By What Authority

A Publication of the

PROGRAM ON CORPORATIONS, LAW & DEMOCRACY

October 2014

http://www.poclad.org

Supreme Authority: The Growing Power of the US Supreme Court and Democratic Alternatives

by Greg Coleridge

The constitutional doctrines claiming "corporations are persons" and "money equals speech" and their effects are not the only fundamental threats to what remains of our democracy.[1] An additional and increasing assault is the U.S. Supreme Court itself – not simply its decisions and their impact, but also its very structure.

Government 101 presents the Supreme Court as one of three branches of government (along with Congress and the President) that "checks and balances" each other. We've been conditioned to believe each branch is accountable to the others and ultimately to *We the People* – resulting in the best democracy in the world.

The major "check and balancing" role played by the Court, we're told, is to preserve individual rights and freedoms that can be threatened by a "tyranny of the majority" when legislatures (Congress) pass laws and executives (the President) enact rulings that harm a few who can't politically defend themselves.

It's true that Supreme decisions in recent times have asserted rights concerning gay marriage, just as in the past it asserted the civil rights of African American in the Deep South. Some Americans look to the Court, therefore, as champions of defending and expanding inalienable human rights that legislatures ignored or repressed.

But as David Cobb notes in a *The Case for Judicial Review*,[2] the Court's affirmation of civil rights of African Americans in the 1950's reversed the Court's oppression of African American decades earlier. Moreover, the Court decisions affirming minority rights often mirror growing social movements for those same rights. The history of U.S. judicial review is further detailed in Cobb's article.

TYRANTS OF AND FOR THE MINORITY

By contrast, the Court has been repeatedly guilty itself of being a tyrant *of* the minority (as in nine unelected judges reversing laws and regulations) and a tyrant *for* the minority (as in corporations and the super wealthy) by, for example, overturning 170 democratically enacted laws that protected workers, including children, during the early 20th century.

More recently, the Court has granted additional power and authority to corporations and the wealthy few. Supreme Court decisions weakened class action lawsuits against corporations, broadened the immunity protections of pharmaceutical corporations from suits over defective medications, heightened the barriers against workers who sue over workplace retaliation and harassment, increased the ability of commercial corporations to collect damages from municipalities that seek to impose conditions for building permits, and prohibited current US residents from suing Shell Oil corporation for human rights violations in Nigeria. Then, of course, there are the *Citizens United, McCutcheon,* and *Hobby Lobby* cases that further extended inalienable constitutional rights to corporations. Additional decisions provided the government greater leeway to conduct warrantless searches and seizures and overturned portions of the 1965 Voting Rights Act.

These anti-democratic decisions are possible because court justices are virtually completely unaccountable to the other branches of government and *We the People.* They've acquired supreme authority – judicial review – that gives them the power to review the actions of the executive and legislative branches to decide whether laws or regulations are constitutional. They are appointed for life. Their decisions cannot be overturned by legislation or Presidential decree. They are the Supremes, or "The Nine"[3] as Jeffrey Toobin calls them. Like Kings and Queens of old, they are virtual Sovereigns, nearly free from the democratizing promise of "checks and balances." Their insulation has been quite deliberate.

Not only are the Supremes untouchable, but their decisions are virtually unchangeable. The Constitution requires a herculean political effort to overturn a court decision by amendment. Two-thirds of both Houses of Congress must support an amendment or two-thirds of state legislatures must call for a Constitutional Convention where amendments can be agreed. Support by three-fourths of state legislatures is required in both instances for amendments to take effect. This anti-democratic high bar explains why the Constitution has been amended just 27 times, despite the many societal injustices demanding attention from the public and well-organized social movements.

It's no wonder the public dislikes the Court. Several recent polls rate the Court as overtly political. Sixty one percent of those polled think most Supremes have their own political agenda.[4] Another poll[5] indicates just 35% give the Supremes a positive job

performance rating, a major decline from what was once perceived as one of the nation's more trusted institution. And this dissatisfaction crosses party lines, with Democrats giving the Court slightly higher marks than Republicans and Independents. On the *Citizens United* ruling alone, 84% Independents, 82% Democrats and 72% Republicans were opposed.

