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ENC 1101

# That’s Why God Invented Courts?

“Just one month ago, when it looked like the gay-marriage ban was winning support here in my home state, I turned to my partner of seven years and told him we’d better say ‘I do’ before California voters told us ‘you can’t.’” (Jefferson, 54) This was Californian David Jefferson’s reaction to the recent battle over Proposition 8, which followed a familiar track in America’s culture wars: liberal courts claim that a state constitution protects some newly-invented “right” that it clearly doesn’t, and mainstream voters respond with a constitutional amendment meant to clarify the issue. The obvious next step is for liberals to appeal to the federal Constitution, which of course trumps state constitutions (U.S. Constitution, Article Six), and get the Supreme Court to write in the newly discovered “constitutional right” emanating from the “penumbras of the Bill of Rights”. (*Roe v. Wade*, 410 U.S. 113 [1973] at 152) After all, rights dear to the hearts of semiliterate metropolitan latté-sipping yuppies are too precious to leave at the mercy of “bitter”, unreconstructed middle or working-class *voters* who cling to primitive totems like guns and religion. Yet the habit of constantly obstructing the will of the people is not perhaps the wisest that liberals could have chosen. Although *actual* constitutional rights specifically guaranteed by the Founders must be preserved by the courts, even against statutory aberrations of the electorate, using the whims of often unelected judges to bypass popular consent is both fundamentally undemocratic and the cause of popular disrespect for and frustration with the judicial system.

Liberals shudder with horror at the mere thought of subjecting their pet innovations to the test of popular consent. On the question of legalizing same-sex marriage, for instance, Anna Quindlen derides anyone benighted enough to “scream that the issue should be put to the people”, who, according to her, will inevitably make the wrong choice. “That’s why God invented courts.” (Quindlen, 68) One wonders what private revelation from the Almighty informed her that “God invented courts” to rubber-stamp liberals’ latest fads, regardless of actual constitutional support. The Old and New Testaments provide no backing for her statement on the divine purpose of the judiciary. Nor, for that matter, does the United States Constitution. David Jefferson finds support for ignoring the will of the people in, of all places, the Declaration of Independence: “I would only hope that the man who promised me ‘life, liberty and the pursuit of happiness’ would agree that affairs of the heart should not be determined by popular vote.” (Jefferson, 54) First, the Declaration doesn’t promise citizens anything; it merely states that all men are “endowed by their Creator” with these rights. Second, David Jefferson can “hope” whatever he wants, but his lifestyle was still a felony at common law in 1776. (*Bowers v. Hardwick*, 478 U.S. 186 [1986])

While the Founders certainly meant to place certain constitutional rights beyond the reach of a fickle electorate, the current fad of using courts to pretend that the founding generation meant to protect some liberal aberration which has been rejected by current voters is nothing short of undemocratic. For instance, liberals go apoplectic at the mere thought of overturning their sacred cow, *Roe v. Wade.* But if *Roe* were overturned, abortion would merely return to its original status as a matter of state-level policy. Despite their claim that *everyone* now supports abortion “rights”, the pro-abortion lobby has an uneasy suspicion that the electorate, if given the choice, might reject the idea of legalized abortion altogether—or might fail to permit abortion under every conceivable circumstance. With same-sex marriage, liberals have used state courts to write the concept into state constitutions as a protected right, instead of trying to enshrine it in the federal Constitution. But liberals forgot one minor inconvenient detail: state constitutions, like the federal Constitution, can be amended by popular vote, which leaves liberals no recourse but “making a federal case of it” or complaining once again that the American voter is too “reactionary” for their taste. Why are liberals so afraid to take their views to the electorate? Why do they always sneak around imposing their views through the court system? As former United States Solicitor General and federal circuit judge Robert Bork complains of the Supreme Court, “What is worrisome is that so many of the Court’s increased number of declarations of unconstitutionality are not even plausibly related to the actual Constitution. This means that we are increasingly governed not by law or elected representatives but by an unelected, unrepresentative, unaccountable committee of lawyers applying no will but their own.” (Bork, 130)

Imposition of unpopular and, indeed, unconstitutional policy positions by judicial fiat is not only undemocratic but also likely to undermine the prestige and legitimacy of the courts themselves. Popular frustration with the American judicial system is based on a widespread perception of the courts as no more than the tame flunkeys of liberal special interests. “Since the politicization of the law has, for half a century, moved results steadily to the left, a very large number of Americans do not like those outcomes. Increasingly, they are not deceived by the claim that those results are compelled by the actual Constitution. This perception delegitimizes the law in their eyes….Americans increasingly view the courts, and particularly the Supreme Court, as political rather than legal institutions.” (Bork, 2) This perception of judicial illegitimacy is likely to provoke a backlash that liberals may not like. “Conservatives, who now, by and large, want neutral judges, may decide to join the game and seek activist judges with conservative views. Should that come to pass, those who have tempted the courts to political judging will have gained nothing for themselves but will have destroyed a great and essential institution.” (Bork, 2)

Great as the temptation may be for an extremist interest group to litigate its way to victory when its position is rejected by mainstream voters, this temptation must be recognized as destructive of American democracy in general and of the judiciary in particular. “Either the Constitution and statutes are law, which means that their principles are known and control judges, or they are malleable texts that judges may rewrite to see that particular groups or political causes win.” (Bork, 2) American democracy, though hard to create, may prove easy to destroy.

## Works Cited

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