'threatens immediate harm to women's rights' and 'prevents a woman's free choice, which is central to personal dignity and autonomy,' Judge Reeves wrote in his ruling," the *New York Times* related. "'This injury outweighs any interest the state might have in banning abortions after the detection of a fetal heartbeat.'" Really? One may wonder about the actual "injury" suffered by the babies never given a choice and robbed of all their tomorrows.

Worse still, Kentucky's prenatal-infanticide law was struck down completely. U.S. District Judge Joseph McKinley, Jr., a Bill Clinton appointee, "ruled that the 2018 law would create a 'substantial obstacle' to a woman's right to an abortion, violating constitutionally protected privacy rights," the *Los Angeles Times* reported May 10. Louisiana's and Georgia's pro-life laws are headed to court, too. And rest assured that they'll surely be shopped around to a sympathetic judge — who'll very likely be an Obama or Clinton appointee.

As for pro-lifers, they're hoping the Supreme Court will hear one of these cases and then overturn *Roe*

*v. Wade*, the 1973 SCOTUS opinion stating that recourse to prenatal infanticide is a right. But is this a sure thing? What if the SCOTUS doesn't overturn *Roe*? Moreover, even if the court does, what of all the babies who'll be killed in the meantime? Of course, Congress could conceivably rein in the judiciary, but we shouldn't hold our breath waiting for that.

But all is not lost. The states passing the pro-life laws can also do something, immediately, about *Roe* and usurpative judges. They can and should refuse to abide by *Roe* — and other unconstitutional rulings — within their own state borders.

This is justifiable because *Roe* borders on insanity. Does anyone really believe the 14th Amendment's framers mean to enshrine prenatal infanticide as a "right"? In fact, they weren't even thinking about it. Moreover, the Constitution gives the federal government no warrant to dictate state actions regarding the matter. The notion that the federal judiciary can tell states what to do about abortion is an invention of activist judges themselves. Moreover, nullifying federal judicial overreach is a no-brainer because Roe-like activism is not the exception but the rule, from a judicial branch that long ago squandered its credibility.

Just consider, for example, how a judge recently blocked construction of part of our border wall. There was the *Obergefell v. Hodges* faux (same-sex) marriage decision in 2015, which, as the late Justice Antonin Scalia noted, lacks "even a thin veneer of law." Judges also stayed President Trump's bans on immigration from certain terrorism-spawning nations, in violation of a '50s-era law (which the courts did not even rule unconstitutional) giving the president such power. Longer ago, judges overturned California's Proposition 8, the 2008 measure defining marriage as what it is, one man and one woman; and the Golden State's Proposition 187, the 1994 measure denying illegal aliens non-emergency public services. This is just a small sampling, too. For it seems that virtually everything ends up in court now, with judges' decisions masquerading as "law," to the point where we may ask: Has legislation just become formality? It's almost as if we could just cut out the middlemen, Congress and the president, and go straight to our judicial oligarchy to learn what will be "permitted."

This might be fine were judges inerrant oracles delivering age-old wisdom. But as Thomas Jefferson observed in 1820, "Our judges are as honest as other men, and not more so. They have, with others, the same passions for party, for power, and the privileges of their corps." Thus, does it make sense that people should vote directly on a proposition — or that a law should be passed by Congress and signed by the president, who represent perhaps hundreds of millions of Americans — and then be nixed by one unelected, gavel-wielding lawyer? Is this what the Founders intended?

Jefferson certainly didn't think so. He warned in 1820 that "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." It would, he'd stated the year before, make the Constitution a "*felo de se*" — an act of suicide. "For intending to establish three departments, co-ordinate and independent, that they might check and balance one another, it has given, according to this [judicial supremacy] opinion, to one of them alone, the right to prescribe rules for the government of the others, and to that one too, which is unelected by, and independent of the nation," he continued. "The constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary, which they may twist, and shape into any form they please."

We've been judicially twisted and shaped for ages now. But there is that solution, nullification, which

Jefferson called in the Kentucky Resolution of 1799 the "rightful remedy" for any and all unconstitutional federal acts, and many of the usurpative judges are of the federal beast. But nullification should be applied to all unconstitutional judicial opinions. And what of judicial supremacy?

Consider: The legislative branch's power to make law is granted by the Constitution. The executive branch's power to enforce law is granted by the Constitution. And the judicial branch's supreme "power" to strike down law and enjoin the other two branches is granted by… what?

It's *not in the Constitution*. Rather, this extra-constitutional judicial supremacy was declared by the courts themselves, most notably in the *Marbury v. Madison* decision (1803). That's right: The courts gave the courts the courts' trump-card power.

It's a great con if you can pull it off, which the courts have done because the other two branches, with rare exception, have abided by it ever since.

