

The Problem With the Courts

By Larry Kramer JAN 29 2014

The Supreme Court decides 70 to 75 cases each year, but most sessions are remembered for just a few cases that are thought to be, in some sense, “momentous.” These are the cases that make the court an important institution. Last year, there were four: *Hollingsworth v. Perry* and *U.S. v. Windsor*, the same-sex marriage cases; *Fisher v. University of Texas*, challenging affirmative action in college admissions (for what seemed like the thousandth time); and *Shelby County v. Holder*, which tested the constitutionality of section 5 of the Voting Rights Act.

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Whatever one thinks of the decisions, it's important to recognize that none of them was actually determined by “the law” per se. That isn't to say that law wasn't important in framing the issues. Nor is it to say that the dispositions didn't look law-like. The court's lengthy opinions were filled with carefully parsed citations to cases, the Constitution and statutes, all in the ways good lawyers are trained to do.



But let's not kid ourselves: The law, such as it is, ran out of guidance or anything resembling an incontrovertible answer long before any of the justices reached their result in these cases. What determined the outcome in all of them was nothing more and nothing less than how far one believes we have come as a society on questions involving race and sexual orientation. Of course, this is true for all the court's momentous decisions (which is why they end up in the Supreme Court in the first place).

But maybe we should ask ourselves: Why on earth would we entrust such judgments, affecting the whole of society, to five people on a court whose members are made as unaccountable as possible and who sit on the bench for life, rather like monarchs?

What kind of democracy does that?

A second observation builds on this first one. If we are going to leave controversial and contested societal choices to an oligarchical council of nine, I at least want its members to have the kind of experience and wisdom needed to make the best possible decisions. There was a time when Supreme Court justices were drawn routinely from the ranks of our most accomplished public figures. Not every justice, of course. But we could count on the court being comprised of people who had been in the thick of our civic life, with personal responsibility for important governing decisions: former governors, senators, party leaders, cabinet officials, even a former president.

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That's a model of judging that could possibly work for the Supreme Court. Yes, those judges had been partisan while they were in politics, but they also gained experience about what governing entails — the kind of experience that encourages thoughtfulness and fosters wisdom. So when the Supreme Court faced those hard cases — the cases that make the court important, the ones that get there precisely because the law doesn't offer a clear or easy answer — they could fall back on that experience. With politics behind them, thanks to a lifetime appointment to an independent court, they were free to decide thoughtfully by drawing on what they had seen and learned from being at the heart of things.

Unfortunately, as the Supreme Court has grown in importance (a process that began with the Warren Court and has been accelerating since) so, too, has the importance of each appointment — and with that, the controversy surrounding each nominee. We've reached a point where it has become impossible to nominate anyone who has actually accomplished anything significant or important in the public life of the nation. Instead we get legal technocrats, justices who may have been very competent — even great — lawyers, but who never held important positions in politics or government or public life. Which means they never had an opportunity to learn from the responsibility this entails.



Since the early 1970s, we have, for no good reason, instead embraced the idea that being on the Supreme Court requires prior judicial experience. This was never true before, and given the nature of the court's work and the availability of highly trained law clerks, seems about the least important qualification to me. The only exception on the current court is Elena Kagan, whose very brief stint as solicitor general amounts to practically the same thing. Most striking: Other than Sandra Day O'Connor, no one since Lewis Powell, nominated by Nixon, has had any serious experience in politics. And Justice O'Connor (herself nominated three and a half decades ago) stands out among justices of the past 40 years precisely for how she drew on her experience as a leading state politician to temper and inform her judgments — something evident and much noted in her decisions on issues ranging from abortion to campaign finance and beyond.

We see the result of all this in the present court: an impressive bunch from a strictly-IQ perspective but utterly lacking in actual experience of the stakes in any of the important decisions they make.

This is nowhere more true than in last year's Voting Rights Act case, in which five members of the court cavalierly substituted their own, uninformed conjectures about political conditions for minorities in the South today in place of longtime congressional wisdom — and a labored-over legislative solution reached by an overwhelming majority in Congress after extensive testimony and research.

The fact is, all nine of the present justices have only ever been technical lawyers and low- or mid-level bureaucrats. None had the kinds of accomplishments before coming to the court of a Marshall (John or Thurgood), a Brandeis, a Warren, a Black or any of the most important figures in U.S. Supreme Court history. Those were people appointed to the court because of extraordinary public accomplishments, because they had been important figures. Today we get the reverse: people who become important figures only because they have been appointed to the court.

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And it matters. Because when we get to those momentous cases, the cases where the law runs out, so too does the only expertise these justices possess. Without real guidance from the law — and lacking experience and understanding of the political world their decisions affect — today's justices fall back on the only thing they have left to guide their decisions, which is ideology. Which, to my mind, makes it all the crazier to entrust them with the important decisions we do.