



Written by [Selwyn Duke](#) on March 21, 2016

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Who will Be Our Next Oligarch?

A Government of, by, and for Judges:

"It is a maxim among these lawyers that whatever has been done before, may legally be done again: and therefore they take special care to record all the decisions formerly made against common justice, and the general reason of mankind. These, under the name of precedents, they produce as authorities to justify the most iniquitous opinions; and the judges never fail of directing accordingly."

— Jonathan Swift, *Gulliver's Travels*

Written in 1726, the above satirical lines again demonstrate how the loathing of lawyers is nothing new. Nor is rule by oligarchy or the like, as autocracy is generally man's lot. But it perhaps took the 20th-century United States to combine the lawyer class with oligarchy and create something resembling a "lawyerocracy."



Just One Judge

In the wake of Justice Antonin Scalia's February 13 passing, liberals are licking their chops and conservatives biting their fingernails over who will replace him on the Supreme Court. And the media, true to form, are putting their thumb on the scale. With a narrative that soon would be echoed by many, the *Washington Post* described the court on February 13 as "evenly divided between four liberal justices and four conservatives." This is curious because even with Scalia on the court, it issued the ObamaCare and *Obergefell v. Hodges* (faux marriage) decisions. Was this the work of a "conservative" body? And how much more liberal is the court with Scalia gone?

The reality is that if Barack Obama is allowed to fill the Supreme Court vacancy with the only type of justice he'd nominate — a devoted liberal judicial activist (a bad judge, put plainly) — the Left will have an unassailable majority. And the days of constitutional Supreme Court decisions even a decent minority of the time will be over.

Yet with Scalia having endeavored to be an "originalist" (meaning, a judge who actually does his job) and having been one of the court's best jurists, the chances of filling his shoes with even a pale imitation are vanishingly small. Four consecutive things must occur for it to happen:

- The Senate will have to exhibit fortitude and delay the confirmation of a successor.
- A Republican will have to win the presidency.
- The GOP will have to retain the Senate in November, despite 24 GOP seats but only 10 Democrat ones being up for grabs.



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- The Republican president in office will have to nominate someone not a wolf in constitutionalist's clothing; the chances of this alone happening are likely less than 50 percent.

This isn't welcome news for many, especially since the Beltway talk is that another Obama justice could reshape not just the court, but the *nation*. Yet this raises a question: If the appointment of one unelected person to one unelected panel of nine can so influence our fate, are we really still a representative republic? Of course, some may now lament that the nature of a judge wouldn't matter if the courts stopped with the "living, breathing, evolving document" shtick and just did their job: abiding by the Constitution. Yet there's a seldom-recognized reality here.

Why should we expect constitutional adherence from judges if we won't practice it ourselves?

What does this mean? Consider that, in a way, Justice Scalia gave us the remedy for judicial overreach just last year: With "each decision ... unabashedly based not on law," he warned his colleagues in his *Obergefell* dissent, the court moves "one step closer to being reminded of [its] impotence." Impotence? When these people can shape the nation with a pen stroke?

They can because we let them.

The Constitution and the Court

The reality is that courts have neither armies nor gendarmes; they rely on government's executive branch, on the federal or state level, to enforce their edicts. Thus, if the president or a governor refuses to be their "muscle," their decision will fall "stillborn," as President Andrew Jackson once put it.

But isn't this a tad revolutionary? Aren't we to be a nation of laws? Certainly.

A nation of laws, not lawyers.

Laws — not judicial decisions.

Some will now mention judicial supremacy (judicial review), which is the idea that courts have the final say on law's meaning and that their judgments must constrain not just their governmental branch, but the other two as well. It's also one of the big cons of our time.

The Constitution is the supreme law of the land. The legislative branch has the power to make law because the Constitution grants it. The executive branch has the power to enforce law because the Constitution grants it. And the judicial branch has the power to review law and overrule the other two branches because the judicial branch granted it. That's right: The Supreme Court gave the Supreme Court its trump-card power — in the 1803 *Marbury v. Madison* decision. And we've been obediently abiding by the rule of lawyers ever since.

It's not as if we weren't warned of this dangerous path. Founder Thomas Jefferson told us in 1819 that judicial supremacy's acceptance would do nothing less than make "our constitution a complete *felo de se*" — a suicide pact. He explained:

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.... 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.



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Abraham Lincoln, who ignored the *Dred Scott* decision, which decreed blacks could not be American citizens and could not sue in federal court, also agreed. As Princeton University Professor Robert George put it while conducting a December interview with Senator Ted Cruz, Lincoln said “that to treat unconstitutional court rulings as binding in all cases, no matter what, no matter how usurpative, no matter how anti-constitutional, would be for the American people — and I quote now the Great Emancipator — ‘to resign their government into the hands of that eminent tribunal.’” Jefferson was even more pointed, writing in 1820 that judicial supremacy is “a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy.” And so it has come to pass. We’re now reduced to arguing about how the next appointed oligarch will shape our house of wax.

While unconstitutional decisions should be ignored (nullified) by chief executives, there are other ways of taming rogue courts. For example, the Constitution’s Article III states, “The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” This means only the Supreme Court must exist; all those that had subsequently been established can also be *disestablished*. In addition, Section 2 of this article grants Congress the power to limit the jurisdiction of federal courts below the Supreme Court and the appellate jurisdiction of the Supreme Court; via this power, the legislature could essentially eliminate courts’ ability to apply judicial review in various areas (e.g., marriage).

If Congress Cared

Now, if every time a court issues a blatantly unconstitutional ruling it found itself knocked out of the game — or was abolished completely and its judges became unemployed — don’t you think the judicial class would start minding its p’s and q’s? So the question is, why doesn’t Congress assert itself? If nothing else, doesn’t it care about its own power?

Insight can be gleaned from statements made last year in response to *Obergefell*. Ohio governor John Kasich echoed many when saying that faux marriage is “the law of the land and we’ll abide by it” and that now “it’s time to move on.” And the message is clear: “Hey, don’t look at me. The court did it!” “Outsourcing” decisions on hot-button issues to the judiciary enables career-driven politicians to avoid making the tough calls that, one way or the other, would alienate a large chunk of the electorate.

This is why, in essence, judges today are far more dangerous than politicians. Having to face continual reelection, the latter’s focus is often on preserving not institutional power, but their own position, privilege, and pocketbook. Freed from these concerns by their lifetime appointments, federal judges have nothing worldly to gain but power. They can hand down the most outrageous, usurpative rulings with impunity.

As for judicial supremacy, anyone defending it ought to wonder why he’d then care about the separation of church and state. If you’re willing to let an oligarchy of nine unelected judges determine your laws, why not an oligarchy of nine unelected clergymen? Sure, churchmen will claim divine inspiration, but so what? If they’re right, then they’re relating God’s will and we can’t but welcome their ethereal governance. Of course, if atheists are right, the clergymen’s ideas are mere inventions of man. And you know what that makes them? Just like the judges.

Whatever the case, it’s not surprising that jurists play God, being not only the source of their own extra-constitutional power but also, increasingly and ever more intolerably, dictating law to 320 million



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citizens. For a balance of power only works when all parties concerned exercise their power. And since we likely won't get better judges anytime soon, and Congress won't tame the bad ones, the only recourse left is what Jefferson called the "rightful remedy": nullification.

In her book *Yankee From Olympus: Justice Holmes and His Family*, Catherine Drinker Bowen wrote, "Colonial America had looked upon (lawyers) as mere tradesmen who earned a questionable living by cleverness and chicanery." It's time to resurrect that founding spirit and once again make the judiciary "the least dangerous branch."



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