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The Illiberal Court

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What does the Marlboro Man ride? "When you're little, you want a pony. When you're old enough to know better, it's too late. They're hooked." After all, nicotine is addictive. This view of smoking (and addiction in general) is a vast oversimplification. Bob Dole's "nonscientific" view is actually more sophisticated. As he noted, many people who try cigarettes never become regular smokers, and many regular smokers quit, some easily and some (like Dole) with much difficulty. There are almost as many former smokers in this country as there are smokers, and the vast majority of them gave up the habit on their own, without formal treatment.

On the other hand, some 45 million Americans continue to smoke, despite the availability of nicotine gum and patches. Given the hazards of smoking, that choice would be puzzling if, as Kessler suggests, all they wanted was a nicotine fix. Such a reductionist view of smoking also fails to explain why so many smokers who try to quit go back to the habit long after any withdrawal symptoms have disappeared. Clearly, smoking served an important function in their lives—relieving boredom, soothing distress, aiding concentration, warding off loneliness—and they miss it.

When Kessler says smoking is "a pediatric disease," he's implying that smokers who take up the habit as teenagers should be treated like children for the rest of their lives. By calling behavior a disease, he obscures the fact that, whenever they start, smokers choose to continue smoking every day. They may be ambivalent about it, but they have implicitly decided that the costs of quitting exceed the benefits. Indeed, if we could somehow prevent everyone under the age of 18 from lighting up, many people would still choose to smoke. This simple fact—the real reason "the tobacco companies continue to not just survive, but prosper"—seems to elude both Kessler and Jennings.

Kessler is the hero of Jennings's story, and all who oppose him are pawns of the villainous tobacco industry. Noting that think tanks and members of Congress who criticize the FDA receive contributions from cigarette companies, Jennings implies that complaints about the agency's inefficiency and overzealousness are a way of punishing Kessler for his foray into tobacco regulation. The flaw in this theory is that conservatives and libertarians were calling for reform of the FDA before Kessler decided that cigarettes were covered by the Food, Drug, and Cosmetic Act. Could some of these critics be acting on principle, instead of simply carrying water for the merchants of death? Jennings never considers the possibility that politicians and think tanks might get tobacco money because they support certain policies, rather than the other way around.

For Jennings, there is no legitimate opposition to the war on tobacco. Smoking is an unequivocal evil that needs to be stamped out. "The cigarette companies have been winning," Jennings claims, "in part because there's never been a national debate about the death and destruction which smoking causes." Anybody want to make the case for death and destruction?

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Illiberal Court

The United States Supreme Court is engaged in the process of undermining democracy.

DAVID FORTE

Some people simply cannot mind their manners. Jeremiah was roundly despised for proclaiming the infidelity of Israel. The little boy of Hans Christian Andersen exclaimed at the nakedness of the emperor. And Justice Antonin Scalia has the effrontery to expose the oligarchic agenda of his brethren.

Justice Scalia has long used his acerbic style to disassemble the jerry-built logic of Supreme Court opinions. In the Romer case this last term, for example, he

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40 NATIONAL REVIEW / JULY 29, 1996
declared that in the Court's current view of the equal-protection clause, "our constitutional jurisprudence has achieved terminal silliness."

Scalia has paid a political price for his temerity. Truthfully, his disparagement of his colleagues' views has sometimes verged on the personal insult. It is doubtful that his style has won many votes from his fellow Justices.

Yet he will not be turned aside. In the just-completed 1995-96 term of the Supreme Court, he went further than he has ever done before. Taking a cue from academia, Scalia spiritedly "deconstructed" the arguments of the Court in a number of significant decisions, and revealed where he thought the majority's political agenda lay. Scalia is no longer content with taking apart a badly constructed argument. He sees something much more dangerous afoot, and has decided to confront it.

Scalia believes that the nation's "law-trained elite" and its social prejudices have gained control of the Constitution-making machinery of government. That elite, he says, has "embarked on a course of inscribing one after another" of its current preferences into the Constitution. He decries the Court as elitist, "illiberal," and intolerant of the democratic process. He bitterly confesses to being profoundly disturbed by the Court's changing of long-standing political practices overnight, especially since this is being done "by an institution whose conviction of what the Constitution means is so fickle."

Despite his ire, the 1995-96 term of the Supreme Court was not as radical as either Justice Scalia or the press depicted it. The largest group of significant cases was in the area of criminal procedure. There, the tradition of the Rehnquist Court continued, in incrementally strengthening law enforce-

The elite has 'embarked on a course of inscribing one after another' of its current preferences into the Constitution

ment as well as in limiting repetitive appeals by convicted felons. The Court decided many of those cases, however, by a fragile one-vote margin.

The Court continued to strike down race-conscious redistricting, in North Carolina and Texas (again by vulnerable 5 to 4 votes), and let stand a ban against a racially preferential admissions program at the University of Texas Law School. Two cases modestly improved the position of the states, one requiring federal courts to enforce New York State's revision of punitive-damage awards, and another preventing Congress from authorizing suits by Indians against the states.