And Congress' inaction is especially damnable. It does have the power under the Constitution's Article III to limit the jurisdiction of federal courts below the Supreme Court and the appellate jurisdiction of the latter, thus stopping the lower courts, for instance, from ruling on abortion cases altogether. Congress can also impeach judges and even eliminate any and every federal court except the SCOTUS. Why isn't this done?

Cowardice and ignorance.

Congress would have to take firm stands on contentious issues (e.g., marriage) and perhaps suffer electoral consequences. It's easier for politicians to just puff up their chests, complain of judicial overreach, then throw up their hands and say, "The courts have ruled — there's nothing we can do!" Few today understand the Constitution, so who will argue?

## The Futility of Trying to Restore the Courts

While Republicans emphasize appointing conservative judges, sometime between the 1960s and today the courts were "indeed lost forever." That's the claim writer Daniel Horowitz made in his 2016 piece "12 reasons why the federal judiciary is irremediably broken." Here's a summary of his points (all quotations his):

1. There is a "permanent imbalance on the courts." The legal profession's nature ensures that "every Democrat appointee is a rabid post-constitutionalist," and roughly half (at least) of "the GOP appointees are not originalists."

2. "There is enough existing 'jurisprudence' to destroy every facet of the Constitution based on liberal precedent."

3. Lower courts "are even worse," and since SCOTUS only considers a fraction of their opinions every year, relatively little of their adventurism gets righted.

4. "The next president [Trump] will not fundamentally alter the balance in lower courts" because leftists dominate numerically and have lifetime appointments. Note: "These judges are not only redefining civilization, thereby rendering election results moot, but are also preventing us from winning elections in the first place by perpetuating voter fraud."

5. The Left need find only one sympathetic judge, from their pool of activist jurists, to scuttle any

traditionalist measure.

6. "Unlike our judges who uphold even post-constitutional precedent, the Left's judges have no qualms about overturning 200 years of settled case law and the plain meaning of the Constitution [e.g., *Obergefell*]."

7. We can't "balance bad judges" because true "originalists won't manipulate the system to get the desired political result.… Thus, liberal judicial activism is a cancer that can only be cured with wholesale surgery, not chemotherapy."

8. "Rigged rules of standing" — for "every one at-bat we have at the courts to strike down bad laws in blue states, the other side gets 50 at bats against our laws in red states.… To use a[nother] sports analogy, they have a perpetual first-and-goal at our one-yard line with as many tries as they want. Coupled with one-directional *stare decisis* [enshrinement of precedent], we have to win every case while they only have to win once to cement an enduring victory."

9. Senate politics, with the GOP agreeing to nominate compromise candidates — along with few judges willing to overturn "corrosive" precedent to begin with — ensure a majority of non-originalists.

10. When conservatives "win in the courts, they are narrow victories. When the other side wins, they are sweeping social transformations across the board."

11. Horowitz's point 11 is that the "Supreme Court is not equally divided," contrary to myth. While he didn't foresee Trump's victory and a GOP opportunity to replace two SCOTUS justices, those picks just buttress his thesis. Will Neil Gorsuch and Brett Kavanaugh buck "pragmatism"-born precedent and restore constitutional integrity? Don't bet on it.

12. Horowitz's last point appears to be a call to inspire Congress to tame the judiciary; this won't work owing to cowardice and ignorance, as explained earlier.

Horowitz concludes with an apropos 1996 quotation from the late, great Judge Robert Bork. "Republican Presidents have used the nomination process in an effort to change the direction of the Court with almost zero results on the major issues," Bork lamented. "After twelve years of Presidents Reagan and Bush, each of whom made a determined effort to appoint Justices who would abide by the Constitution as originally understood, we seem farther than ever from a restrained Court.… A majority of the Justices has become more arrogantly authoritarian than ever."

I'll now make a brief philosophical point. What's perhaps the deepest reason our judges are so bad? Studies (and experience) have shown that most Americans today are relativists, believing, for example, that what we call right and wrong changes from time to time and place to place. So, question: Would you expect that upon receiving a judicial appointment, a relativist would suddenly become an absolutist regarding the Constitution? Would you fancy that a judge believing "principle" is mere preference would be principled when executing his duties? If someone thinks even "morality" is negotiable and can be lawyered, why would he suppose constitutional law couldn't be?

Another factor in judges' overreach was explained by British historian Lord Acton: "Power tends to corrupt; absolute power corrupts absolutely." Now, consider: As Dr. Alan Keyes, a former Reagan-era ambassador, explained in a 2005 *G. Gordon Liddy Show* episode, judges have, of course, their judicial power. Yet if they can strike down laws against the legislature's will, they've also arrogated to themselves the legislative power; if they can tell the chief executive that an action must or mustn't be

executed, then they've arrogated to themselves the executive power as well. Note here that James Madison, "Father of the Constitution," characterized having the executive, legislative, and judicial powers all in one entity's hands as the very definition of tyranny. Put simply, judges are corrupt partially because they're wielding something akin to absolute power.