TINA

In regard to problem after problem and structural flaw after structural flaw, we're told time and again, "There is No Alternative" (TINA). Just accept unjust conditions as they are and go watch a sports contest or post what you ate for breakfast on Facebook.

But people are outraged. The veneer of the Supremes' objectivity has been shattered. The realization that citizens have near zero influence on the Court is causing people—to explore alternatives and the means to bring them about. Efforts to overturn Supreme Court decisions via Constitutional Amendments, including the *We the People* Amendment proposed by Move to Amend, are varied and energetic. The issue of Judicial Review is being increasingly discussed and ways to "democratize" the Supremes are receiving more attention.

DEMOCRATIC STRUCTURAL ALTERNATIVES

Are there democratic alternatives to the current Supreme Court structure that might retain a degree of independence yet hold the Court accountable to the legislative and executive branches, as well as to *We the People*?

Of course there are.

Alternatives exist not simply in legal textbooks or some distant past, but presently in other nations, many considered to be as "democratic," if not more so, than the U.S.

What follows are several proposed changes for restructuring the Court based on features existing in other nations.

Mandatory Retirement Age

There is no mandatory retirement age for US Supreme Court justices. As long as they can breathe, they can serve. This is not the case in other countries.

A huge number of nations have mandatory retirement ages for justices who serve on their nation's highest courts. Retirement ages range from 62 to 75. This allows more frequent turnover with the increased possibility that younger judges reflect values and views prevalent in current society. It can shake up cliques that may exist in the nation's highest court. It also allows more opportunity for democratic input in the selection of justices in countries where the judicial appointment process is inclusive.

Nation's with mandatory retirement ages:[6]
Anguilla. Antigua and Barbuda, Armenia, Australia, Bangladesh, Barbados, Belarus, Belgium, Belize, Bosnia and Herzegovina, Botswana, Brazil, British Virgin Islands, Brunei, Burma, Canada, Cayman Islands, Croatia, Chile, Republic of the Congo, Denmark, Djibouti, Dominica, Ethiopia, Fiji, Finland, Germany, Ghana, Gibraltar, Greenland, Guyana, Hong Kong, Hungary, India, Indonesia, Iraq, Ireland, Israel, Jamaica, Jersey, Kenya, Kosovo, Kuwait, Latvia, Lesotho, Liberia, Malawi, Malaysia, Maldives, Malta, Marshall Islands, Mauritius, Montserrat, Namibia, Nepal, Netherlands, Nigeria, Niue, Norfolk Island, Norway, Pakistan, Palau, Paraguay, Peru, Philippines, Pitcairn Islands, Poland, Puerto Rico, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Seychelles, Sierra Leone, Slovakia, Solomon Islands, South Africa, South Korea, Sri Lanka, Swaziland, Tanzania, Tajikistan, Tanzania, The Bahamas, The Gambia, Trinidad and Tobago, Turkey, Turks and Caicos Islands, Tuvalu, Uganda, Ukraine, Vanuatu, Yemen, Zimbabwe.

Terms and Term Limits

There are no term limits for U.S. Supreme Court justices. Appointments are for life. This is not the case elsewhere.

A large number of nations have terms or term limits for justices of their highest court. As with mandatory retirement ages, term limits facilitate more frequent turnover and allow for more democratic input in the selection of new justices. Terms and term limits range from 2-12 years in these countries. Some permit only one term, others allow for consecutive terms, still others require justices to cycle off but they are eligible for future service.

