Written by **Selwyn Duke** on August 30, 2021

COVID Power Grab: Leftist SCOTUS Judges Think Property Rights Are Property PRIVILEGES

"Life, liberty, and the pursuit of property." So important are property rights that the preceding Adam Smith formulation was made part of The Declaration of Colonial Rights, crafted by the First Continental Congress in 1774. Don't try telling this to the Supreme Court, however, and especially to the far-left third of it that apparently believes your property rights aren't "rights" at all and can be subject to unelected bureaucrats' whims.

AP Images
Stephen Breyer

At issue is the SCOTUS's most recent dissent. Penned by Justice Stephen Breyer and joined by fellow travelers Elena Kagan and Sonya Sotomayor, it was written in response to the Thursday opinion that the CDC-imposed eviction moratorium is unconstitutional.

Reflecting contemporary leftist thought, it essentially holds that the government's "power is so overarching as to impact nearly every citizen, so broadly interpreted as to be essentially limitless, and so singularly vested as to be checked virtually solely at the discretion of the bureaucracy itself," as the Federalist's Christopher Bedford puts it.

Unmentioned, however, is that the court's conservative majority also erred, mainly because it's "conservative" and not constitutional.

"The absurdity begins in the opening paragraph of Breyer's dissent," states Bedford, where "he lauds what he describes as the government's limited and judicious use of its power, writing, 'the [Centers for Disease Control]'s current order is substantially more tailored than its prior eviction moratorium, which automatically applied nationwide.'"

Now, this could remind one of how British satirist Jonathan Swift, while mocking lawyers and judges, wrote that they've a habit of "dwelling upon all circumstances which are not to the purpose." In other words:

> Breyer's "reasoning" is a distraction.
>
> For he never addresses whether the CDC even has the constitutional power to act in the given area. A "tailored" constitutional trespass is still a constitutional trespass.
>
> And how "tailored" is it? Well, it doesn't apply "nationwide" — just to 90 percent of Americans!
>
> "This, he [Breyer] openly admits, is the left's idea of 'substantially more tailored,'" writes Bedford; "it's right there in the open."

And whence does this power come? The CDC claims it's derived from the Public Health Service Act, a law Congress passed in 1944 to handle serious disease outbreaks and which reads, "The Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary."

"But according to Breyer, the Public Health Act essentially says 'we can kill your dog in a plague, so we also have the power to say you don't have to work during COVID' — a broad interpretation of congressionally authorized power at best," Bedford also tells us. He then continues:

> How does he get there? Simple: the part of the law that grants the surgeon general the power to enact "other measures, as in his judgment might be necessary."
>
> Or, by not specifically naming every single means of identifying, isolating, and destroying COVID, Congress gave the CDC limitless authority to do as it pleases. "If Congress," Breyer assures us, "had meant to exclude these types of measures from its broad grant of authority, it likely would have said so."
>
> Compare that reasoning with Kavanaugh's [Kavanaugh penned the majority opinion], who maintains the court expects "Congress to speak clearly when authorizing an agency to exercise powers."

Breyer's "reasoning" is not actually that, but rationalization; it's "the art of proving, by words multiplied for the purpose, that white is black, and black is white," to quote Swift again. Unfortunately, the same can be said of the court's "conservative" wing.

After all, Kavanaugh also wrote that if "a federally imposed eviction moratorium is to continue, Congress must specifically authorize it." But where does the Constitution give the feds, elected or not, the power to involve themselves in private rental contracts?

For that matter, where's the constitutional justification for federal bureaucracies such as the CDC? It's states that possess the power to institute such *and* to regulate rental contracts (whether the latter is a good idea is a different matter). As "Father of the Constitution" James Madison put it in *Federalist* No. 45, "The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite."

As for Breyer, he's an "activist" judge, meaning, a bad one. He's much like a baseball umpire who won't limit himself to just calling balls and strikes and instead wants to bend the rules as he fancies "fair" ("This pitcher is too good; the batter gets four strikes now!").

Breyer "reasons" that the COVID-19 situation "is an emergency, and by going to work, people put themselves at risk of dying," writes Bedford. "Nevermind [sic] that nurses, grocery clerks, flight attendants, bartenders, police officers, construction workers, cab drivers, soldiers, cooks, trash collectors, cameramen, janitors, plumbers, warehouse employees, bouncers, pilots, firemen, musicians, engineers, and a whole host of others have long been back at work. Nevermind [sic] that the United States economy needs workers so badly some businesses are going under for lack of them."

"Breyer is so convinced of this, he openly admits that backlogged government funds and renters refusing to pay rent is an 'injury,' but claims the court has to 'compare that injury with the irreparable harm of 'eviction," Bedford also relates.

Actually, not only doesn't the court have to compare those things; it has no right to. It's much as with then-justice Anthony Kennedy's *Obergefell v. Hodges* (marriage case) opinion in 2015 stating that same-sex couples' children were harmed by the status quo, that they couldn't wait for state laws to conform to their alleged needs. These judges are operating by "good-idea-ism." But if they believe it's their duty to effect a vision of "social good," they're in the wrong business.

They need to resign and become activists, state legislators, or governors.

After all, it's a good idea for people to exercise and remain fit, feed their kids healthful food, and say "Please" and "Thank you." But not every good idea's implementation is the government's role — and not every one that is so is constitutional at the federal level.

And here's a really bad idea: violating the Constitution in a constitutional republic. Akin to saying you're not going to abide by baseball's rulebook in a baseball league, it guarantees system breakdown. Unfortunately, the only argument between conservative and liberal jurists today is the degree to which this bad idea will be indulged.