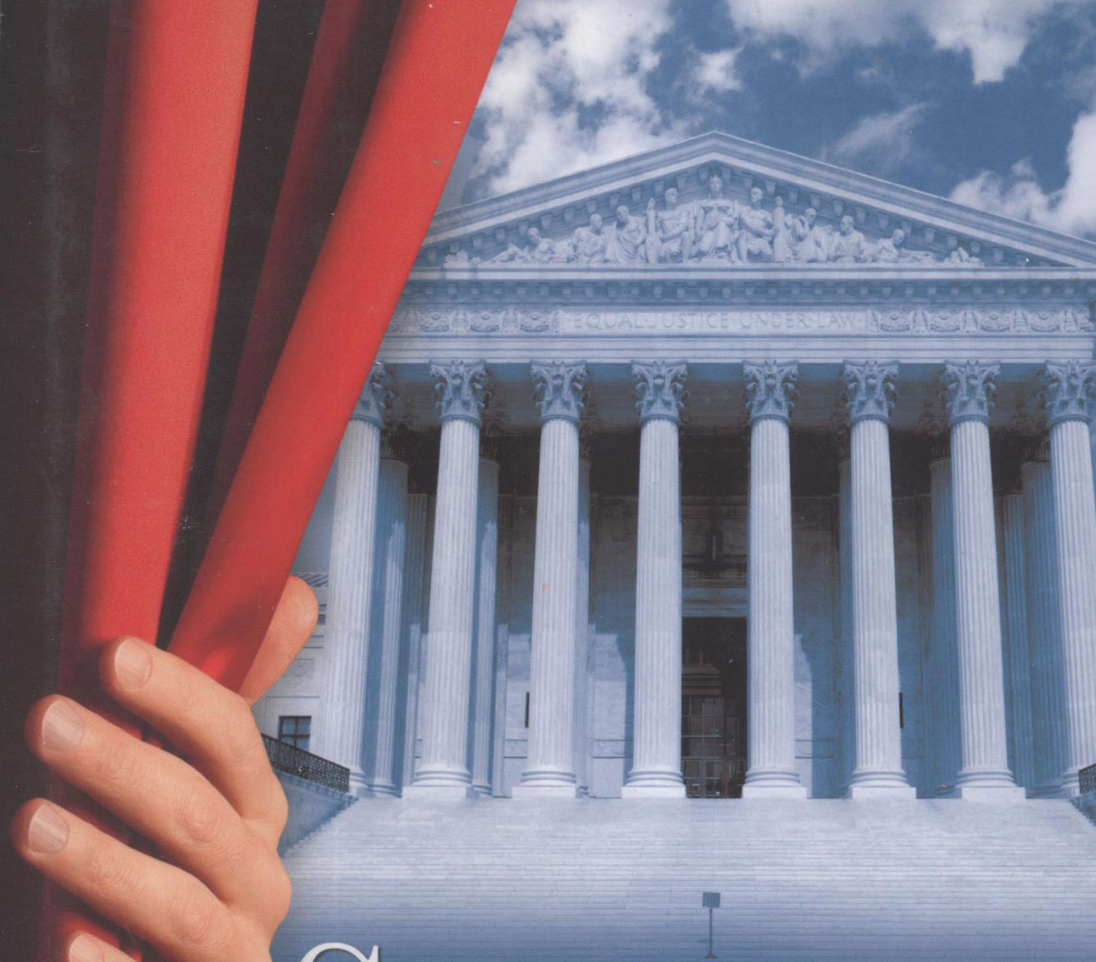

Supreme Myths

Why the Supreme Court Is Not a Court and Its Justices Are Not Judges

ERIC J. SEGALL

SUPREME MYTHS

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SUPREME MYTHS

To, For, and Because of Lynne

Preface

It is no great secret that the Supreme Court's constitutional law decisions reflect the personal values of the Justices. Law professors and other Court watchers have long described the Justices as politicians in robes. But these critics, by and large, suggest only that the Court should take law more seriously, and do not advocate fundamental change. I wrote this book, not to repeat this well-worn critique, but to argue that the problem with how the Supreme Court operates extends far beyond the great subjectivity that infects the Court's decision making. The unfortunate truth is that, for an array of different reasons, the Supreme Court does not function as a true court and its Justices do not decide cases like true judges. In other words, that politics and personality affect the Court's decisions is only the beginning of the story.

This book is written for academics and nonacademics as well as lawyers and nonlawyers. I hope it will interest not just those who follow the Supreme Court but anyone who wants to learn more about important and controversial issues such as abortion, affirmative action, freedom of religion, and gun control. I will show how the Court prevents the American people and our elected leaders from resolving these issues democratically through our representative system of state and federal elections. That political system is by no means perfect, and it too needs to be reevaluated. But when people in a democracy reasonably disagree over difficult policy questions not obviously resolved by their Constitution, those differences should be resolved by public debate and elections, not by the personal opinions of unelected, life-tenured Justices, and the supreme myths, disguised as law, the Justices create.