If all this sounds negative enough to make you run for the hills or the Prozac, know that not only is it true, it drives home the point: At this juncture, nullification is a necessary recourse — and *our only one*.

By the by, we'd only be taking a leaf from the Left's book, anyway. After all, what are "sanctuary cities"? They're places where liberals decided they're simply going to resist federal immigration law. What's happening when states (e.g., Colorado) and municipalities ignore federal drug laws? Nullification is happening.

Some may now wonder, "But, wait, if the president and Congress can just ignore judges, what power do the courts actually have?" In accordance with the judiciary's intended status as "the weakest branch," it's the limited power of applying the law in *individual cases*. For example, let's say the government brings Selwyn Duke up on charges, and the judge I come before says, "I consider the law here unconstitutional; Duke goes free." I do walk, and the government can't charge me again with the same crime because the Constitution forbids double jeopardy. But the law stays on the books and operative because, since only Congress can make law, *only Congress can unmake law*.

Above and beyond this, the courts act as an "alarm bell," as Alan Keyes put it on the phone with me about a year ago. They can be a warning system that says to public officials and the people, "Examine this or that law; we believe it's unconstitutional."

## Imperial Congress?

One concern I've heard with shedding extra-constitutional judicial supremacy is that it would allow Congress (and the president) to abuse power and institute insanity. Yet isn't this precisely what the courts have been doing for decades? Are the most ridiculous social innovations the work of legislatures, or courts? Moreover, while elected representatives can also err egregiously, the difference is that the elected can also be rejected. In fact, for this reason the Constitution makes Congress *supreme* (inter-branch coequality is a myth), as reflected in how that body can impeach presidents and judges but itself is untouchable — except by the people. Note here that not only are there many congressmen, but House representatives stand for biennial reelection, making them more answerable to the electorate. Congressional supremacy reflects a government of, by, and for the people; judicial supremacy reflects one of, by, and for judges.

Then there's the moral supremacy of oaths. It's a principle that even a lowly army private not only has no obligation to follow illegal orders, but a duty to disobey them. In fact, as in the post-WWII Nuremberg trials, a soldier can be held accountable for not doing so. So here's a question: If even a low-ranking soldier must disobey illegal orders issued by superiors, isn't the same burden on presidents and governors faced with not orders, but illegal (unconstitutional) opinions, issued by inferiors?

That is to say, presidents, governors, congressmen, and senators take an oath to uphold the Constitution. They *do not take an oath to uphold lawyers' agenda-driven judgments*. In fact, Keyes points out that the "judicial review" concept itself is a deception. The proper idea is "constitutional review," and it "is equally the prerogative, or the responsibility, at a common-sense level, of all three

branches," he explained in his 2005 interview. "What the lawyers have done — and it's very cute — is they have tried to act as if the judges get to obey their oath, but when they tell the legislature to break its oath, it must go ahead and do it; or when they tell the executive to break his oath, he must go ahead and do it," he continued.

This is just common sense: Taking an oath implies that you must perform the examination necessary (the "review") to ensure you're following it. Thus, that executives and representatives take constitutional oaths implies rejection of judicial supremacy.

The kicker is that the judges break their oaths, too. As Daniel Horowitz complained, *stare decisis* — determining points in litigation according to precedent — is now status quo. Insofar as these precedents are unconstitutional, and they often are, this means that judges are upholding not the Constitution but merely other judges. So for how long will we continue upholding these judges, people whose passions are clearly "for party, for power, and the privileges of their corps," and God and country be damned?

Some may now ask, lastly, if congressmen and judges don't have the wisdom, guts, and integrity to rein in rogue courts, why would our nation's chief executives possess the wisdom, guts, and integrity to effect nullification? The difference is that a legislative or judicial remedy requires a majority of representatives or judges.

Nullification requires just *one* brave governor willing to get the ball rolling.

If such a person rises to that occasion, and eloquently and passionately defends his position, the ice will be broken and others may follow suit. It takes just one man, one intrepid leader, who's willing to make waves and history as he really helps make America great again. Think about what he'd accomplish, too: He actually could be more hated by the Left than Donald Trump, as he does God's work and becomes a true hero for our time.

*Photo: Chris Ryan/OJO Images/Getty Images*

*This article originally appeared in the July 8, 2019 print edition of* The New American. *To subscribe, click here.*

*Related article:*

Mommy, Don't Kill Me

New American

Written by **Selwyn Duke** on July 8, 2019

Published in the July 8, 2019 issue of the New American magazine. Vol. 35, No. 13