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The Supreme Court's "Make Believe Law"

"The Law" is Nothing but an Amorphous Body of Assertions

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"Laws are like sausages. It is better not to see them being made." Otto von Bismarck (1815–1898)

You know that piece of parchment called the Constitution? People are told that it created a government made up of three coequal but separate branches—the legislative, the executive, and the judicial. The legislature writes the laws, the executive enforces them, and the judiciary decides whether the law has been violated. But although true in unessential ways, this description, like a historical novel, is pure fiction.

The legislature (Congress) certainly writes and enacts laws, and sometimes (but not always) the executive enforces them. (The executive branch has unimpeded discretion.) And the judiciary does determine whether the law has been broken. Well, sort of!

Trial courts, the lowest level of the judicial system, do attempt to do that, but cases, when they leave the trial courts, enter a Disneyesque fantasy world where nothing is what it seems to be. It is a world in which the principal characters write their own scripts, and where the simplest English words are made to mean whatever the characters decide they want words to mean, even if the new meanings render the language entirely unintelligible to literate readers. Lewis Carroll, were he alive today, could use the judiciary for inspiration and write Through the Opaque Looking-Glass. Opinions, written by lawyers schooled in abstruse legalese, are nothing less than enigmas. Oh sure, we know what the decision is, but we never know exactly what the grounds for making it are. The grounds are always hidden in a maze of precedents, often derived from cases so dissimilar that no reasonable person would ever have associated them. Alice in Wonderland logic prevails!

Two cases, decided in the same term by the same justices concerning almost identical laws, reveal this capriciousness in the American legal system—Morehead v New York ex rel Tipaldo and West Coast Hotel Co v Parrish. Both considered minimum wage laws for women, the first in New York, the second in Washington state. The first was declared to be unconstitutional, the second, constitutional. How could this possibly have happened? The answer lies in how American appellate courts work.

The Supreme Court decides cases in accordance with "The Law." But "The Law" is not the law that legislatures enact; those laws are what are being adjudicated. So if you believe that the Congress enacts "The Law," you are mistaken. "The Law" has nothing to do with the laws Congress enacts.

So what is "The Law"? Where does it come from? Well, "The Law" is what the members of the Supreme Court say it is. Where does it come from? They make it up.

Supreme Court decisions are made on the basis of what jurists call “controlling rules.” In the two cases cited above, the cases were decided differently because the jurists making up the majority in each case used different “controlling rules.” Why? Merely because the rules selected justified their own beliefs about what “The Law” is. “I know of no rule or practice by which the arguments advanced in support of an application for certiorari restrict our choice between conflicting precedents [controlling rules] in deciding a question of constitutional law” (Stone in Morehead).

“The Law” is nothing but an amorphous body of assertions made by jurists in previous cases to justify the decisions they favored. “[T]he majority (whether a bare majority or a majority of all but one of its members) . . . establishes the controlling rule. (Southerland in West Coast Hotel Co).” These “controlling rules” are not found in the Constitution and have not been enacted by any legislature. They, like Athena who burst forth from the forehead of Zeus fully armed, burst forth from the heads of, yes, our jurists.

Consider a few of the most renowned “controlling rules.”

First, “It is emphatically the province and duty of the judicial department to say what the law is (Marbury v Madison).” Who says so? Why Chief Justice Marshall did in 1803. But the Constitution does not give the judiciary this power; the court merely assumed it. Furthermore, it is a devious rule. Anyone can read what the Constitution or any law says. But to the court, “The Law” may not be what the Constitution says, it is what the court says “it is”! (This “controlling rule” is also cited by Kennedy in Citizens United.)

Second, “Those who apply the rule to particular cases, must of necessity expound and interpret that rule. . . . This is of the very essence of judicial duty (Marshall in Marbury).” And “The judicial function is that of interpretation (Southerland in West Coast Hotel Co).” Again, the Constitution never gives that power to the court, and there is a vast difference between “reading” the Constitution and “interpreting” it.

For instance, ask ten successful popular singers to sing the same well-known song. Ten different versions will ensue, each a different “interpretation” of the original. Any student in a literature class studying poetry can tell what a poem says by reading it, but ask the students for an interpretation, and numerous different interpretations will follow. Which is right? None is! An interpretation is what the reader/singer reads into what the song or poem says. An interpretation is nothing more that the reader’s/singer’s personal view or opinion. The same is true of any jurist’s interpretation; it’s just his/her opinion. Interestingly enough, no one seems willing to ask why the nine jurists on the Court (usually lawyers) are more qualified to decide what the supreme law of the land is than the many lawyers elected to the Congress are. Of course, nothing makes the jurists more qualified; the jurists merely decided that they were going to do it. Sutherland in West Coast Hotel Co v Parrish writes, “Under our form of government, where the written Constitution, by its own terms, is the supreme law, some agency, of necessity, must have the power to say the final word as to the validity of a statute assailed as unconstitutional. The Constitution makes it clear that the power has been intrusted to this court when the question arises in a controversy within its jurisdiction [my emphasis]. . . ,” but Southerland provides no citation and Article III, Section 2 (Original Jurisdiction) of the Constitution cannot be read to provide that power except by interpretation which makes the claim circular. (Jurists interpret the Constitution in a way that allows them to interpret the Constitution.)

Third, “First Amendment standards, however, ‘must give the benefit of any doubt to protecting rather than stifling speech.’ (opinion of Roberts in Citizens United citing Goldberg in New York Times Co v Sullivan who cites Douglas’ book The Right of the People). (How’s that for searching far and wide for “controlling rules”?) But who are these people to say so? Just jurists!

