When Judges Run Amok:
The Lie of Judicial Lawmaking

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INTRODUCTION

The November 1996 issue of *First Things*, a "Journal of Religion and Public Life," was largely devoted to a symposium of articles examining the subject of "The Judicial Usurpation of Politics." Since then, the Supreme Court decisions in *Reno v. A.C.L.U.* (invalidating the Communications Decency Act) and *City of Boerne v. Flores* (holding the Religious Freedom Restoration Act unconstitutional) have renewed the outcry to curb judicial activism.

The key issues examined in the symposium were: 1) whether "the government of the United States [via the judiciary] no longer governs by the consent of the governed"; and 2) whether "law, as it is presently made by the judiciary, has declared its independence from morality." However, none of the contributors found it necessary to examine, or even to express any view, as to the nature of judicial power. Further, none looked to the Bible for guidance in defining the proper authority of a judge.

To a large extent, public discussion of how to curb judicial activism has focused on various legal and political means of limiting what courts, or a least the U.S. Supreme Court, can do. But such proposals begin far downstream, jurisprudentially speaking, from where we should start. A more appropriate place to begin the discussion is to reexamine the nature of judicial power itself. In particular, we should reconsider a primary tenet of contemporary jurisprudence, namely, that judges make law.

What the voting public, Congress, other public officials, or organized religion should do is not my immediate concern. The present focus is what we Christian lawyers can and should do. Although no one can rightfully blame us for the current state of the judiciary, nonetheless, we have become a part of the overall problem. Thus, before we can fix the external problem of judicial activism, we must first reexamine our own internal attitudes and beliefs about what judges are supposed to do.

BIBLICAL MODEL

The Bible indicates what is the nature of judicial power. The first recorded instance of civil judgment involves Moses, who judged the people of Israel as recorded in Ex. 18:16: "When they have a dispute, it comes to me, and I judge between a man and his neighbor, and make known the statutes of God and His laws."

Notice that Moses exercised his judgment consistent with the common law tradition. After all, Exodus 18 chronologically precedes the giving of the law in Exodus 20 and later scriptures. Since God had not yet verbally revealed His laws for Israel, how could Moses make known God's statutes? Apparently, Moses was basing his judgments in a discernment of the laws of nature which God had impressed upon the creation.

Moses also waited for the disputes to come to him. He judged between individual parties in specific cases and controversies. He did not purport to make rules binding on non-parties.

Further, by "making known" the law of God, Moses indicated his judgment was not merely the exercise of his personal will, but rather was a declaration of law which pre-existed the dispute before him. That is, Moses did not purport to *make* laws for Israel, but only to declare what laws he had found. Even when Moses later acted as the law-bearer to Israel, he never claimed that such laws originated with him. All Moses ever did, both as judge and as law-bearer, was deliver to the people the laws God revealed to him.

We could be cynical and take the position that Moses either lied about how he judged, or that he didn't really know what he was doing - that in spite of his statements to the contrary, he was really "making" law as he judged. But, how can we dispute the accuracy of Moses' statement in Ex. 18:16 without calling into question the accuracy of the whole Pentateuch, which was written by him on God's behalf? And how can we disbelieve Moses "found" God's laws as a judge, yet affirm that Moses "found" God's Ten Commandments? What kind of Christian faith would take such positions?

Moses was not alone in judging according to this pattern. Samuel, who later judged Israel, exercised a judicial function by holding King Saul accountable to the law. *See*, 1 Sam. 13. Like Moses, Samuel did not judge according to a legal standard which was merely right in his own opinion, but judged that Saul had violated a pre-existing and known legal obligation imposed by God. The prophet Nathan judged king David on the same basis.

Nor should we slough off these examples as unique to ancient Israel or the Old Testament. It is not necessary to embrace theonomy or a revival of the Mosaic law as a means of understanding the biblical pattern. Jesus, although He never occupied the office of a civil judge, pronounced spiritual judgments from time to time. When he did so, He also followed the pattern of judging on the basis of the pre-existing will of God, not His own will. "I can do nothing on My own initiative. As I hear, I judge; and My judgment is just, because I do not seek My own will, but the will of Him who sent Me." Jn. 5:30.

HISTORIC VIEW

This biblical view of judging was understood and endorsed by many of the historic legal scholars and commentators. In fact, the correlation between the historic understanding of judicial authority and the biblical pattern is quite remarkable. In the historic common law tradition, the role of the judge was to declare what law already existed. The standard legal maxim which guided judges for several hundred years was, *Jus dicere, et non jus dare*. That is, the province of a judge is to declare the law, not to make it.

This view of judging and judicial authority was embraced by William Blackstone, James Kent, Joseph Story and virtually all legal commentators in England and America prior to the U.S. Civil War. For example, The Federalist Papers (No. 78) declared: "The judiciary . . . may truly be said to have neither FORCE nor WILL but merely judgment . . .. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body."

This view of judging was even acknowledged by the U.S. Supreme Court, once upon a time:

> [The judicial] department has no will, in any case. . .. Judicial power, as contra-distinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. . . . Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law. [*Osborn v. The Bank of the U.S.* (1824).]

MODERN APPROACH

Things have changed radically since 1824 due to the legal and political upheaval following the Civil War, of which social Darwinism (as propounded in the legal academy by C.C. Langdell) was a major component. That's when America began a major shift away from an integrated view of God and law (presuming a God-defined legal order applicable in civil affairs) toward a dis-integration of both (law is only what people say it is and God is concerned only with religion). Not surprisingly, legal writers began taking a radically different view of judicial power. And, we have been trying to re-integrate our faith with legal practice ever since.

