The Judicial Transformation of America

Two views on a timely, scathing critique of judicial tyranny

FRED ELBEL

Americans neither want nor deserve societal transformation without representation.

America is at a breaking point. If nothing is done to strip the judiciary of its presumed authority over foundational issues, our representative democracy will disappear. Our ability to restore America from judicial overreach — which includes deleterious immigration policies — will be lost.

Daniel Horowitz, in his book *Stolen Sovereignty: How to Stop Unelected Judges from Transforming America*, observes that bureaucrats, political elites, and unelected judges are transforming our society, sovereignty, and system of governance without consent. Horowitz observes that:

> … even many of the conservatives within the legal community have become brainwashed into the notion of one-directional *stare decisis* — upholding unconstitutional decisions of past liberal judges as precedent — even if those decisions themselves were reversals of long-standing settled law…
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> A government that was once committed to shielding its citizens from any undesirable immigration — from public charge to security and cultural threats — is now committed to bringing in anyone and everyone unless they are proven terrorists up front.

Stolen Sovereignty is an important, readable, and well-researched book. It's an engaging read, which includes a moderate discussion of relevant case law, oriented toward the lay reader. Horowitz emphasizes that with the election of conservatives to Congress and the Presidency, it is imperative to address judicial overreach before it is too late.

***Fred Elbel** is an IT consultant and Director of Colorado Alliance for Immigration Reform (CAIRCO). He has been active on immigration issues for several decades.*

HISTORICAL LIMITATIONS

Horowitz writes that historically:

> … [federal] courts were never vested with the power to decide broadly consequential societal and political questions not explicitly addressed in the Constitution, such as gay marriage, abortion, and immigration policy. They were primarily created for the purpose of interpreting and plying the meaning of statutes, mediating disputes between individuals and between states, deciding complex separation of powers disputes between the legislature and executive, and several esoteric jurisdictions for which the Constitution granted the Supreme Court original jurisdiction…

STOLEN SOVEREIGNTY
How to Stop Unelected Judges from Transforming America
by Daniel Horowitz
WND Books (July, 2016)
288 pp., $25.95

> They were to have "neither force nor will" with regard to political issues. Consequently, there was no reason to overrule them because they never had jurisdiction over governing the nation; they had the power to offer opinions in individual "cases and controversies."

President Calvin Coolidge reaffirmed this view in his July 4, 1926 speech commemorating the 150th anniversary of the Declaration, that the ideals expressed in the Constitution were immutable:

> If all men are created equal, that is final. If they are endowed with inalienable rights, that is final. If governments derive their just powers from the consent of the governed, that is final.

Horowitz clarifies that:

> What Coolidge was noting is that, unlike the shallow-minded bleeding-heartedness of the Left, the spectrum of liberty is not an infinite straight line; it's a bell curve. You have to get it just right and freeze it at the peak. That peak was established by the Declaration of Independence, ratified by the Constitution despite the gaping hole of slavery, and repaired by the Fourteenth Amendment in 1868.

What a marked contrast to the modern liberal tenet of a "living and breathing" Constitution!

The principle of judicial limitation was first challenged in 1803 by Chief Justice John Marshall in *Marbury v. Madison*, where the power of judicial review originated. Horowitz notes that:

> Marshall opened the door for the view of the court as the final arbiter of every important ideological debate in this country, although Marshall himself never envisioned the Court as the final arbiter, but merely as an arbiter of constitutional disputes.

In 1907, leading progressive Charles Evans Hughes, who served as Chief Justice during the bulk of FDR's tenure, made the more radical statement: "We are under a Constitution, but the Constitution is what the judges say it is." Horowitz remarks how this paradigm has become entrenched in the modern judiciary:

> Starting in the FDR era, accelerating during the Warren court of the '60s, and now crystallizing during the modern era of Obama, the courts — aided by the left-wing takeover of the legal profession — have gradually yet relentlessly turned the governing arrangement on its head by completely reinterpreting the most foundational aspects of our Constitution. Judges who were supposed to be immune to politics have enshrined their political and social preferences into the Constitution itself. What is in the Constitution, they refuse to recognize as a fundamental right and defend from the encroachment of the other branches of government. Yet, what is not in the Constitution they have installed as new and evolving fundamental rights.

OUR UNCONSTITUTIONAL CONSTITUTION

During the 1970s and 1980s, Thurgood Marshall, on the Supreme Court with William Brennan and Earl Warren, exemplified the paradoxical approach that "the Constitution is unconstitutional," stating:

> While the Union survived the civil war, the Constitution did not. In its place arose a new, more promising basis for justice and equality, the Fourteenth Amendment, ensuring protection of the life, liberty, and property of all persons against deprivations without due process, and guaranteeing equal protection of the laws.

In other words, Marshall professed that the Fourteenth Amendment completely rewrote the Constitution, maintaining that it is a "living and breathing document."

