

THE SUPREMACISTS

Foreword

WHAT IS THE FUTURE of self-government in America? Will we continue to be the world's greatest self-governing people, a land of liberty and of the prosperity that flows from freedom?

Or will we, like so many others, allow ourselves to be ruled by a small band of elitists who pretend to be wiser than the rest of us and force their policies upon us?

Our American institutions and culture are being undermined today by judicial supremacists. They are carrying out a revolution in our system of government, and most Americans don't realize it because it has happened stealthily and sporadically over the last fifty years. Activist judges have been legislating a liberal agenda that opposes religious values, conventional morality, the Constitution, and even the right of American citizens to govern ourselves.

A supremacist is one who believes in or advocates the supremacy of a particular group. The threat to America

comes precisely from those who believe in and advocate the supremacy of one particular group—judges—over the lawful wishes of the people.

Textbooks still say that we have three balanced branches of government—but textbooks are badly behind the times because one branch has assumed authority over the other two. Today, we are suffering from the oppressive rule of judicial supremacists who have replaced the rule of law with the rule of judges.

We respect the proper role of judges. We need judges, and we need a properly functioning judicial branch. We need judges for the same reason that baseball needs umpires. Someone has to call the balls and strikes and resolve close plays. But umpires are never allowed to change the rules of the game. We would not tolerate an umpire who called a batter out after two strikes. As Chief Justice John G. Roberts Jr. said in his confirmation hearings, “I will remember that it’s my job to call balls and strikes and not to pitch or bat.”

The assault by the judicial supremacists against the Constitution and the rule of law is the most serious issue facing our political system today. If unchecked, judicial supremacy will continue to grow like a cancer and destroy our republic.

This book describes what judges have done to our nation and explains how the Constitution contains all the tools needed to rescue America from the tyranny of judges.

Judges Rewrite the Constitution

THE UNITED STATES CONSTITUTION did not create judicial supremacy or consign us to be ruled by a judicial oligarchy. On the contrary, the Constitution separated the vast powers of the federal government into three branches—legislative, executive, and judicial—with an ingenious system of checks and balances so that each branch can serve as a continuing check on the others. We call this the separation of powers, and our state governments are also modeled on the same design. James Madison wrote in *Federalist 51* that this system is the best way to achieve the twin goals of liberty and justice. By “so contriving the interior structure of the government,” Madison wrote, “its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.”

But Congress, the legal establishment, and the American people have all failed in their duty to keep the judiciary in its proper place.

The unique and brilliant design of our Constitution—the system of checks and balances, with each branch checking the power of the other two branches—has been replaced by the Imperial Judiciary. Judicial supremacists have grabbed unconstitutional powers for the courts, and Congress has failed to restrain their power grab.

Our Constitution's Framers designed the judicial branch to be the least powerful of the three branches. Alexander Hamilton wrote in *Federalist 78* that the judiciary “will always be the least dangerous” branch of government because it has the least capacity to “annoy or injure” our constitutional rights. His prediction was correct for a century and a half, but today the judiciary annoys and injures our constitutional rights to a shocking extent.

The U.S. Constitution vests “all” legislative powers in the Congress. That means no legislative powers are granted to the courts. Yet, over the past fifty years, judges have become increasingly activist—legislating from the bench, and writing their own policies and attitudes into the law. In the latter half of the twentieth century, some of our most far-reaching social, economic and political decisions have been made by judges rather than by our elected representatives.