Thus, John Austin (1790-1859) dismissed the Blackstonian view of law as a "childish fiction." He believed judges could not help but *make up* the common law. Otherwise, the law must be "a miraculous something made by nobody existing, I suppose, from eternity." A similar view was popularized by O.W. Holmes, Jr., who wrote: "The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified. . .." [*So. Pacific Co. v. Jensen* (1917).] Both men rejected the existence of objective legal rules for society imposed by God.

The modern view of judicial power is perhaps best summarized by John Chipman Gray, a Harvard law professor who was a contemporary of Langdell and Holmes:

> Law is made up of the rules for decision which the courts lay down: That all such rules are Law; that rules for conduct which the courts do not apply are not Law; that the fact that the courts apply rules is what makes them Law; that there is no mysterious entity "The Law" apart from these rules; and that the judges are rather the creators than the discoverers of the Law.

Modern scholars have even gone so far as to `trace' the modern view of judicial authority back to Chief Justice John Marshall's opinion in *Marbury v. Madison* (1803), when he stated, "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."

However, modern commentators, when reviewing *Marbury*, conveniently forget to mention three things: 1) To "say what the law is" was historically recognized as a statement equivalent to "*jus*

dicere," that is, to declare (not make) the law; 2) To apply a legal rule "to particular cases" by issuing an order is vastly different from using particular cases as a means of announcing general rules binding on non-parties (a legislative function); and 3) It was Marshall who wrote the opinion in *Osborn*, quoted above. Attributing the modern view of judicial authority to Marshall is one of the great frauds perpetrated on the legal profession today.

HOW TO RESPOND?

We are faced with two distinct, in fact opposing, systems of thought about what judges are supposed to do. One view, the biblical-historical view, says judges cannot, dare not, make laws. The modern approach, on the other hand, says judges cannot help but make law as an indispensable part of judging. At the most fundamental level, both views cannot be equally right. So, what can we do?

I submit that we lawyers have been duped, and we should admit it. What we were taught about judicial power in law school, and what we assume about it as we engage in our professional careers, is simply wrong in two senses: *first*, it is historically inaccurate (in fact, a gross misrepresentation of the historic understanding); and *second*, it is morally wrong.

Judge for yourself. Either ancient Israel's law was created by God, or it was invented by man. Either Moses found the law or he created it. If he had really judged according to his own will, is it reconcilable with scripture? Would it have been sin? If Jesus had judged according to His own will, would He have followed the will of God? Is it even possible that Jesus could have misunderstood (much less misrepresented) the nature of what He was doing?

The "discover law, don't make it" pattern of judicial power seems to be the exclusive model presented in the Bible, and the only pattern of judicial power to which God has given His approval. It seems reasonable to conclude this biblical view of judging reflects the will of God as He has impressed it upon the created order and is in fact God's eternal ***law*** of judicial power.

Next, we should renew our minds on the subject (Rom. 12:2) to avoid being taken "captive through philosophy and empty deception, according to the tradition of men." Col. 2:8. Finally, we must be willing to advocate God's law in the face of opposition. "We are destroying speculations and every lofty thing raised up against the knowledge of God, and we are taking every thought captive to the obedience of Christ, and we are ready to punish all disobedience, whenever your obedience is complete." 2 Cor. 10:5-6.

Jesus has already modeled the behavior pattern we should follow. There are numerous instances in the Gospels where Jesus confronted man-made traditions of right and wrong behavior. For example, Jesus confronted the scribes and Pharisees concerning the practice of Corban. "And He answered and said to them, `And why do you yourselves transgress the commandment of God for the sake of your tradition?'" Matt. 15:3.

Jesus: 1) knew what God's law was and how it differed from man-made rules; 2) obeyed God's laws

rather than man's legal traditions without exception; and 3) took every opportunity (or so it seems) to let people know how their rules came up short when measured next to God's standards. Oh, that we Christian lawyers would be more like Christ!

A CALL TO ACTION

To the extent we have accepted conventional wisdom regarding judicial activism, we have become a part of the problem by encouraging its continuation. How often do we litigators make arguments, even in instances of `Christian litigation,' that presuppose, and indeed invite, the court to make new law? Or openly rely on judicial precedents which are nothing more than a legislative act in the garb of a judicial opinion? How often do we as professors teach our students no other view of judicial power than the one propounded by the U.S. Supreme Court?

It's no wonder the problem of judicial activism hasn't gone away (and will not go away) merely by appointing new judges to the bench, whether Christian, conservative, or otherwise. The new judges think just like the old judges, and we Christians aren't training anyone to think differently. If we as Christians don't advocate God's law of judicial power, no one else will. For this, we must accept responsibility.

I suggest there is no long-term solution to the problem of judicial activism other than a concerted effort on our part to advocate God's law. No federal statute, no amendment of the Constitution, no replacement of judges on the bench, no limitation on court jurisdiction, no review of judicial decisions by political bodies, and no amount of civil disobedience will correct the foundational problem. Unless and until judges are willing to submit their own wills to the will of God and His law, the problem will only get worse. And unless we are willing to commit to the long-term process of raising up a generation of people who will do that, little will change.

Yet, we must do more. It is not enough to prepare people to submit their heart and will to God's law if we haven't taught their mind what God's law is. And how can we do that, except we learn it ourselves?

This is why it is so important to earnestly devote ourselves to the task of rediscovering and rearticulating a comprehensive biblical jurisprudence - a legal philosophy for modern society and today's world, but conforming to God's timeless standards. We often talk about justice, but who among us knows what it really is? Thankfully, we need not start from scratch - many before us have laid the foundations. Let us rise up, in the words of the prophet, to rebuild the ancient ruins and raise up the age-old foundations, "And you will be called the repairer of the breach, the restorer of the streets in which to dwell." Isa. 58:12.

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