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Carolyn Wood read every word from around the corner, and Bill Hausdorff read every word from thousands of miles away. These two dear and brilliant friends have been challenging and improving my intellectual abilities for decades, and this book is much better because of their efforts to make me think more deeply and responsibly.

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My wonderful family has been behind me from the start. Mom, Dad, Liz, and Pete, thank you for all your love, faith, encouragement, and support.

Anyone who has ever taught in a law school knows how much our success depends on the dean. In my case, I have been lucky that, for the last five years, Steve Kaminshine has been not only the best dean anyone could ever hope for, but also one of my closest friends. He has provided me with his generosity, counsel, and advice. This book specifically, and my professional and personal development generally, have benefitted from our relationship beyond what words could possibly express.

To my daughters, Jessy, Sara, and Katie, your warmth, love, and sunshine radiate over me every day of my life. To Lynne, because you are my soul mate, and also provided so much help with the book, you get double billing.

Prologue

> If changing judges changes law, it is not even clear what law is.
>
> —Judge Richard Posner

On June 20, 1860, Susan P. Hepburn of Louisville, Kentucky, borrowed $11,250 from Henry Griswold. At the time she issued her promissory note, the only legal currency in the United States was gold or silver coin. Mrs. Hepburn did not pay back her note so Mr. Griswold sued her for the balance owed. In today's economy, the debt was well over $200,000. Neither party likely foresaw that this lawsuit would change the course of American history.

On February 25, 1862, Congress passed the Legal Tender Act, which, for the first time in American history, made paper money (called greenbacks) legal tender to pay private debts.[1] The Lincoln administration made this dramatic decision because of the desperate financial situation of the federal government. The North had to fund the ongoing Civil War, and the government was out of money.[2] Soldiers needed to be paid and the army required supplies and weapons.

Mrs. Hepburn eventually came to court and offered to pay $12,720, the full amount of the principal plus interest, in United States paper money. Mr. Griswold refused this offer arguing that he had the right to be paid in gold or silver not greenbacks, which had less value. The court, however, accepted the payment and discharged Mrs. Hepburn's debt. Mr. Griswold appealed the case, which went all the way to the United States Supreme Court. He argued that the

United States Congress had no legal authority to make paper money legal tender.

Although it may seem obvious today that Congress has this power, the issue sharply divided the country in the post–Civil War era. The leading economists, academics, and judges of the time disagreed on the question, both as a matter of fiscal policy and constitutional law.

In terms of economics, the issue was divisive because the federal government had printed more and more money resulting in great inflation. Because preexisting debts now could be paid with cash instead of coin, debtors were helped and creditors hurt as the paper money depreciated. Most influential Democrats at the time were against the Legal Tender Act while many Republicans supported it.

As a matter of constitutional law, Congress has the authority to "coin Money [and] regulate the Value thereof."[3] There is nothing in the Constitution, however, that gives the government the authority to issue "paper money," and opponents of the Legal Tender Act argued that the term *coin* referred only to metals not paper currency. They also believed that, if Congress had the authority to make paper money legal tender where that authority did not expressly exist in the Constitution, the federal government's power would expand uncontrollably, and the framers' desire for a limited national government would forever be lost.

Congress does have the power to "regulate commerce," and to "borrow Money on the credit of the United States."[4] Advocates argued that these provisions, along with Congress's implied authority to exercise its enumerated powers, justified the decision to issue paper money. These supporters also contended that the Constitution should be interpreted to allow Congress to respond to new and unforeseen events like the Civil War. Both sides of the debate felt passionately, and this issue, arising after the worst crisis in this nation's history, raised fundamental questions about the nature of our national government, how our economy should be structured, and the appropriate balance of power between the Congress, the states, and the American people.

On February 7, 1870, the Supreme Court of the United States announced its decision in *Hepburn v. Griswold,* holding that Congress did not have the power under the Constitution to make paper money legal tender.[5] The majority (four Democrats plus one Republican) held that no provision in the Constitution gave Congress that authority, and doing so would give the federal government far too much

power.[6] Additionally, the Court found that the Legal Tender Act unconstitutionally interfered with preexisting contracts because creditors expected to be paid in gold or silver, not paper money.[7] The dissenters (all Republicans) took issue with each of these points with one Justice boldly arguing that Congress needed to have the power to issue paper money and, without it, the government would have perished "and, with it, the Constitution."[8] Less important, perhaps, Mrs. Hepburn had to pay Mr. Griswold in silver or gold coin not greenbacks.

