Schizophrenia at the Law Desk of the New York Times

by Lev Tsitrin

This is annoying. *The New York Times* prides itself on being a fact-based publication – yet when writing about judiciary, it deliberately keeps looking away from the facts. Its latest editorial on the subject, "*The Supreme Court Has a Crisis of Trust*" is a case in point. It yet again offers the standard lament that "[Supreme Court's] majority substitutes a rule by judges for the rule of law," the paper's editorial board wringing its hands over a lack of "perfect remedy to the court's politicization" that resulted in "only 25 percent … having a high degree of confidence in the institution" and declaring that "this widespread lack of confidence and trust

in the nation's highest court is a crisis" Yet while the editorial cites many court cases, it omits the key culprit – *Pierson v Ray*.

This case is the cornerstone of judges' ability to decide cases the way they want to, rather than the way they have to, resulting in "a rule by judges, not of law." In it, Supreme Courts gave judges the right to act from the bench "maliciously and corruptly" – and therefore, to judge arbitrarily, thus voiding "due process of the law" the Constitution presumably guaranteed us.

The *New York Times* may have a very good reason for not mentioning it. *New York Times'* definition of how judges ought to operate is (to put it plainly), schizophrenic. Having lamented the political nature of the court, the *Times* proceeds to declare that court's chief function *is to be political* – "The court's most important obligations include safeguarding the constitutional rights of vulnerable minorities who can't always count on protection from the political process and acting independently of political interests;" furthermore, the court should not merely "provide the last word in interpreting the Constitution" but " – and this is the key – to do so in a way that is seen as fair and legitimate by the people at large." The goal being politically-popular outcomes (popular, at least, in the eyes of the *New York Times* editorial board), it is no wonder that the *Times*' editors do not see *process* as essential but focus on the *outcomes* – the recent *Dobbs* decision that overturned the federal right to an abortion being a focus of particularly intense ire.

Yet, it is simply impossible to fit the square peg of "due process" into a round hole of politically-desired decisions. Something has to give – for a simple reason that "due process" should prevent judges from being parties to the case argued before them (that's what recusal is all about). Judges are supposed to impartially evaluate respective merits of plaintiff's and defendant's argument, and rule accordingly –

counter to their political instincts, if necessary. That's what impartiality is all about. Concocting judges' own, "*sua sponte*" argument so as to have the excuse for deciding a case for the favored party (as judges routinely do under protection of *Pierson v Ray*), nullifies "due process," turning judicial decision-making into an arbitrary, "corrupt and malicious" action and resulting in "the rule of judges rather than the rule of law" presumably lamented by the *New York Times*.

Time and again when covering courts, the *New York Times* bashes the political nature of judicial decision-making, blaming it for the decisions it does not like – and yet as invariably, it adamantly refuses to shed light on *Pierson v Ray* – the Supreme court decision that permits arbitrary, and therefore politically-driven – judging. The latest editorial sheds light on the dilemma that faces the *New York Times* and their journalistic mainstream ilk: honest judging sounds good on paper, but it cannot guarantee "progressive" outcomes that the paper desires. And despite the loud protestations of the *Times*' editorial board, the paper is rooting for outcomes, process be damned. Hence, outcomes should be attained by legal hook or by legal crook, *Pierson v Ray* which legalized legal hooks and crooks of arbitrary, "*sua sponte*" judging being an excellent tool insofar as the *New York Times* is concerned. The trick is to pack the court with the right kind of judges via some "structural reform – expanding the number of justices, imposing term limits or stripping the court of jurisdiction over certain types of cases" and let them judge as they see fit. But depriving judges of the ability to use their own, "*sua sponte*" argument so as to become parties to the case argued before them while avoiding recusal, is not on the list of reforms, for a simple reason that "due process" is not what the *New York Times* wants. It only wants due, "progressive" outcomes.

I would suggest that, before writing the next editorial on the subject of judiciary, the *New York Times* editorial board

visits a shrink and cures itself of its schizophrenia. After the schizophrenic urge to reconcile the irreconcilable – the politically-favored judicial outcomes with non-political, straightforward, trustworthy judicial process – is gone, the paper should decide what it wants: honest (because impartial) adjudication of parties' argument that does not guarantee the outcome, or politically favored outcomes via a crooked process that involves judges putting their own, bogus argument on the scale of justice in violation of "due process".

Only having realized that it has to settle either for the "rule of law" or for preferred outcomes, but cannot have both, can the paper proceed with editorializing about judges – of necessity focusing on *Pierson v Ray* and the "corrupt and malicious" judging it permits, which is at the root of all the malfeasance in the nation's courts, be they "Supreme" or not – because what we have, courtesy of *Pierson v Ray*, is indeed the "rule of judges and not the rule of law." .

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