

## The Supreme Court and Our Future

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If a century ago one had predicted the Supreme Court's next hundred years, one would no doubt have gotten it wrong. Within five years of such a forecast, the Court would have held that segregation was consistent with the equal protection of the law; sixty-three years later, that it was not. Within six years, the Court would have begun the transformation of the 14th Amendment from a guarantee of equality to a guarantor of economic liberty; forty-six years later, on that front at least, it would have beaten a full retreat. Within some sixty years, it would have launched a different activist campaign, this time to protect the rights of some of the weakest in society; but as the century closes, that battle too has come to an end. At best, it was a century of cycles; at worst, it was confused.

Of a prediction of the next hundred years, there is little reason to expect anything more. At most we can speak about the very near future, a clue to which may be found in the very recent past. Consider just one case. It is the law that a criminal conviction obtained by general verdict cannot stand if one of the grounds upon which the conviction *could have* rested is unconstitutional or in some other way illegal. As the Supreme Court held in *Yates v. United States* in 1957, "a verdict [must] be set aside in cases where the verdict is supportable on

one ground, but not on another, and it is impossible to tell which ground the jury selected."

In *Griffin v. United States*, decided this Term, the Court considered the types of insupportable grounds that are within the rule of *Yates*—specifically, whether the *Yates* rule covers a ground that is insupportable because the evidence it relied upon is insufficient as a matter of law. In an opinion written by Justice Scalia, the Court (without dissent) said that it did not. The *Yates* rule, the Court held, applied to "legal errors" only, and for these purposes, insufficiency of evidence is not "legal error." True, the Court said, in some cases the Court has held that insufficiency of evidence is legal error; indeed, it is *constitutional* error. But even if sometimes insufficiency of evidence is "legal error," sometimes it is not. In this case, not. As the Court viewed it, the difference was mere "semantics."

For what *was* important was that "what the petitioner seeks is an *extension* of *Yates*' holding . . . to a context in which we have never applied it before." *Griffin* is a criminal (or at least may be); with respect to criminals, the Constitution now protects only what it now protects; its protections will not be extended to something more.

Which is not to say that they will not be *contracted* to something less. The recent past is littered with examples of the Court's willingness to change constitutional law when change means less protection for the currently disfavored, and more protection for the currently favored: Less protection for criminals, for the poor; more protection for states, for racial majorities, and for the police. For this is no less an activist Court than courts before—activist both in the sense that it constructs constitutional barriers to the decisions of democratic majorities (by resisting affirmative action and creating "states' rights"), and in the sense that it pursues its reconstructive task at an ever increasing rate.

Conservatives argue that such change is conservative because *restorative*, but restorative to what end? Even if the Constitution has been illicitly "amended" by past activist Courts, does anyone really believe that the public views this current restoration as a reaffirmation of original principles rather than as yet another illicit and



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political attempt by yet another president to "amend" the Constitution through judicial appointment? Will the result of this restoration be a public reawakened to the possibility of constitutional *law*, or a public increasingly cynical about constitutional *politics*? The Court calls itself conservative, but we have known conservatives. Justices Harlan and Frankfurter were conservatives. These justices are not. This Court, like the Court before it, like the Court before it, and like the Courts before it, has its own conception of a properly activist role, and with a certain unseemliness, is quite eagerly pursuing it.

The result will be a relatively more statist society, though statist in an oddly skewed sense. Government will have more power as individual rights are curtailed; but less power as majority rights (resisting affirmative action) and states' rights (resisting regulation by Congress) are expanded. (The one exception may be economic and property rights. There, individual rights may increase—a gain for some of those already possessed of the most power in society.) And barring calamity, this will be the pattern for at least the next two decades, for the conservatives have succeeded in lacing the court with youth—the average age of the last five appointees is fifty-three, the average retirement age over the century is seventy-two; the most recent addition, Justice Thomas, will just speed the reform.

Beyond substance, however, there is something particularly arresting about

the form of the Court's most recent turn, a change that should lead some of us to ask whether we give the Court more attention than is due. Few doubt that the *legal* work-product of the Court has declined, as less is done by Frankfurters, or Jacksons, or Stones, or Holmeses, and more by clerks—our students, good students, but students just two years out of law school. Similarly, few doubt that the *political* product of the Court has increased, due again to who the Justices are not, and to what they have let their clerks become. Both trends should suggest the intellectually barren terrain that is the Court.

And yet the largest category of legal scholarship continues to be directed to the Court, reflecting on its work, its method, and its mission. Why? For what is most striking about this Court is its complete disengagement from anything like a reflective perspective on its work. While the academy continues to grind out essay upon essay struggling with the substance and theory of much of the Supreme Court's job (over the past decade, for example, there were some 1600 published articles discussing theories of constitutional interpretation), there is an inescapable sense that this is not a perspective that the Court finds either interesting or important, let alone comprehensible. Instead of advancing a theoretical debate to advance the practice for which it is a debate, we have engendered a theoretical debate for theory's sake alone. The rod has disengaged from the piston.

No doubt this is in part due to a change in our own work-product as much as to a change in the Court, as academics flee the law for economics, or philosophy, or literature, and as more and more of our work appears political, if only because it reveals the premises that we no longer share. But in part too it is due to an attitude of the current judiciary that abjures theory for approaches more pedestrian, that scorns the reflective to embrace the reactive, that has given up any sense that there is sense to be made of the practice as a whole, or at least that part which is the Court's practice.

My point is not about blame. It is instead to ask how we should respond to this current separation, whatever its cause. When the academy and the Court were closer, both in attitude

and in interest, we may well have been right endlessly to engage questions of constitutional theory or theories of interpretation. These are, after all, questions about a certain kind of interpretive *practice*, and make sense as questions so long as they remain questions of that practice. But do they make sense when at most their answers play to an audience of none? Do they make sense in a world where *most* of what law routinely does it does quite poorly, and where they address not at all issues about what law routinely does? Is it possible that our greatest contribution is no longer to constitutional theory, but to ordinary practice? To the questions raised and yet unanswered by Zeisel and Kessler, rather than Dworkin and Rawls?

Whatever the Court will become a century from now, we know what it will not be for the next generation. It will not be the institution that advances this nation's, or law's, ideals. At best, it will wait for democrats to do that; at worst it will lend aid to the resistance. We should accept this and move on to more fertile ground.