Supreme Court 2021 – what a term!

cnav.news/2022/07/01/accountability/supreme-court-2021-term/

By Terry A. Hurlbut July 1, 2022

Yesterday the United States Supreme Court closed out one of the most momentous terms in its history. The Court corrected several profound errors in its past. When the Court did that, it broke its slavish devotion to preserving error for the sake of preserving judicial infallibility. It also helped restore Constitutional government – but also exposed some of the Constitution's weaknesses.

Supreme Court restores the Constitution

The Supreme Court restored, or helped restore, the Constitution in an important sense. To see why, we must turn to two of its harshest critics from two centuries ago. The first of these was Judge Spencer Roane, then of the Court of Appeals of Virginia (1794-1822). The Supreme Court had just ruled (*McCulloch v. Maryland*, 1819) that the Second Bank of the United States need pay no taxes to any State bank. In so ruling, Chief Justice John Marshall held that the federal government had an *implied power* to charter a bank. This power derived from the money-coining power – and the Necessary and Proper Clause (Article I, Section 8, Clause 18). (See here for our discussion of expressed, implied, and inherent powers of government.) By no accident, many Constitutional scholars call this clause the Elastic Clause.

In other words, the Supreme Court *read into the Constitution* a *banking* power as an extension of a *money-coining* power. This outraged Judge Roane. In his view, chartering a bank was *neither necessary nor proper* to the execution of the money-coining power. Mints coin money; *banks* borrow and lend money. Furthermore, by denying a State's power to tax the United States Bank, the Supreme Court revoked a Reserved Power of the States and thus violated the Tenth Amendment!

Judge Roane shared his outrage with Thomas Jefferson, enclosing several op-eds he had published in *The Richmond Enquirer*. He then asked for Mr. Jefferson's opinion.

Thomas Jefferson writes back

Jefferson, writing back, fully agreed. First he complimented Judge Roane for espousing "the true principles of the revolution of 1800." Jefferson regarded his election, and the "flip" of Congress to the Party he and Madison had started, as every bit as revolutionary a change as was the American War for Independence. But that "Revolution" had captured Congress and the Presidency. *It had not captured the Supreme Court.* And now the Supreme Court, in Jefferson's view, was betraying his "Revolution."

> [W]e find the judiciary, on every occasion, still driving us to consolidation.

By "consolidation" he meant the reduction of the States to mere districts of the higher-level government, with no sovereignty. But then Jefferson went further. Roane had written, citing Madison in 1800, that:

> The judiciary is the last resort in relation to the other departments of the government, but not in relation to the rights of the parties to the compact under which the judiciary is derived.

That compact is the Constitution. But Jefferson saw at once what was wrong. The Supreme Court, being the body of last resort, dictated to Congress and the President what was and wasn't Constitutional. Nor had Congress used its impeachment power to check this. This led Jefferson to observe that:

> the constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary which they may twist and shape into any form they please.

Proving Jefferson's point

The further history of the Supreme Court would prove Thomas Jefferson correct in that assessment. Justice Clarence Thomas observed that in his concurrence in *Dobbs v. Jackson Women's Health Organization*. He identified a judicial Trojan horse called *substantive due*

process, which had proved just as elastic as the "Elastic Clause." Thomas blamed this for the decision in *Dred Scott v. Sandford*, that would start a War Between the States. It also gave us *Roe v. Wade* (1973).

But that's not all. Magruder (*American Government*) has observed, over many editions, that the Supreme Court *informally amends the Constitution* through its decision making. The history of the Court includes many decisions, some since overruled but many still in force, that infringe Constitutional rights. *Dred Scott v. Sandford* and *Plessy v. Ferguson* are the obvious examples, though neither remains in force. The Court corrected the second error, but it took a war to correct the first.

A list of problem precedents

Other decisions that still deserve our attention include:

- *US v. Miller* (1939), sustaining the National Firearms Act of 1934.
- *Everson v. Board of Education of Ewing* (1947), forbidding government aid to any religious institution because it *was* religious. (See here for further discussion of that precedent.)
- *McCollum v. Board of Education of School District 71* (1948), the *real* School Prayer Case.
- *Engel v. Vitale* (1962), the "School Prayer Case" of legend. The infamous Madalyn Murray O'Hair liked to take credit for that, but she likely didn't deserve it. The credit – or the blame – goes to James G. Blaine (1875).
- *Abingdon School District v. Schempp* (1963), another explicit prohibition against Bible reading in class.
- *Lemon v. Kurtzman* (1971), containing the anti-religious "Test" bearing the name of the petitioner.
- *Roe v. Wade* (1973).
- *Wallace v. Jaffree* (1985), forbidding silent prayer time.
- *Lee v. Weisman* (1992), forbidding baccalaureates or clergy-led prayers during commencement at government schools. (In the USA, a *baccalaureate* is a religious service for honoring graduates.)
- *Santa Fe Independent School District v. Doe* (1995), essentially forbidding prayer on school playing fields.
- *National Federation of Independent Businesses v. Sebelius* (2012), the Obamacare Case.
- *Obergefell v. Hodges* (2015).