This last example is especially interesting. Five members of the court concurred in Citizens United: Kennedy, Roberts, Scalia, Alito, and Thomas. Kennedy cites these same five jurists 43 times in 24 pages. Thirty-eight of these citations are from previous majority opinions, but 5 are from dissenting opinions. So “controlling rules” need not even be selected from majority opinions; they can be selected from dissenting opinions and anywhere else the jurists choose to find them. Sometimes they are just made up.

Fourth, “First Amendment protection extends to corporations (Kennedy citing Powell in Bellotti along with a long list of additional citations).” Some claim that the Court extended these rights in Santa Clara County v Southern Pacific Railroad although the case did not take up the question. It has been reported, however, that before oral argument took place, Chief Justice Waite said that “The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion [my emphasis] that it does.” Unfortunately, no hard evidence now exists to confirm that Waite made this statement, but even if he did, it is only the jurist’s opinion. As a result, a corporation is now a person without a mother who experienced birthing pains, without a father, whose birth was not attended by an obstetrician or midwife, who doesn’t breathe or eat or walk or reproduce or excrete but miraculously talks. Parrots have more attributes in common with people than corporations do; yet, corporations are persons while parrots are not. So where did this “controlling rule” come from? Straight from a jurist’s head.

Of course, nothing required Kennedy to select this “controlling rule.” He could have cited Rhenquist in Bellotti: “the liberty protected by that Amendment ‘is the liberty of natural, not artificial, persons,’ (citing Harlan in Northwestern National Life Ins Co v Riggs) or Marshall in Trustees of Dartmouth College v Woodward: “A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created.” But Kennedy didn’t. Why? Because he didn’t want to.

If anyone still doubts that the Court engages in the mere imposition of the opinions of its members on “The Law,” consider what Southerland writes in West Coast Hotel Co v Parrish:

“It has been pointed out . . . that th[e] judicial duty is one of gravity and delicacy, and that rational doubts must be resolved in favor of the constitutionality of the statute. But whose doubts, and by whom resolved? Undoubtedly it is the duty of a member of the court, in the process of reaching a right conclusion, to give due weight to the opposing views of his associates; but, in the end, the question which he must answer is not whether such views seem sound to those who entertain them, but whether they convince him that the statute is constitutional or engender in his mind a rational doubt upon that issue. The oath which he takes as a judge is not a composite oath, but an individual one. And, in passing upon the validity of a statute, he discharges a duty imposed upon him, which cannot be

consummated justly by an automatic acceptance of the views of others which have neither convinced, nor created a reasonable doubt in, his mind. If upon a question so important he thus surrender his deliberate judgment, he stands forsworn. He cannot subordinate his convictions to that extent and keep faith with his oath or retain his judicial and moral independence. . . . The check upon the judge is that imposed by his oath of office, by the Constitution, and by his own conscientious and informed convictions, and since he has the duty to make up his own mind and adjudge accordingly [all emphases mine].

In plain English, Southerland says a jurist must vote his own convictions even if s/he cannot convince his/her colleagues s/he is right. The procedure followed by the Court is nothing but sheer sophistry. A majority of its members decides what it wants "The Law" to be and then selects the "controlling rule" that validates the decision. The majority "cherry picks" the "controlling rules." It is an entirely subjective process utilized by both conservative and liberal jurists. The result is that the Court's decisions command no respect from either the conservative or liberal segments of the population, and instead of settling issues, they are merely exacerbated and prolonged.

Charles Evans Hughes, who served on the Court from 1921 to 1941, revealed the insidiousness of what the Court does in a frank speech before the Chamber of Commerce in Elmira, NY: "We are under a Constitution, but the Constitution is what the judges say it is [emphasis mine]. . . ." So when a jurist is given a seat on the Court and takes the oath of office and swears to "faithfully and impartially discharge and perform all the duties incumbent upon [him/her] . . . under the Constitution," s/he is merely swearing to conform to a Constitution which is entirely of his/her own making. That piece of parchment called the Constitution on display at the Smithsonian might just as well be blank.

The Court, by adopting a procedure used in seventeenth century England known as stare decisis (let the decision stand) has given America a legal system designed to protect the seventeenth century status quo and enhance the wealth of an aristocracy at the expense of the people. The result is that the nation founded by the ratification of the Constitution in 1789 is not the nation Americans live in. The Court has ignored entirely the fact that the Constitution nowhere enshrines any specific economic system or instructs the government to protect private property. In fact, the only two references to private property in the Constitution have to do with how people are to be deprived of it.

Citizens United has been criticized for putting elections up for sale. The Court's majority in Citizens United would, of course, deny it, but it is noteworthy that Kennedy, in his opinion, uses the word "marketplace" eight times, even citing previous decisions in which the word is used. But isn't a marketplace where things are bought and sold?

Everything known as case law in America is nothing but the judicial codification of jurists' personal opinions justified by specious "controlling rules." It adversely affects the lives of ordinary people far more than all of the enacted federal code. Thanks to the Court, America is a replica of seventeenth century England, where an aristocracy using a predatory economic system prospers while the people languish, where rights guaranteed to the people are transferred to corporations, and elections are bought and sold. The Court has never concerned itself with the establishment of justice, the insurance of domestic tranquility, the promotion of the general welfare, or the insurance of the integrity of the democratic process as the Constitution requires. The people have been betrayed!

Because of the enigmatic nature of the Court's decisions and the abstruse nature of

legalese, what the Court has done has been done virtually in secret. To expect ordinary people, even those well educated, to do the research and analysis necessary to reveal the reality behind the Court's actions is unrealistic. Yet the people need to know. This usurping cabal needs to be exposed.

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