Nations with terms or term limits for justices of their highest court:[7]
Afghanistan, Albania, Algeria, Andorra, Angola, Azerbaijan, Belarus, Belize, Benin, Bolivia, Bulgaria, Burkina Faso, Cambodia, Cameroon, Central African Republic, Chile, Colombia, Comoros, Cook Islands, Costa Rica, Croatia, Cuba, Czech Republic, Democratic Republic of the Congo, Djibouti, Dominican Republic, East Timor, Ecuador, El Salvador, Equatorial Guinea, France, Gabon, Georgia, Germany, Gibraltar, Guatemala, Honduras, Hong Kong, Hungary, Iran, Italy, Kazakhstan, Kosovo, Laos, Latvia, Lebanon, Liechtenstein, Lithuania, Madagascar, Mali, Mauritania, Moldova, Mongolia, Montenegro, Mozambique, Niger, Northern Mariana Islands, Panama, Papua Peru, New Guinea, Portugal, Qatar, Republic of Macedonia, Romania, Rwanda, San Marino, Sao Tome and Principe, Senegal, Singapore, Slovakia, Slovenia, South Africa, South Korea, Spain, Switzerland, Syria, Taiwan, Tajikistan, Thailand, Turkey, Turks and Caicos Islands, Ukraine, Uruguay, Uzbekistan, Venezuela, Vietnam, Virgin Islands

Justices in South Africa retain office until discharged by an Act of Parliament.

Inclusive appointment process

The US Constitution was designed to make Supreme Court appointments a completely in-house operation. For the most part, it still is. After all, the US President, not directly elected via a popular vote but through the Electoral College, nominates justices. The US Senate gives its advice and ultimate consent. The original Constitution specified US Senators were to be chosen by state legislatures, not directly elected by popular vote. The

selection process serves the oligarchy all the more now as Presidents and Senators have become all the more beholden to the oligarchy due to their political investments shielded by the "money as speech" constitutional doctrine.

Around a dozen other nations have a similar selection process of national leaders nominating justices followed by legislative confirmation.

There are countries with even less democratic processes for reaching their highest court. Justices are simply appointed by a monarch, as in Aruba, Brunei, Bahrain and elsewhere.

Scores of nations have a more inclusive (s)election process for filling their highest judgeships than the U.S. Alternatives that seek to make the judicial branch more accountable are wide ranging:[8]

- direct election by citizens of judges nominated by the legislature occurs in Bolivia;
- election of the head of the nation's high court by the legislature takes place in Albania, Croatia, Hungary, Laos, and Slovenia;
- judicial nominees come from opposition leaders of the legislature (Barbados, Belize, Fiji, Seychelles, Trinidad and Tobago, Tuvalu and Vanuatu), a body including public prosecutors (Cote d'Ivoire, Democratic Republic of the Congo) or other types of independent commissions (Burundi, Belgium, Burundi, Cayman Islands, El Salvador, Greenland, Guatemala, Hong Kong, Kosovo, Macau, Nigeria, Palau, Paraguay, Peru, Sierra Leone, Slovakia, Sudan, Ukraine, Venezuela, United Kingdom, Zimbabwe);
- legislatures choose justices to fill a certain number of seats on their high court. The executive branch and/or other national institutions select the remaining justices. This system exists in numerous nations, including Bosnia and Herzegovina Colombia, France, Gabon, Germany, Guatemala, Indonesia, Italy, Latvia, Nicaragua, Portugal, Serbia, Ukraine and Venezuela;
- legislatures exclusively elect or appoint justices. This system take place in Republic of the Congo, Costa Rica, Cuba, Honduras, Hungary, Lithuania, Republic of Macedonia, San Marino, Sao Tome and Principe, Switzerland and Togo, among other nations;
- there are both extreme exclusive and inclusive elements of judicial selection in Japan. The monarch has a major role in appointing or confirming all justices, however all justices come before voters for confirmation at the first general election after their appointment and every 10 years afterward;
- a similar probationary period for chosen justices exists in Sweden, Greece and Saudi Arabia before appointments are made permanent;
- nominating or choosing one or more justices by leaders of the legislature takes place in Gabon, Kazakhstan and Mauritania;
- legislative branch nominates judges in Mongolia, Netherlands, Haiti, and others.