Judicial supremacists have:

- censored the Pledge of Allegiance in public schools
- removed the Ten Commandments from public schools, buildings, and parks
- changed the definition of marriage

- banned the acknowledgment of God in public schools, at graduations, and at football games
- imposed taxes and spending of taxpayers' money
- rewritten laws of criminal procedures
- dismantled laws that protect internal security
- imposed the social experimentation called forced school busing
- upheld racial preferences and quotas in hiring and college admissions
- outlawed term limits for Members of Congress
- rewritten laws on the conduct of elections
- banned the Boy Scouts from public property

Judicial supremacists have invented so-called rights such as:

- the right to abortion
- the right to same-sex marriage licenses
- the right to show and publish pornography, even with taxpayers' money
- the right of illegal aliens to receive taxpayer-paid benefits

Judicial supremacists have arbitrarily overturned laws adopted by majorities in statewide referenda in:

- Arizona
- Arkansas
- California
- Colorado
- Nebraska
- Washington State

Judicial supremacists have set themselves up as a super-executive and grabbed authority to micromanage:

- schools
- prisons
- hiring standards
- legislative reapportionment

THE PROPER ROLES

Social, economic, and political policies should be made by our elected representatives, not by judges. The American people should not allow judges to usurp the constitutional role of legislators. Judges have assumed authorities and responsibilities that the Constitution never gave them, and they are doing great harm—to our society, our culture, our institutions, our schoolchildren, and our right of self-government. We must not permit a judicial oligarchy to rule unchallenged.

We need trial judges to resolve disputes based on applicable law. We want decisions reviewed by appellate courts to ascertain that the law was properly applied. But we do *not* want judges making new law, setting policies, usurping the authority of other branches of government, or imposing their own social and political views on our people. We do *not* want judges rewriting the Constitution under the pretense that they are interpreting it. Article V of the Constitution provides a procedure for amending it, and the judiciary has *no* part in that process.

It is not fashionable to question the authority of the courts. Not recognizing something as wrong for several

generations gives it a superficial appearance of being right and allows a noisy clamor to rise in its defense. Those who have profited by the expansion of judicial power have erected formidable barriers against change—and even against criticism.

Our country's future depends on a courageous inquiry into the constitutional errors that have allowed a judicial oligarchy to rule over us. This book will help the American people replace longstanding assumptions and fallacies with the truth. This book offers simple facts, plain reasons, and common sense.

We repeatedly hear the maxim, "We are a nation of laws, not of men." Our Constitution specifically defines *itself*—not the opinions of judges—as "the supreme law of the land." But political judges have turned us into a government of men, not of laws. Judicial grabs for power have been escalating for a half century and there is no end in sight.

One of the "usurpations" that caused Americans to declare our independence in 1776 was royal rulers' "declaring themselves invested with Power to legislate for us in all cases whatsoever." The signers of the Declaration of Independence knew that the essence of freedom is the right to be a self-governing people, to have laws made by representatives whom the voters elect, because government can justly exercise only such powers as are based on "the consent of the governed."

If we are to remain a free and independent nation, we must reject judicial "usurpations," that is, the pretense of judicial supremacists that they are "invested with Power to legislate for us in all cases."

A LIVING AND EVOLVING CONSTITUTION?

The judicial supremacists refuse to be bound by the words and the original understanding of the United States Constitution. Instead, they espouse the theory that the Constitution is a “living” document which can change according to judicially directed “evolution.” “Living” and “evolution” (or “evolving”) are code words used by judicial supremacists to express their conceit that they can substitute meanings that were never present in the Constitution or our statutes. Activist judges simply ignore the Constitution’s plain language and original meaning.

The late Supreme Court Justice William J. Brennan was a leading advocate of these supremacist ideas. In a speech he delivered on November 21, 1982, he argued for “the evolution of constitutional doctrine” and for law itself “to rethink its role.” Brennan said that in previous eras “the function of law was to formalize and preserve (accumulated) wisdom,” but “over the past 40 years Law has come alive as a living process responsive to changing human needs.” He bragged that “evolution of constitutional law has been, in fact, a moving consensus,” and that “our constitutional guarantees and the Bill of Rights are tissue paper bastions if they fail to transcend the printed page.”

Listen to the arrogance of Brennan’s proclamation of judicial supremacy: “The Supreme Court has been, and is, called upon to solve many of the most fundamental issues confronting our democracy, including many upon which our society, consciously or unconsciously, is most deeply divided,

and that arouse the deepest emotions. Their resolution, one way or the other, often rewrites our future history.”