At the time of the decision, the Court had only eight Justices, and one of them had announced his resignation a week before.[9] Thus, on the same day that the *Hepburn* decision was made public, President Grant nominated two new Republican Justices, William Strong and Joseph Bradley, to the Court. Both were eventually confirmed, giving the Republicans a clear majority. There is little debate that Grant would only have nominated people for the Court who believed in the validity of the Legal Tender Act.[10] Although the president made his nominations the day *Hepburn* was announced, it appears that his administration was told of the decision two weeks prior.[11]

The *Hepburn* case not only had a major effect on the post–Civil War economy but also set forth a new and significant interpretation of the limited powers of Congress and the kind of national government the Constitution anticipated. Because of its importance, *Hepburn* had been "argued and reargued by numerous and distinguished counsel. It is probable that never in the history of the Court has any question been more thoroughly considered before decision."[12]

Despite the enormity of the *Hepburn* decision, however, both its result and rationale were short lived. Just over a year later, in May 1871, the two new Republican Justices joined with the three Republican dissenters in *Hepburn* and explicitly reversed the case in *Knox v. Lee (The Legal Tender Cases)*.[13] This new majority argued that the legal tender provisions were urgently needed to fight the Civil War, and Congress should have broad powers to deal with that kind of emergency.[14] Both contentions had been specifically raised and then rejected only 15 months earlier by a majority of the Court in *Hepburn* (four of whom now dissented). The new majority pointed to no new facts or arguments supporting its reversal of the prior decision.[15]

The decision upholding Congress's power to make paper money legal tender was met with mixed reviews in the leading periodicals of the day. The *New York Times*, the *New York Herald*, and *Harper's*

Weekly "expressed the pleasure and gratification of the common people," while those periodicals with conservative tendencies criticized the decision and accused President Grant of packing the Court.[16] The *New York World* reported that, "The decision provokes the indignant contempt of thinking men. It is generally regarded not as the solemn adjudication of an upright and impartial tribunal, but as a base compliance with Executive instructions by creatures of the President placed upon the Bench to carry out his instructions."[17]

The decisions in the *Legal Tender Cases* illustrate three major problems with how the Supreme Court operates that continue to this day. First, although the opinions and dissents in these cases purported to be based on constitutional language and history, neither source could definitively support the result advocated by any of the Justices. As one scholar has written, "the language of the Constitution leaves the question open, and the debates in the Convention do not reveal any consensus of opinion."[18]

This description of the indeterminate nature of the issues raised by the validity of the Legal Tender Act is equally true for virtually every constitutional question litigated in the United States Supreme Court. For example, neither the text of the Constitution nor its history sheds any more light on the validity of laws concerning affirmative action, abortion, or gun control than it sheds on Congress's power (or lack thereof) to make paper money legal tender. Law (defined as constitutional text, the text's history, and prior case law) and legal reasoning simply cannot answer these questions, especially when the Supreme Court is free to, and often does, reverse its own decisions.

Second, even though prior law did not give rise to a concrete answer in the *Legal Tender Cases,* the Justices in both the majority and the dissent wrote their opinions as if their preferred results flowed naturally from that law. This pretense—that law drove the results—is problematic because judges have an important obligation to be candid about the actual reasons for their decisions. Supreme Court Justices, however, rarely admit that they are doing anything other than applying prior "law" to new facts, which is simply not how they resolve constitutional law cases. Instead, the Court's decisions are based on the Justices' personal and controversial value judgments.

Third, the Court in the *Legal Tender Cases* changed its mind on one of the most important policy questions ever to face this country *only* because President Grant had the opportunity to appoint two

new Justices whom he knew supported Congress's power to make paper money legal tender.[19] The Supreme Court frequently reverses itself on important constitutional law issues for no other reason than the composition of the Court changes. The problem with this back and forth, in addition to the instability it causes, is that the Supreme Court's legitimacy stems in part from its intended role as a traditional court whose judges apply the "law." But, as was the case with the *Legal Tender Cases,* and as will be true for most of the issues discussed in this book, "if changing judges changes law," then it is uncertain whether the law controls judges or the other way around. In other words, the nature and history of the Supreme Court calls into serious question the axiom that we are a government of laws not people, at least when it comes to Supreme Court decision making.

The purpose of this book is to present an accurate picture of the Supreme Court of the United States, and present a few proposals to help cure the problems caused by the overreaching of the Justices. Because the Court functions much more like a political veto council than a court of law, and because the Justices decide cases more like a traditional council of elders than typical judges, the Supreme Court's power to overturn the important decisions of other governmental officials should be seriously reevaluated. Perhaps having an ultimate veto council is a good idea for a representative democracy whose people believe in limited government. But if so, we should be honest about how the council is structured and actually operates. It is well past time to pull back the curtain on, and then reassess, the Supreme Court of the United States.

