Hang Together

"We must indeed all hang together, or most assuredly we shall all hang separately." Benjamin Franklin

Of Activist Courts And Self-Governance

Posted on **September 18, 2012** by **Daniel Kelly**

Self-governance. It is one of the greatest accomplishments in the annals of Western political philosophy. And I dare say its importance enjoys widespread consensus. Great as this principle is, it is not safe from those who wish to overrun it in an ends-oriented stampede towards their goals.

Last week, a Dane County judge struck down a statute passed last year that saved the State of Wisconsin from a massive structural deficit and helped municipalities recover budgetary control from the public unions. You might remember this law – it's the one that inspired the occupation of the State's Capitol and led to the failed recall of the Governor. I won't go into the details of the judge's opinion (unless you want me to, in which case I'll talk about it all day). I'll say just this much — there was no rational relationship between the law and the reasons given for deeming it unconstitutional (teaser: the judge said it constrained free speech because it kept the speaker from getting what he wanted, not because it actually, you know, constrained speech).

I bring this case to your attention not because it's an outlier in our modern jurisprudence, but because it's not. The judge's decision is of a piece with a philosophic movement that has been afoot for several decades. Working from inside our government, there is a cadre of judges who are hollowing out the substance of self-governance, leaving behind only a cast simulacrum.

"Judges," someone once said (we won't talk about who, it just hurts too much) "are like umpires[; they] don't make the rules, they apply them." That's a useful description of how judges are supposed to act, but it doesn't reach the much more important question of *why* they should act that way and how that preserves self-government.

In our tri-partite form of government, each branch has a discrete function that corresponds roughly to the temporal framework within which it works. Thus, it is peculiarly the legislature's province to address the future. It determines what the laws shall be that will govern tomorrow's actions. And the executive concentrates on the present; he decides what shall be done to properly carry the laws into effect today.

The judiciary takes for itself matters of the past. It compares what has already happened against the laws as they existed at the time the acts occurred. It is because of the judiciary's backward-looking function that a judge may legitimately be nothing more than an umpire. Changing the decisional standard after the act has already occurred is, by definition, antithetical to the rule of law. So, for example, it is unjust to change the strike zone after delivery of the pitch because it prevents the pitcher from knowing where to throw the ball.

If we lose the rule of law, then to the same extent we lose our claim to being a self-governing people. We do not authorize judges to legislate, and they most assuredly have no authority to legislate *retroactively*. When judges like the one in Dane County take the partisan banner in exchange for the judicial robe, they attack the very concept of self-governance.

When we cannot order our affairs according to a presently known standard, there is no sense in which we can say we are governing ourselves. We are, in that circumstance, being governed by an arbitrary judge who will retroactively substitute his personal standard for those that had informed our decisions.

These judges profess, to be sure, that they are pursuing justice and fairness, objectives higher and more worthy than a pedestrian slavery to the rule of law. But men are not gods, and we need our structures to protect us against those who believe they are.

There is no illustration of the importance of these structural protections more incandescent than the one given us by Robert Bolt in his play "A Man For All Seasons." In the most memorable excerpt, Sir Thomas More declaims against casting aside laws and principles to more effectively pursue justice:

William Roper: So, now you give the Devil the benefit of law!

Sir Thomas More: Yes! What would you do? Cut a great road through the law to get after the Devil?

William Roper: Yes, I'd cut down every law in England to do that!

Sir Thomas More: Oh? And when the last law was down, and the Devil turned 'round on you, where would you hide, Roper, the laws all being flat? This country is planted thick with laws, from coast to coast, Man's laws, not God's! And if you cut them down, and you're just the man to do it, do you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake!

If we let judges hack down our laws to pursue their more enlightened goals, why would we ever expect our laws to be respected and enforced? And if we do not have that, then we do not have self-governance.

The Dane County judge's decision received a rousing and jubilant cheer from a waiting crowd. But I thought I heard, too, beneath it, a sibilant susurration of wind whispering over an empty plain.

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4 THOUGHTS ON “OF ACTIVIST COURTS AND SELF-GOVERNANCE”

Greg Forster
on **September 18, 2012 at 4:53 pm** said:

This actually points to another tough issue that I was already planning to write about tomorrow: how do we handle the problem of getting the legal and political system to practice what it preaches when it comes to moral consensus? Because there has actually been a very heartening trend away from explicit advocacy of judicial activism. Judicial nominees now must profess to be neutral umpires, etc. to get confirmed, regardless of party. That’s a sign of a robust consensus that was absent for most of the 20th century. Great news! Except a lot of people aren’t living up to it in practice and we have few effective tools to bring to bear on that problem. As I said, more tomorrow.

Daniel Kelly
on **September 18, 2012 at 5:05 pm** said:

Greg, I’ll look forward to your post. You are right that there appears to be broad agreement that judicial activism is a destructive practice. One of my favorite national organizations, the Federalist Society, has done a great job in moving the debate on this issue in the right direction. (Full disclosure: I am president of the Milwaukee Lawyers’ Chapter of the Federalist Society).

But, as you note, there is definitely a disconnect between practice and professed policy. I was amused several years back when Justice Louis Butler, a noted practitioner of judicial activism on the Wisconsin Supreme Court, decried his fellow jurists’ activism shortly before being voted out of office for being, well, a judicial activist.

We are in the ascendant on the philosophical model. Now we just need to figure out how to get our jurists to follow through.

Michael Hintze
on **September 20, 2012 at 4:36 pm** said:

Judicial activism. The words seem so beneficial. I believe that the average person hears or reads those words and thinks, “Well of course we want activist judges. Who else may we depend upon to right the wrongs of society?” To some, if not outright beneficial, the words seem merely benign. But to those who care about a well-functioning society, a society in which competition among the various components creates a non-intrusive government that recognizes the freedom of all to pursue each one’s own dream, the words are the most baneful utterance one might hear as a description of the judicial philosophy that guides the thinking of our judges and justices.

For justice to be justice, it must be impartial–it must favor no person over another, no group of people over another, no ethnic group over another, no skin color over another. Blind justice is more than just a bromide, it is an indispensable characteristic of justice without which justice is anything else but.

Blind justice does not solely apply to justice determining controversies between persons or groups; it must also be a defining characteristic of justice with respect to those cases or controversies before the court in which the courts must decide whether a rule, regulation, or law is or is not Constitutional. It is not, and under our form of government cannot be, the role of a judge or justice to issue a ruling based on that judge or justice’s desire to produce an outcome consistent with his or her philosophical preference. The law and the Constitution can and must be the judge or justice’s sole and only guide.

Whenever a member of the judiciary strays outside the confines of the judiciary’s proper role, the judge or justice arrogates to him- or herself the authority reserved to the legislator under our Constitution, and in doing so, takes another chip out of the public’s belief in and respect for the rule of law; and our government becomes a government of men and not of law.

There is great danger to our republican (small “r”) form of government in continuing along this path. The cornerstone upon which our government has been built is that government derives its just powers from the consent of the governed. An activist judiciary that imposes its desired outcome based on an unwarranted belief that he or she knows what is best for the parties involved, and for society as a whole, submits our society to a “tyranny of the judges” wholly unwarranted by any fair reading of the intent of the Founders. Judicial tyranny is as much to be feared and averted as any other form, and may be the most dangerous due to the perception of most people that judges and justices are impartial umpires in fact as well as in theory. When fact and theory fail to match, the fabric out of

which our relationships with one another are woven is torn asunder, and this best (however imperfect) government ever devised by the mind of man stands in real danger of falling.

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