These precedents, more than any others, made hash of the First Amendment (Free Exercise Clause) and Second and Tenth Amendments. They also represent an explicitly atheistic and authoritarian, if not totalitarian, jurisprudence with an obsession with socialism, hedonism, and death.

The Supreme Court comes back part of the way

But in its 2021 Term, the Supreme Court has overruled many of these precedents and put others in direct threat. To be specific:

Roe v. Wade falls to *Dobbs v. Jackson Women's Health Organization*. About that case, the country got nearly two months' warning – though *CNAV* wouldn't recommend the method of that warning.

Everson v. Board of Education of Ewing falls to *Carson v. Makin*.

US v. Miller doesn't *quite* fall to *New York State Rifle and Pistol Association v. Bruen*, but it does come under threat. Federal firearms regulation was not at issue. But State "may-issue" licensing schemes that openly invited arbitrariness and caprice, were.

Lemon v. Kurtzman falls to *Kennedy v. Bremerton School District*. In *CNAV*'s view, this decision invites challenges to the *McCollum, Engel, Abingdon, Wallace, Lee,* and *Santa Fe* precedents. Had Coach Kennedy really "pushed" it, he could have knocked out *Santa Fe* as well as *Lemon*.

In addition to all the above, Clarence Thomas specifically, in his concurrence in *Dobbs*, invited re-examination of no fewer than three "substantive due process" precedents. *Obergefell v. Hodges* is one of them. If any precedent will fall from revising out "substantive due process," it's that one. (Of the other SDP precedents, *Roe* has already fallen. The other three precedents will prove much harder to challenge, because they might merely need better reasoning.)

Separation of powers

Besides all that, the Supreme Court threw up a breastwork against further compromise of separation of powers. In *West Virginia v. Environmental Protection Agency*, the Court held that sweeping economic transformations need real, old-fashioned law. Executive agency regulation won't serve.

The Court struck another blow, to the bitter chagrin of two of its now-current members. (The third, Stephen G. Breyer, retired yesterday – but the Court's newest member likely shares his chagrin.) The Supreme Court essentially held in *West Virginia* that America has not handed itself over to cadres of "experts." It's about time – for the history of science and medicine clearly shows that an "expert" remains an "expert" only until someone shows, in ways no one can deny, that this "expert's" opinion defies common sense. How, then, can any "government by expert" function?

But that's the hazard of our Constitutional system. Too often the electorate, or a President and Senate, put people into positions of power they can't or shouldn't handle. And after that, rarely does anyone make a serious effort to remove them. And when some people *do* make such efforts, they make them in bad faith. We saw this with Andrew Johnson, and with Donald Trump (twice), and arguably with Richard M. Nixon and Bill Clinton. But to Thomas Jefferson's point, we have *never* seen it with a Justice of the Supreme Court. (We *have* seen it with lower-court judges, most notably Alcee Hastings of the Southern District of Florida.)

The way forward for the Supreme Court – and us

Nevertheless, the Supreme Court went a long way to redeeming itself as an institution in the 2021 Term. In fact the biggest losing precedent is the one no one lists as such, because it isn't really a case. That precedent is *stare decisis*, the notion that the Court must let a decision stand, *even in error*. To observe that without exception is to treat Supreme Court opinions as if they were Papal Bulls and Encyclicals. (Or decrees of the ancient Persian kings; see for instance the Ahasuerus Decrees in the Book of Esther.)

CNAV sees many precedents that deserve to fall, including all the precedents mentioned above, that remain in force and effect. As long as they remain, the country has come back *part* of the way from being an explicitly atheistic country in which the government may invent a "reason" to deprive people of their right, and the means, of self-defense. Furthermore the weeping and gnashing of teeth we've seen from Sotomayor and Kagan JJ, clearly shows the country can backslide.

Be careful whom we appoint – and be ready to stand up for the Constitution

Alexander Hamilton extolled the virtues of an institution, the members of which had lifetime appointments. See *The Federalist*, essays 78, 79, 80, and 81. The vituperative attitudes of several Members of Congress show that Hamilton likely had something there. But the flip side is that we must be very careful whom we see appointed. That in turn means being careful whom we task with such appointments.

More than that, if court, legislature, or executive tramples on your rights, fight for them. Coach Kennedy did not fight as hard as he might have, so he achieved lesser results. The pro-life movement *did* fight – patiently at first, then with an all-out push, with the result you know. Gun owners have been fighting for a long time, but some of them need to realize how much harder they can fight. *US v. Miller* went the way it did because *Mr. Miller didn't fight for his rights.* The Supreme Court decided that case *by default*. Today anyone who declines to challenge an unjust law, executive action, or verdict, loses by default. The same holds for those who will not challenge an erroneous precedent. The problem is that we *all* lose by such defaults. Coach Kennedy defaulted on some of his rights as surely as Miller did.

This Term shows that the struggle to restore Constitutional government in full is far from futile. Now we must continue the struggle.