Yet section 5 of the Fourteenth Amendment explicitly grants *Congress* enforcement purview, not the judiciary, stating "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Identical provisions are contained in both the Thirteenth and Fifteenth amendments.

One might ask: how then could the courts claim absolute power via the Fourteenth Amendment?

The answer was provided by Justice William Brennan's "ratchet theory." He authored an opinion upholding the power of Congress through section 5 of the Fourteenth Amendment to expand upon the scope of rights expressed in that amendment. As with a ratchet, Congress could move forward in creating new rights, but could not revoke preexisting rights — even if they were established under liberal judicial interpretation of the Fourteenth Amendment. Thus the "guarantees" of the Fourteenth Amendment are to be defined by the *courts*, *not Congress*, even if those guarantees infringe on state powers provided under the Tenth Amendment.

As a consequence of this theory, the concept of *stare decisis* — that is, legal precedent — is one-directional, leading to inevitable judicial tyranny. Horowitz clarifies:

> There is no greater tyranny than the retroactive creation of an ever-elastic set of laws that is anchored to nothing more than the political judgment of unelected judges at the time they woke up that day.

RATCHETING CASE LAW

Horowitz investigates a number of high profile cases that reveal how liberal judicial activism has ratcheted up. He points out that the Commerce Clause was never intended to establish federal regulatory activity, yet even in 1829, Madison wrote that it had already been abused. The purpose of the original clause was to break down trade barriers between the states, not to create mandates on the American public. Today it is used in a myriad of regulatory manners, including banning of firearms.

Recently, Chief Justice Roberts interpreted the Commerce Clause as having the power to regulate *inactivity* in order to preserve Obamacare at all costs. He rewrote legislation from the bench which upheld the

Obamacare individual mandate under auspices of the power of Congress to levy taxes, thus *compelling* an individual to engage in commerce.

Horowitz points out that the Supreme Court's decision to uphold federal subsidies to states with federal health insurance exchanges was an "even more egregious and nakedly political" decision:

> What Roberts was essentially saying is that anytime the policy of a bill goes off the rails and is in need of a political fix, the courts have the power and desire to help fix the law in the event of litigation against executive overreach in defying the plain meaning of the law.

Roberts' *legislative* decision has further enabled the courts to serve as an *unelected super-legislature*.

Horowitz examines how in the same-sex marriage case of 2015, Justice Anthony Kennedy redefined marriage from the bench and in doing so trampled on the Constitution and our entire system of governance, writing "and so they [the framers of the Fourteenth Amendment] entrusted to future generations a charter protecting the right of all persons to enjoy liberty as *we* learn its meaning." Here the "we" refers to the courts. Future courts can use this ruling to "discover" new rights supposedly granted by a presumably prescient Fourteenth Amendment. Left-wing social policy, from amnesty for illegal aliens to transgender bathrooms, has now become the domain of the courts.

Horowitz notes that when our founding documents mentioned "rights," they referred to protection from a *negative* action—that is, imprisonment, fine, or capital punishment without due process. This contrasts with the *positive mandate* of the 2015 *Obergefell v. Hodges* ruling on same-sex marriage. Justice Scalia commented in strong dissent that the activist courts have taken this decision away from the people. Horowitz explains that:

> This court opinion was not about homosexual rights, equality, or marriage. It was about permanently remaking the Constitution in a way that will allow all subsequent justices to create new rights and laws from the bench without any limitations. And yes, that will include expanding rights to illegal aliens.

Horowitz points out that in legal and prosecutorial terms, homosexuality has been elevated to the status of a national religion. James Madison referred to religious conscience as the most sacred of property rights. Yet bakeries and private farm owners have now been prosecuted — and one might say persecuted — in the name of gay rights. Unelected judges have concocted *super rights* for special classes that now supersede our most inalienable rights of religious conscience and private property.

IMMIGRATION AND CITIZENSHIP

Illegal immigration drastically undermines the sovereignty of a nation-state. Horowitz predicts that we will soon see courts issue judicial amnesty for illegal aliens, even if the political branches of government regain rational commitment to enforcing immigration law.

As explained by John Quincy Adams in 1819, our Founders did not regulate immigration because they did not want to *encourage* it with fixed policy. Congress began significantly regulating immigration in 1875. In 1882, Congress barred immigrants from China, as well as undesirables who would be a burden or danger to society. The Supreme Court affirmed this right of Congress in 1889. In 1896, the court reaffirmed the legislative authority of Congress to deport legal permanent residents without judicial review. Horowitz notes that this authority remains today regarding deportation of non-citizen Islamists.

During the Great Wave from 1880 through the 1920s, courts humbly recognized that they had *no* role in immigration policy. Yet within a generation, we have gone from deporting *legal immigrants* without judicial review to mandating full constitutional rights for *illegal aliens*, resulting in dangerous criminal aliens being released into the general population without public consent.

