Missing the Point – The arrogant nonsense of the Supreme Court.
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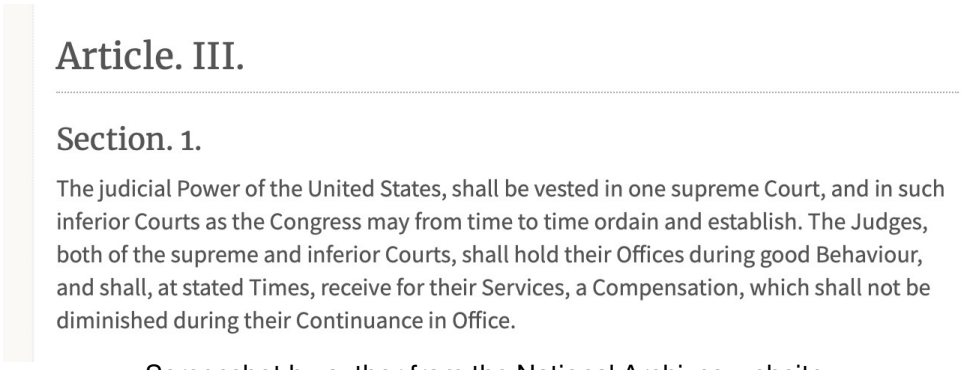
Recent decisions make you wonder if Lady Justice and the equality under the law that she symbolizes are still blind. (Background image from Shutterstock.)

Appointing someone to a prestigious, well-paid office for life conveys a certain arrogance and power to the appointee that does not serve us well.

Article III, Section 1 of the Constitution states, in part, that "The Judges... shall hold their Offices during good Behaviour." (Capitalization and spelling are from the original text.) That phrase, "during good Behaviour," has been interpreted as meaning, "for life." And who is there to validate that interpretation? Ultimately, none other than the Supreme Court itself. I argue that the "Justices," as we call them now, have not been behaving well and that a wise Congress would limit their terms in office. If their modern title is to have any real meaning, they need to behave accordingly, dispensing enduring justice and not the fleeting politics of our time.



Article. III.

Section. 1.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Screenshot by author from the National Archives website.

Last week, the Supreme Court of the United States released three major decisions. One put an end to affirmative action. Another gave a website designer the right to selectively decline to provide her services to gay couples. And a third put an end to President Biden's plan to cancel student loan debt for millions of Americans. All three decisions were six to three, the six being the conservative leaning Justices, three of which were appointed by now ex-President Trump. In each case, the three dissenting Justices were liberal female appointees.

What's striking about these recent Supreme Court rulings is that they were made by Justices appointed, not because of their Constitutional expertise per se, but to accomplish the political objectives of what amounts to a relative handful of elected officials. In a country that believes in representative government, these rulings are one more unfortunate example, proof positive of "minority rule" in the literal, mathematical sense of the term. Increasingly, we are allowing a handful of people determine the course of our lives.

The conventional analysis is that the Court has become politicized. True, but then Supreme Court decisions have always had political implications. That's not the problem in this case. By "politicized," the media and pundits mean that Justices have been appointed, not just because they are qualified students of the Constitution – albeit some are prone to take the Constitution literally, others to interpret its text in the context of modern times – but to facilitate profound and sweeping changes to the fabric of our society. Such as to reverse Roe v. Wade, effectively denying the protection of the Constitution for women who would abort a pregnancy. "Politicization" is exactly what's happened, which is unfortunate, but not the only or most remarkable aspect of these rulings.

If the Justices of the Supreme Court are going to play fast and loose with political interpretations of the Constitution, well then, you've cheapened this aging, but still noble document. At best, you've turned the law, the framework it was written to define into guidelines. Worst case scenario, you've allowed it to become a convenient excuse for doing whatever you want.

Affirmative action.

The Court told Harvard and the University of North Carolina that race – or any other "protected class" for that matter – could not be considered as a standard for or against admissions. Federal law, subject to rulings of the Supreme Court, protects the following "classes" of individuals against workplace discrimination based on...

- Race
- Color
- Religion or creed
- National origin or ancestry
- Sex, which includes gender, pregnancy, sexual orientation and gender identity
- Age
- Physical or mental disability
- Veteran status
- Genetic information
- Citizenship

If you can do the job for which you are applying, your membership in any of these protected classes can't influence, one way or another, the decision to hire you.

Republicans believe that affirmative action discriminates against White people in favor of disadvantaged minorities, principally African Americans. They're correct, but get zero points for their lack of serious efforts to resolve systemic inequalities in our society.

Democratic liberalism, on the other hand, is outdated. Democrats feel bad that we're not doing everything we can to correct for the effects of discrimination and they're right. We're not, but affirmative action, or the lack thereof, has nothing to do with it.

The impatience of these liberals is both stunning and counterproductive. You can't fix inequities in education at the end of the process when those whose "class" has been discriminated against are applying to college. You need to go back and start at the beginning with preschool and then on up. Give our African American children the same quality education as their White counterparts and, eventually, sufficient numbers of highly qualified Black applicants will be competitive for admissions to our very best colleges and universities. And the problem affirmative action was meant to solve will resolve itself organically.

