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Overthrowing the Constitution and Subverting Representative Democracy

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Too many judges can no longer be counted on to reach rational and reasonable decisions based on the law. Instead, too many judges now regularly issue decisions based on the absurd and the fanciful. To make matters worse, these same judges impose their political views on the rest of us through anti-democratic and politically unaccountable means and then they tell us the Constitution made them do it. Understandably, much of the public is beginning to view these judges as freak show entertainers rather than dispassionate arbiters of the law. We are all the poorer for it.

Here are just three recent examples.

First, earlier this year, the U.S. Supreme Court in a 5 to 4 vote rejected the plan language of the First Amendment and held that the government can regulate and even ban some forms of political speech within 60 days of an election when it upheld the unconstitutional campaign finance bill.

The First Amendment clearly states, “Congress shall make no law ... abridging the freedom of speech.” This unequivocal language has, in the past, been broadly used by the Court to protect flag burning and pornography—even forms of child pornography. But somehow, the Court could not find the language clear enough or broad enough to protect legitimate political speech shortly before an election—the very time such political discourse is most needed.

Thus, that which the Constitution clearly and unequivocally requires—the right of free speech—the Court ignores and in so doing turns the Constitution on its head.

Second, the highest court in Massachusetts ruled that homosexual marriage is a fundamental constitutional right. The court then completely outdid itself and ordered the Massachusetts legislature to pass “appropriate” legislation within 180 days. In so doing, the court usurped the role of legislator, and abandoned its role of arbiter of the law. So much for separation of powers. The court in Massachusetts apparently thinks the legislature works for the court and answers to the court.

The proper role of the courts is to adjudicate legitimate legal disputes. The role of the legislature is to make laws. Whether state law should permit homosexual marriage is a question that should be decided by the people through their elected representatives. The courts have forgotten this separation of powers, taken off their judicial robes, and overthrown the will of the people as expressed by the legislators they elected. This is the behavior of a dictator or a despot.

Third, last year, the Ninth Circuit Court of Appeals ruled that the words “under God” in the Pledge of Alliance are an unconstitutional establishment of religion—even though the Constitution does not forbid the mention of God in public. The Constitution provides a wise balance—a prohibition against state established religion *and* the freedom to worship according to the dictates of our conscience. Yet, some courts completely ignore the Free Exercise Clause because of their hostility to religion. Judges, who ignore one half of the equation, are bound to get the wrong answer.

I teach constitutional law and always tell my students on the first day of class that there are three fundamental rules of constitutional interpretation. These rules are: first, read the document; second, read the document; and third, read the document. The U.S. Supreme Court, the Massachusetts high court, and the Ninth Circuit Court of Appeals would do well to enroll in my class.

It is interesting that this attack on America's Constitution and its democratic institutions is led not simply by rogue judges, but also in large part by the American Civil Liberties Union (ACLU). Together rogue judges and the ACLU act as a battering ram to dismantle the Constitution. What makes their destructive actions all the more outrageous is that they claim to be preserving the Constitution as they work to dismantle it.

Words have meanings and so do constitutions. Courts simply do not have the right to ignore the clear meaning of the Constitution and impose their personal political views on society. Judges who do this violate their sworn oath of office and ought to step down.

There are plenty of other examples of courts run amok. Courts have tried to force the Boy Scouts to drop a duty to God from the Scout Oath and allow homosexual scout leaders. There is no shortage of examples. But, the question is what to do about it. Some suggest that we need constitutional amendments—redefining political speech, defining marriage, banning flag burning, protecting the Boy Scouts—just to name a few.

There certainly is a problem, but it is not the Constitution. It is irresponsible judges. Despite what some rogue judges may say, the Constitution does not grant government the power to regulate political speech before elections, or require recognition of gay marriage or remove words from the Pledge of Alliance.

If irresponsible, rogue judges are the problem—and they are—why should we be forced to mount an effort to amend the Constitution—a very difficult process, just to undo their outlandish deeds? What guarantees do we have that these same judges won't just ignore and flout the newest amendments to the Constitution?

Problems are best solved by addressing their cause, not by implementing a “work around” solution. In this case, the cause is rogue judges who violate their oath of office, lay siege to the Constitution and our laws, and demean our representative democracy.

That means that judges should be selected carefully. It also means that Americans must demand that rogue judges—those who refuse to uphold their oath of office and instead act as unelected, unaccountable legislators—be removed from office. When Americans grow tired of these judicial abuses and demand they stop, the problem will be solved and it will have been done without a single amendment.

But if we don't wake up soon, we will have lost the greatest system for self-government known to man. What is happening is the slow and gradual overthrow of the Constitution by judges who have sworn to uphold and defend it. At some point, Americans must stand up and demand that judges uphold the Constitution rather than undermine it.

George Washington and his army of patriots fought against all odds to free Americans from the oppression of an unelected, life-tenured king and an out-of-control parliament. They did not make these sacrifices so that 200 years later a group of life-tenured and out-of-control judges could crown themselves our despotic rulers.

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