That is the mindset of liberal elitist judges, who have convinced themselves that *they* should rule over Americans of lesser status. The Constitution does not give judges any authority to evolve or transcend its language. Nobody “called upon” nine life-tenured, unelected, unaccountable justices to solve the fundamental issues confronting us and to dictate our “future history.” We must *call upon* our elected representatives to reject these unconstitutional notions.

Another famous liberal Supreme Court activist, the late Justice William O. Douglas, called the Due Process Clause in the U.S. Constitution “the wildcard to be put to such use as the judges choose.” In light of Douglas’s controversial Las Vegas gambling connections, his metaphor was apt.

The Due Process Clause is included in both the Fifth and Fourteenth Amendments: no person shall be deprived of “life, liberty, or property, without due process of law.” That language, which applies, respectively, to the federal government and the states, was clearly intended to ensure that lawful procedures are used by our government. For example, the clause means that accused criminals are entitled to their day in court. The clause was never intended to determine what should or should not be a crime.

The judicial supremacists have used this clause as a wildcard by expanding “due process” to include *substantive rights*. It was used most famously in *Dred Scott v. Sanford* (1857) to expand the rights of slaveowners and in *Roe v. Wade* (1973) to declare a right to abortion. There is no authority

in the Constitution for this creative use of the term “due process.”

Under “substantive due process,” the judicial supremacists assert that the federal courts have the discretion to create new substantive rights not mentioned in the Constitution and to decide what substantive rights should be protected and how extensive that protection should be. Substantive due process has become the fundamental legal theory upon which the judicial activists depend for decisions that have no basis in the Constitution, and it has been cited in more than one hundred Supreme Court decisions since *Roe v. Wade* in 1973.

The attitude of activist justices that they can treat the Constitution like “tissue paper,” which they can change by playing a “wildcard,” is totally contrary to the intent of the Constitution and must not be tolerated. The trouble with some judges is that once they are appointed to the federal judiciary, they seem to think they have been anointed to rule over the rest of us. They pretend they are *interpreting* the Constitution when in fact they are just writing their own opinions into the law. They selectively choose language to reach preordained conclusions without concern for fidelity to the text, a practice that Harvard law professor Laurence Tribe calls the “free-form” approach.

Americans do not want to live under an Imperial Judiciary. We still adhere to the Constitution, the separation of powers into three branches of government, and the rule of law—and we expect judges to abide by them, too.

The concept of a “living” and “evolving” Constitution has taken root in the political arena. When Al Gore was

asked during his 2000 campaign what kind of judges he would appoint, he replied, “I would look for justices of the Supreme Court who understand that our Constitution is a living and breathing document, that it was intended by our founders to be interpreted in the light of the constantly evolving experience of the American people.”

This heresy has spread throughout the judicial system. The Massachusetts high court, which mandated the granting of same-sex marriage licenses in *Goodridge v. Department of Public Health* (2003), ruled that “civil marriage is an evolving paradigm.” The word “evolving” was used to suggest that there are no enduring standards and that constitutions can be rewritten by power-grabbing judges. The word “paradigm” was used to suggest that the traditional worldview about marriage is temporary and has no rational basis. You know that judges are engaging in activism when they use such code words as “evolving” and “paradigm.”

The word “originalist” has come into our national vocabulary to describe judges who base their decisions on the Constitution as written and not on the pretense that the Constitution is evolving. Originalism is not a new idea. As explained by Justice Antonin Scalia in a speech at Vanderbilt University on March 21, 2005, “Originalism was the dominant philosophy until fifty years ago. . . . The Constitution is not a living organism.”

Thomas Jefferson was really advocating originalism when he wrote: “On every question of construction, [we should] carry ourselves back to the time when the Constitution was adopted; recollect the spirit manifested in the debates; and instead of trying [to find] what meaning may

be squeezed out of the text, or invented against it, conform to the probable one in which it was passed.”