The Court continued to enforce a rigorous interpretation of the First Amendment. It struck down a Rhode Island ban on liquor-price advertising. It also voided a state law that limited the right of a political party to campaign expenditures. Even in the face of community values, the Court voided a congressional act that would have limited "indecent" visual and verbal expression coming into the home via cable.

Little progress came, however, in the protection of property interests. An innocent owner of an automobile used in a criminal activity by her husband (engaging a prostitute) had her interest forfeited with no recourse. In cases dealing with labor disputes, the Court leaned on the side of the labor unions over the employer. And the Court showed little inclination to help the states protect the unborn, even within the narrow confines of the 1992 Casey decision. It did remand a decision of a federal Circuit Court to determine whether Utah's restriction of abortions after the 20th week of pregnancy was constitutional.

On the other hand, the Court refused to grant certiorari to a questionable decision out of South Dakota in which a parental-notification law had been struck down on its face.

It was in the area of moral concern and community mores, however, that the Court demonstrated most clearly the kind of attitude that Justice Scalia finds so biased and objectionable. In two of the most controversial cases, dealing with gay rights in Colorado and male-only military education in Virginia, Justice Scalia discerned a consistently pursued agenda by a privileged elite to impose its moral views. Once the Court had implanted those views into the Constitution, he argued, they became permanent bars to the social values long and deeply held by the people. These cases provoked his most bitter and vehement denunciations to date.

In Romer v. Evans, the Supreme Court struck down a Colorado constitutional provision passed by the state's voters directed at repealing existing laws and prohibiting future laws that would grant preferred status to homosexuals. The Court's majority could find no reasonable purpose in such a provision, and attributed it to hatred and animus against homosexuals by the Colorado electorate in violation of the equal-protection clause of the Fourteenth Amendment. The Court stated a blanket rule that a law that makes it more difficult for one group to obtain government aid than others is by definition a denial of equal protection.

In reply, Justice Scalia (joined by Chief Justice Rehnquist and Justice Thomas) ticked off a number of what he thought were quite obvious propositions.

―Since the Supreme Court itself has declared that a state may criminalize homosexual conduct, it logically follows that the state can deny those who engage in it benefits in its civil law.

―Colorado's disapproval of homosexual conduct is in fact unusually mild. It was one of the earliest states to repeal its criminal prohibitions against homosexual conduct. Its non-discrimination laws protect homosexuals now and would continue to do so. All the state wanted to do was to limit the opportunity for homosexuals as a group to achieve additional benefits in the law.

"The ad said that no unicorn would call."

(Continued on page 56)
I KNOW YOU’RE OUT THERE SOMEWHERE. I am a 24-year-old devout Catholic, never-married, college-educated, Republican lady living in central Massachusetts. I would like to meet a Republican, Catholic, never-married, non-smoking, college-educated, financially secure gentleman, 27-32, who is seeking a serious relationship to lead to marriage and a family. NR Box 2358.

FORTE

(Continued from page 42)

—In the political and moral battle over homosexuality, gay partisans, who tend to be well educated, well financed, and concentrated in particular areas, achieved political victory in certain political districts. Their opponents took the battle to a higher level of democratic decision-making and won. This has happened countless times before and is now normal in a hierarchical democratic regime.

What the Court has really done, Justice Scalia declares, is to take sides in the culture war and write its preferences into the Constitution. The principles of the majority opinion are not in the Constitution, but only reflect the “views and values of the lawyer class from which the Court’s members are drawn.” He cites the rules of the American Association of Law Schools that prohibit potential employers access to campus if their firms do not disavow discrimination based on sexual orientation.

There is an irony in Scalia’s analysis. The Supreme Court struck down the attempt of Colorado to remove the issue of the legitimacy of homosexual conduct from the local political process and lodge it in the state constitution. But in doing so, the Supreme Court itself went far to remove the issue from most of the political process altogether.

Justice Scalia’s accusations against the Court were even more biting in the VMI case. In the Court’s decision that voided the Virginia Military Institute’s exclusion of female cadets, Scalia stood completely alone (Justice Thomas did not participate in the case).

For him, the question of whether there was any real benefit to single-sex public education should be left to the political process. True, he admits, previous generations were biased against women’s education. Nevertheless, democracy “enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly.” At least our biased ancestors “left us free to change,” he said. But if the “smug assurances” of any age—of this age, of this elite—are written into the Constitution, the democratic process is necessarily destroyed.

Justice Scalia has moved beyond a critique of the reasoning process of the opinions of the Court. It is clear that he believes that political and social objectives are corrupting the constitutional enterprise itself. His rhetoric has never been as alarmist.

What good does Antonin Scalia’s jeremiad do? It has attracted few admirers on the Court. Even Chief Justice Rehnquist veered away from Scalia in a number of cases this term. His effect on lower-court judges is necessarily attenuated, and any effect on law schools will not be seen until far into the future at best.

The prophetic role of Justice Scalia is to speak to the age, as is the role of all prophets. He speaks less to his own—the courts and the legal fraternity—and more to those in other parts of our political system. He casts up a dire warning that not only has the Supreme Court in many ways removed the Constitution from the Framers, it is also removing the democratic process from the people and their representatives. His words are on the edge of the apocalyptic: If the Republic is to stand, the Republic must take heed.