Weakening Judicial Review

Courts possess the authority to set aside legislation that contradicts the constitution in most western countries. The role of judges in many European nations in deciding policy issues has become more accepted over the last few decades,[9] having become legislative "veto players."[10]

Yet, strong traditions and rules exist in several European nations placing judiciaries in more equal, if not subordinate, roles than in the U.S.

A French law of 1790 and the nation's first Constitution prohibited judicial review outright of legislation and administrative acts. Both were based on the principle that courts should not take part in lawmaking functions. The judge was imagined to be a virtual "slave to the legislature" or more specifically, subordinate to the code system of law. Judicial review was considered to be "government of judges" that violated the sovereignty of the People. Legislative statutes were to be the sole credible source of law. Codes were to be written as simply and clearly as possible.[11]

There is still no judicial review of passed legislation in France. Its Constitutional Council can only review the constitutionality of a proposed law *before* it is enacted.

Courts in the United Kingdom may only issue a "declaration of incompatibility" when reviewing statutes. The declaration does not affect the operation or enforcement of the existing law, although it may spur a legislative effort to amend the law. A comparable system exists in New Zealand.

The German Constitutional Court possesses the authority to review legislation, but it can only overturn a passed law if either one-third of the legislature, a state government or federal government files a suit. Individuals must bring a constitutional challenge before a three-judge panel.

While Canadian courts possess judicial review, the national and provincial legislatures can couch proposed laws in certain ways that shield them from judicial examination.

Courts cannot overrule lawfully enacted legislation in the Netherlands. The same is true of Switzerland. In the latter case, questionable constitutional laws passed by Parliament can be challenged directly by people via a national referendum if 50,000 valid signatures are collected. The nation's democratic cultural heritage and skepticism towards the judiciary are major factors supporting their system.

Other alternatives

Additional ideas have been suggested for reforming our judicial system to make it more accountable. Most of these would require amending the Constitution.

Certain issues (i.e. whether corporations should be granted never-intended constitutional rights) could be excluded from judicial consideration. Congress via a super majority could override the Court decisions or decisions could be overturned via national referenda. The interpretive powers of the Supreme Court could be narrowed. Or the Court itself could be eliminated, with the Senate serving as a Constitutional Court.

Some if not all of these ideas are debatable. What is not debatable is the public's desire for change. There is overwhelming trans-partisan support for changes to the Court structure. More than 70% of the people support abolishing lifetime appointments and allowing justices to serve only a fixed term, including 72% Republicans, 71% Democrats and 69% Independents.

CONCLUSION

When nothing is sure, everything is possible.
~ Margaret Drabble

The certainty or "sureness" of the Supreme Court's impartiality and integrity is gone. People of all political views trust the Court less and less. Nothing suggests that decisions in the short or medium term will bring different reactions.

This creates educational and organizing possibilities that have been, for the most part, deemed impossible.

Where this leads is up to us. Fundamental constitutional changes in the past have come about following deep, sound and profound social movements. Democratizing the U.S. Supreme Court will be no different.

Coleridge is a member of the POCLAD collective and Director of the Northeast Ohio American Friends Service Committee (AFSC). The views in the article are not necessarily those of AFSC.

Sources

[1] Democracy here refers to the US democratic republican system that contains elements of representative government (election of executives and legislators) and direct democracy (initiatives, referendums, recalls).
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A Publication of the PROGRAM ON CORPORATIONS, LAW & DEMOCRACY

By What Authority (ISSN: 524-1106) is published by the Program on Corporations, Law & Democracy. The title is English for *quo warranto*, a legal phrase that questions illegitimate exercise of privilege and power. We the people and our federal and state officials have long been giving giant business corporations illegitimate authority. Today, a minority directing giant corporations and backed by police, courts, and the military, define our culture, govern our nation and plunder the earth. ***By What Authority*** reflects an unabashed assertion of the right of the sovereign people to govern themselves.

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BWA is a tool for democracy proponents to rethink and reframe their work. To that end we encourage readers to engage us with comments, questions and suggestions.

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