Children of illegal aliens are currently granted citizenship via a masterful misinterpretation of the Fourteenth Amendment. Congress has plenary power over immigration, and the amendment itself grants Congress power to enforce the amendment. Horowitz discusses the amendment's infamous "subject to the jurisdiction" clause. He notes that opponents of U.S. sovereignty hang their hats on the 1898 *Wong Kim Ark* decision, in which Justice Gray interpreted the Fourteenth Amendment as granting birthright citizenship under English common law. Yet this interpretation is antithetical to the consent-based concept of citizenship embraced by America's Founders. Drafters of the amendment quite simply had no intent of providing birthright citizenship to immigrants.

Proponents of Anchor Baby citizenship also rely on a footnote in Justice William Brennan's 1982 *Plyler v. Doe* opinion. However, that note is tangential dicta — that is, nonbinding comments not related to the case, which ignore 90 years of case law. Horowitz comments:

> There you have it; American citizens — through their elected representatives — have no recourse to prevent future illegal immigrants from obtaining citizenship against their will — all because of the nonbinding footnote of one of the most radical justices of the twentieth century, from a case reversing precedent and relying on the English feudal system that was twice repudiated. This

> is what passes for constitutional scholarship among our political elites.
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> Horowitz asks us to consider:
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> When was the last time Congress passed a bad immigration bill? It's been about thirty years. Every time they try to pass an open borders bill through both houses of Congress, the public weighs in swiftly and decisively against it. This is why liberals resort to using the administrative offices and the judiciary to enact their transformative agenda…
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> It could truly be said that the lawlessness of the modern courts could not possibly drift further from the intent of the Founders than it already has in respect to immigration.

SINKING SOVEREIGNTY

Immigration without assimilation is an invasion. Massive immigration ultimately threatens our sovereignty. It brings with it foreign concepts of government and values antithetical to America's form of government. Our founders never imagined that immigration could be used as a powerful tool to transform society from within.

Horowitz delineates five immigration practices that undermine our sovereignty and dilute our ability to self-govern:

- birthright citizenship
- chain migration
- refugee resettlement
- counting illegal aliens in the census, and reapportionment
- non-citizens voting in our elections.

For example, under chain migration, a single immigrant can trigger an automatic chain of 273 additional immigrants. Horowitz points out that ending chain migration is the single most effective policy step our government could take.

He also recommends immediately suspending refugee resettlement, and forcing Congress to reauthorize refugee programs yearly.

Horowitz notes that counting illegal aliens in the census is doubly detrimental, disenfranchising voting constituents via reapportionment. For example, counting illegal aliens has given California an extra five seats in the House, and has provided Washington and New York each with one extra seat. No one sought approval from the American public before doing this.

REINING IN THE COURTS

Horowitz asks: why are judges who have invested themselves with the power to concoct law and change the Constitution not elected? After all, their power now exceeds the power of the entire legislature.

> After 240 years of serving as that asylum for religious liberty, have we regressed as a people so deeply that we will obsequiously accept the judicial tyranny of a few flawed individuals in robes who overturn the preamble of the very document that spawned our independence and affirmed the very rights they seek to expand? If the spirit of liberty runs through your veins, you must shout from the rooftops, "Hell no!" and start rejecting the illegitimate coup d'état of the unelected oligarchy.

The courts were never intended to have jurisdiction over sovereignty or political questions. The Judiciary Act of 1789 did not grant the Supreme and inferior courts appellate jurisdiction on important issues. It wasn't until 1875 that Congress transferred that authority from state courts. Then in 1914, Congress granted the Supreme Court appellate jurisdiction over cases heard by state supreme courts. Note that Congress has the authority to grant judicial purview, as well as negate it.

As Horowitz notes, we have been brainwashed into thinking the courts are the last word on legislative issues. Yet Congress ultimately *does* have the final say. Congress has complete power to regulate district and appellate courts. Indeed, the Constitution in Article III, Section 2, Clause 2 specifically grants Congress the authority to regulate and limit appellate jurisdiction of the Supreme Court, stating:

> In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

FINAL OBSERVATIONS

As Benjamin Franklin left the Constitutional Convention, he was reportedly asked, "Well doctor, what have we got, a republic or a monarchy?" He famously replied, "A republic, if you can keep it."

A core principle of a republican form of government is that political and societal questions must be addressed by the *political* branches of government, which are *directly accountable* to the people.

Today we are confronted with stolen sovereignty, thanks to dogmatic judicial activism. We are quickly moving toward irremediable, non-representational despotism. We are being ruled, not governed, by an activist judiciary. As Horowitz so aptly asks:

> If judges serve life tenures, can decide political issues, and are inoculated from congressional checks on their authority, then what was the purpose of the revolution? ■