Chief Justice John Marshall, expressing the same point of view, wrote in *Marbury v. Madison* that the Constitution has “committed to writing” the limits on the powers of the governmental departments, so that those “limits may not be mistaken or forgotten.” To disregard its limits, Marshall wrote, is to “reduce . . . to nothing what we have deemed the greatest improvement on political institutions—a written constitution.”

As Justice Scalia told the Vanderbilt students, “Most people think the battle is conservative versus liberals when it’s actually originalists versus living constitutionalists.”

NEW JUDGES CAN’T SOLVE SUPREMACY PROBLEMS

The federal courts today are precariously balanced between activists who support a radical agenda and constitutionalists who adhere to the Constitution. It is important to elect a President who will appoint only constitutionalist judges—but that alone will not solve the problem because too many judicial supremacists have life tenure, and too many judges become supremacists after they taste judicial power.

President Clinton appointed almost half of all federal judges now serving, and federal judges appointed by Presidents Carter and Johnson are still deciding cases. Presidents Nixon and George H. W. Bush both appointed some activist judges, and a Nixon-appointed judge on the Ninth Circuit (Alfred Goodwin) wrote the infamous Pledge of Allegiance decision in 2002 (*Newdow v. U.S. Congress*).

Seven of the nine justices currently serving on the Supreme Court were appointed by Republican presidents. Someone once asked Dwight Eisenhower if he had made any mistakes as President that he later regretted. Ike replied: Yes, two, and they're both sitting on the Supreme Court.

While the American people typically have the opportunity to correct a bad election result after four years, a bad legal precedent can last for decades or even centuries. Justice William O. Douglas was appointed to the U.S. Supreme Court because President Franklin D. Roosevelt wanted to replace what he called the “nine old men” with young, liberal justices. Douglas stayed on the Court for thirty-six years (writing twelve hundred opinions), through the terms of Presidents Harry Truman, Dwight Eisenhower, John F. Kennedy, Lyndon B. Johnson, Richard Nixon, and Gerald Ford. Douglas’s prejudice against religion grew so intense that he even questioned the constitutionality of chaplains in the armed services and the words “In God We Trust” on our money.

When he was a member of Congress, Gerald Ford tried (unsuccessfully) to have Douglas impeached because of his money dealings with Las Vegas gamblers. Four times Justice Douglas took a wife “for better or for worse . . . until death do us part,” and he divorced three of his wives. Yet, the American people were locked in a judicial embrace with Douglas no matter how outrageous his decisions or behavior.

Alexander Hamilton wrote in *Federalist 81* that he expected Congress to use its discretion to make appropriate “exceptions and regulations” to keep the judiciary “the least

dangerous” of the three branches of government. It’s long overdue for Congress to protect us from dangerous judges who are assaulting fundamental American principles.

THE COUP D’ÉTAT

Judge Robert H. Bork describes some of the enormous damage that activist judges have inflicted on America in his book *Coercing Virtue: The Worldwide Rule of Judges*. He finds that the courts are dominated by faux intellectuals of the Left who, unable to persuade the people or the legislatures, “avoid the verdict of the ballot box” by engaging in “politics masquerading as law.” We are “increasingly governed not by law or elected representatives, but by unelected, unrepresentative, unaccountable committees of lawyers applying no law other than their own will.”

All over the nation, special interest advocacy groups are forum-shopping to find judges willing to bypass the Constitution and write their own social and sexual preferences into the law. Plaintiffs are seeking out judges willing to cooperate in deconstructing our culture by abolishing the Pledge of Allegiance and the Ten Commandments to please the atheists, and by abolishing marriage standards and anti-pornography statutes to induce the nation to condone unrestricted sex.

Judges are not trained to consider the trouble their rulings may cause. When judges rewrite laws regarding social policy, they are generally clueless about the potential consequences. Judges lack the necessary information to make political and social policy decisions, they don’t

have the political processes to ensure that diverse interests are represented, and they don't hold hearings to assess the damage they might cause.