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CHAPTER 1

Supreme Mythology

> The Supreme Court's rules and structures, along with those of the American political system in general, give life-tenured justices enormous latitude to reach decisions based on their personal policy preferences. Members of the Supreme Court can further their policy goals because they lack electoral or political accountability, have no ambition for higher office, and comprise a court of last resort that controls its own caseload.
>
> —Jeffrey A. Segal and Harold J. Spaeth

THE MYTHS

This book's argument that the Supreme Court does not act like a court and its Justices do not decide cases like judges will strike many readers as implausible. After all, Supreme Court Justices work in a courtroom, wear black robes, and decide cases brought before them. But all that proves is that the Justices *look* like judges. It does not demonstrate that they *decide cases* like judges. How the Justices resolve legal issues, how truthfully they explain their decisions, and what limits (if any) are placed on their authority are the important factors to consider when determining whether the Court functions more like a court of law or more like an ultimate political veto council.

Why should the American people care whether the Supreme Court functions more like a court of law or a political veto council? The answer is that the Court frequently prevents elected governmental officials from implementing important policy decisions favored by

the voters and/or their representatives. For example, if a majority of voters in Chicago want to prohibit handguns in order to reduce homicides and fatal accidents, or if a majority of people in South Dakota wish to criminalize abortion because of concerns for the sanctity of human life, or if Congress wants to enact meaningful campaign finance reform to lessen the corrosive effects of corporate money on federal elections, the people and their representatives are not allowed to implement those decisions because the Supreme Court has made those policy choices illegal. Sometimes the Court favors liberal policies, sometimes conservative ones, and often the Court splits the difference. But on virtually every occasion that the Supreme Court of the United States removes an important policy question from the hands of voters and politically accountable governmental officials, the American people lose some of their power to govern themselves and our representative democracy becomes a little less representative and a little less democratic. This loss might be tolerable if the Justices were acting like traditional judges applying preexisting law to difficult legal problems. But the Court's decisions are based much more on personal and contestable value judgments than legal reasoning.

WHAT ARE JUDGES SUPPOSED TO DO?

How do we expect judges to resolve hard legal issues and how is that different from how the Supreme Court actually operates? From ancient times to the present, whether in America, Europe, or other democracies, judges are supposed to resolve cases by faithfully interpreting legal texts and prior cases and then applying that law to the facts before them. Of course, there are many cases where the governing legal text is vague, the facts truly in dispute, and the applicable law unhelpful, incomplete, or contradictory. No one suggests that judges can act like computers and simply apply clear law to agreed-upon facts and derive right or wrong legal answers. But even when the law does not point to solutions or provides significant discretion, judges remain obligated to examine and interpret legal materials such as constitutional language, relevant history, and prior cases to arrive at the best decision they can.

Not only are judges supposed to carefully examine prior law, but because judges are governmental officials who exercise coercive power, it is important that they explain their legal decisions with

honesty and transparency. This requirement does not mean that judges have to justify in writing every decision they make, but there is general agreement that they ought to make public the reasons why they rule one way or the other on difficult legal issues, especially in contested constitutional law cases. One eminent law professor has expressed this idea as follows:

> Because of the inescapability of judgment in the interpretation and application of the Constitution, candor is essential if the justices . . . are to ask the rest of us to take them seriously. . . . Only if you and I understand the true grounds of the decision can we assent to its correctness . . . even though we think it wrong in substance. Because the Constitution is not a crossword puzzle with only one right answer . . . , playing the constitutional game fairly demands that the players be clear about why they give the answers they do. *Candor is indispensable if the system is to retain its moral dignity.*[1]

The Justices of the United States Supreme Court, however, do not treat prior law in a way that generates their constitutional decisions nor do they consistently offer the true justifications for the results they reach. Instead, the Justices employ the fancy but misleading jargon of constitutional law (text, history, and prior cases) to hide the personal value judgments that actually support their decisions. Thus, both in terms of their adherence to prior law, and their obligation to transparently explain legal decisions, the Justices fail to act like true judges.

One reason that prior law does not generate the Justices' decisions in constitutional cases is that most of the cases they choose to hear involve vague terms such as *due process of law, equal protection of the law, establishment of religion,* and *liberty.* These concepts simply cannot be defined without controversial and subjective interpretations. Imagine a legal directive requiring that Supreme Court Justices decide whether the government is acting *right,* or *fair* or requiring the Court to determine whether people are treated *equally* by the government or whether their *liberty* has been denied by the government. Would it make sense to say the Court is following or interpreting prior legal directives when determining what words like *fair, equal,* or *liberty* mean? Yet, these are the words that have generated