In the meantime, maybe colleges should be picking applicants the way they do on The Voice, the talent show on NBC, with the judges facing away from the contestants so they aren't influenced by how auditioning singers look. No more college fairs, in-person visits to campus or interviewing applicants? What about last names like Wu, Lopez, Jamal and Cohen that indicate ethnicity? Even zip codes can be telling. Not to mention applicant essays that might talk about one's race or gender, whatever. The

point is, whether affirmative action is a formal policy or incidental preferences for or against a specific class, there's no shutting it down entirely as long as humans are involved in the process.

No matter what, the solution for colleges and universities is not to work around the Court's ruling, to conduct affirmative action surreptitiously. Maybe they can be more aggressive in reaching out into the country to encourage qualified minorities to apply – the way professional sports teams scout for qualified players. If even that is okay with the Supreme Court. Heaven forbid we should do anything without their permission.

Affirmative action has always been a token program favorite of old school liberalism. Make room for a relative handful of minority students who, in fact, may not be as qualified as their White counterparts, but do little or nothing to resolve the problem in our public school systems where it originates. Liberalism, if it's to be meaningful, needs to focus on the root causes of social and economic problems, even if that means having to let the current generation of college applicants fend for itself.

The Court's dissenting opinions, which I appreciate and respect, are themselves inherently shortsighted and old-school in their liberalism. What's all this contentious discourse between the conservative and liberal Justices? It's the sound of something coming. Change isn't just "blowin' in the wind" as Bob Dylan once told us. It's so thick you can cut it with a knife. Change from the old to a new, more intelligent, more patient liberalism, from an old to a more productive conservatism that survives the current idiocy of the Republican Party.

In fact, the composition of the Supreme Court is all about affirmative action. Put Blacks on the Court. Put women on the Court. Put people on the Court who are personally opposed to abortion and this and that.

In no way is the Supreme Court representative of the population of people who are qualified to be Justices or of the population in general. These Justices, whatever their conservative or liberal credentials, whatever their personal beliefs and political allegiances, were hand-picked to give a small subset of our society an advantage. It may not be the same as affirmative action to diversify a student body, but it's definitely a form of affirmative action nonetheless, as discriminatory as any other.

The right to decline to serve a customer based on sexual orientation.

Have you noticed that the decision in favor of the website designer contradicts the Court's ruling against affirmative action?

In its affirmative action ruling, the Court mandates that it's wrong to discriminate, for or against an applicant to college, based on his or her race or other protected class. But then turns around and argues that the owner/operator of a website design company can discriminate her heart out just because she's selling something – her website

design services – that has a creative component. It doesn't make any sense. If discrimination against a protected class is wrong in one example, it's wrong in the other. To be clear, it should be wrong, period, to discriminate. This is why the protected classes listed above were created.

As for this website designer, the Court is allowing her to discriminate against gay couples because her work is creative and is therefore deemed to be an expression of protected free speech. I guess that's good news because now I can decline to write for the likes of Donald Trump on the grounds that I refuse to do anything to help him get re-elected. But then I already had the right because, thank goodness, being a jerk and an idiot aren't protected classes under anti-discrimination law. More to the point, what work, product or service, doesn't have a creative element to it that would qualify it for the right to discriminate under the First Amendment?

What a lame decision. The website designer certainly has every right to her opinions and beliefs, but she didn't have to put her name on the websites she designs for same sex couples. Problem solved without having to deny the members of a protected class unequivocal rights to equal treatment.

Student loan forgiveness.

And finally, let's talk for a moment about the third decision which has stopped the President's program to forgive billions of dollars of student loan debt. No question about it, the President knew it was too large an ask not to require Congressional approval, but he was frustrated, having discovered the hard way that his old-school experience with bipartisan Congressional action was no longer relevant. It's another sign that he's too old to run again and that it's high time for a new generation of politicians to take over. He lucked out the first time in 2020, but lightening in the form of having Donald Trump as his opponent may not strike again in his favor.

Not only is Biden physically old, more importantly his liberalism is old-school and unproductive. He tends to think in terms of relatively immediate solutions to long-term problems. Unfortunately, there's no simple or quick fix for inequities that have been decades, even centuries in the making.

Opponents of the President's program argue that it discriminates against those who have already paid off their loans or didn't go to college. It's a ridiculous argument. Should we not release new medicines and curative procedures because, however regrettably, some people have already died without them and others never contracted that particular illness?

Ever since we were kids. we've be taught about the separation of powers among the executive, legislative and judicial branches of our government and about "checks and balances." "Checks and balances," I'll say it again. But, as a practical matter, other than by the nomination and approval of Justices appointed for life, who or what is there

to overrule the Supreme Court *right now*? All it takes is five of the nine Justices voting as block, expressing their studied and personal opinions of the applicability of a document ratified 235 years ago in very different times, to reshape the American society for the benefit or detriment of millions and millions of us.

Simply put, the same Court whose sole job it is to make sure our founding document is in still in charge, knows well enough that its own powers effectively exceed those of the other branches. The "balance of powers" is a concept that ignores the different speeds at which individual branches of our government can exercise their control over the other branches – while ignoring the very real potential that all three branches might be under the control of people having the same political sensibilities, however good or misguided.

-Les Cohen

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