Americans believe that revolutionaries usually come dressed in military garb, but Judge Bork details how America has suffered a coup d'état by men and women in black robes who have changed the rule of law to the rule of judges. Here is how Justice Antonin Scalia describes what happened: "What secret knowledge, one must wonder, is breathed into lawyers when they become justices of this Court, that enables them to discern that a practice which the text of the Constitution does not clearly proscribe, and which our people have regarded as constitutional for 200 years, is in fact unconstitutional? . . . Day by day, case by case, [the Court] is busy designing a Constitution for a country I do not recognize."

The cancer of judicial supremacy will not go away until the American people rise up and repudiate it. It's time for the American people to notify their elected representatives, federal and state, that it is their mission to restore the Constitution with its proper balance among the three branches of the federal government. We must save self-government from the rule of judges. The whole future of America depends on it.

Notes

I *Judges Rewrite the Constitution*

- For an early use of the term “living Constitution,” see “Mr. Justice Black and the Living Constitution,” 76 *Harvard Law Review* 673 (1963).
- Justice William J. Brennan’s November 21, 1982 speech was given at Park School, Baltimore, Maryland.
- Justice William O. Douglas’s “wildcard” metaphor was quoted in “Are We Ready for Truth in Judging?” by W. Forrester, 63 *American Bar Association Journal* 1212 (1977).
- The legal doctrine of “substantive due process,” and how it has been abused, is concisely explained in *The Tempting of America* by Robert H. Bork (Free Press, 1990), 31-32.
- The word “paradigm” was popularized by a 1962 philosophy book, *The Structure of Scientific Revolutions* by Thomas Kuhn. The book denied that scientific progress had a rational basis.
- The Jefferson quotation is from his Letter to William Johnson (June 12, 1823) in *Writings of Thomas Jefferson* 439, 449 (A. Lipscomb ed., 1904).

- Justice Scalia’s “a country I do not recognize” is from his dissent in *Board of County Commissioners v. Umbehr* (1996).
- Robert H. Bork gives a useful definition of activist judges: “Activist judges are those who decide cases in ways that have no plausible connection to the law they purport to be applying, or who stretch or even contradict the meaning of that law. They arrive at results by announcing principles that were never contemplated by those who wrote and voted for the law. The law in question is usually a constitution, perhaps because the language of a constitution tends to be general and, in any event, judicial overreaching is then virtually immune to correction by the legislature or by the public.” *Coercing Virtue: The Worldwide Rule of Judges* by Robert H. Bork (AEI Press, 2003), 8-9.
- Robert H. Bork wrote in a January 20, 2003, *Wall Street Journal* op-ed: “The Supreme Court has created a more permissive abortion regime than any state had enacted; prohibited any exercise or symbol of religion touching even remotely upon government; made the death penalty extremely difficult to impose and execute; disabled states from suppressing pornography; catered to the feminist agenda, including outlawing state all-male military schools; created a labyrinth of procedures making criminal prosecutions ever more difficult; used racial classifications to exclude children from their neighborhood public schools; perverted the political process by upholding campaign finance limits that shift political power to incumbents, journalists and labor unions; licensed the advocacy of violence and law violation; and protected as free speech computer-generated child pornography. These decisions are activist, i.e., not plausibly related to the actual Constitution.”

LESSON ONE

JUDGES REWRITE THE CONSTITUTION

QUESTIONS FOR DISCUSSION:

- ★ Discuss the importance of self-government as the foundation of liberty.
- ★ Will we be governed by elected representatives or by elitist, life-tenured, supremacist judges?
- ★ Why should judges be like baseball umpires?
- ★ List some important policy decisions that have been made by judges instead of by elected representatives.
- ★ Is the “supreme law of the land” the Constitution or Supreme Court decisions?
- ★ What does it mean to say that the Constitution is a living and evolving document?
- ★ What are some useful quotes from President Bush, Thomas Jefferson, Chief Justice John Marshall, Judge Robert Bork, and Justice Antonin Scalia?
- ★ What did Judge Robert Bork say about judges who engage in “politics masquerading as law”?
- ★ Do we want judges who believe in originalism, and is that a new or old concept?