

THE JUDICIARY: CONSERVATISM'S LOST BRANCH

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The Supreme Court is a relatively weak political institution with a structural bias toward liberal causes. Indeed, it appears to have been fairly weak throughout most of our history. For about a twenty-year period, from *Brown*¹ to *Roe v. Wade*,² one could argue that the Court was reasonably powerful—although even then, it largely gained its power as part of a much broader movement. The Court played a useful role in advancing the liberal agenda, breaking new ground in certain areas,³ and serving as a backstop to the other branches when particularly contentious issues arose.⁴ With the possible exception of those two decades, however, the Supreme Court has not made much of a difference in American political life, particularly for conservatives. Thus, conservatives should direct their energies toward political, rather than judicial, change. At most, conservatives can prevent the judiciary from remaining a liberal bastion after the forces of liberalism have been routed. Term limits for federal judges are a step in this direction.

During the Reagan-Bush era, liberal constitutional doctrines were not rolled back to the extent hoped for by many in the conservative movement. For example, in the area of separation of powers, the “Rehnquist Court” handed down *Morrison v. Olson*,⁵ which upheld legislation that required the Executive to make a showing of “good cause” before it could dismiss the independent counsel—one of the Executive’s “inferior officers.” In *Casey v.*

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1. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding that segregation of white and black children in state public schools solely on the basis of race denies black children the equal protection of the laws guaranteed by the Fourteenth Amendment).

2. *Roe v. Wade*, 410 U.S. 113 (1973) (holding that a right to abortion is grounded in a constitutional right of privacy).

3. *See, e.g., Baker v. Carr*, 369 U.S. 186 (1962) (holding that claims concerning legislative apportionment are justiciable).

4. *See, e.g., Katzenbach v. Morgan*, 384 U.S. 641 (1966) (holding that a congressional ban on state English literacy tests for voting was constitutional under the Congressional Enabling Clause in Section 5 of the Fourteenth Amendment, even though the Court itself would not have found that the these literacy tests violated the Equal Protection Clause).

5. 487 U.S. 654 (1988) (holding that the independent counsel provisions of the Ethics in Government Act of 1978 do not violate the Appointments Clause of Article III or the principle of separation of powers).

*Planned Parenthood*⁶ and *Lee v. Weisman*,⁷ both decided two Terms ago, the Court failed to reverse decisions that many conservative critics of the Warren and early Burger Courts thought should have been overturned. In criminal justice, though some practical effects of Warren and Burger Court decisions were significantly limited,⁸ the basic structure erected by liberals remains. Why was there no conservative reclamation of the Court during the Reagan-Bush era?

The first reason that a fundamental conservative shift on the Court never materialized over the last dozen years can be attributed neither to doctrinal limitations, nor to the character of particular Court appointments. It was a lack of *political* support that ultimately halted the conservative movement. Despite Republican victories in three consecutive presidential elections, conservatives controlled only one branch of Congress, the Senate, for only six years. During this time, conservatives did not dominate the constitutional agenda. For example, Congress reauthorized the independent counsel statute,⁹ even though conservatives opposed it. Then in 1987, conservatives failed to secure the confirmation of Judge Robert Bork, who espoused the doctrines that legitimized a constitutional rollback,¹⁰ to the Supreme Court.

If there had been a political rollback, a constitutional rollback would have followed. A conservative revolution throughout the nation would have resulted in a conservative Court. Without a conservative political revolution, however, a conservative judicial revolution was unlikely to follow. The judiciary is fundamentally dependent on the other branches of government, especially Congress, which is, as the *Federalist Papers* predicted, the most powerful arm of government.¹¹

The most obvious recent example of the Court's dependence on Congress is in the field of civil rights. Conservatives have long complained that bureaucrats and judges have distorted the origi-

6. *Casey v. Planned Parenthood of Southern Pennsylvania*, 112 S. Ct. 2791 (1992) (holding that *stare decisis* required a reaffirmation of *Roe v. Wade*, and establishing the "undue burden" test for abortion questions).

7. 112 S. Ct. 2649 (1992) (holding that a public school cannot provide for "non-sectarian" prayer led by a clergyman selected by the school).

8. See, e.g., *Illinois v. Gates*, 426 U.S. 213 (1983) (adopting a lenient "totality of the circumstances" analysis for probable cause determinations).

9. Ethics in Government Act of 1978, 28 U.S.C. §§ 49, 591-99 (1982).

10. See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

11. See *THE FEDERALIST* No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) ("In republican government, the legislative authority necessarily predominates.").

nal 1964 Civil Rights Act¹² in the direction of encouraging quotas. Finally, during the late 1980s, the Court interpreted the Act to disfavor quotas.¹³ Congress responded by passing legislation that overruled six anti-quota Supreme Court decisions.¹⁴ Quotas were encouraged after all, despite conservative opposition. In the aftermath of a legislative reversal of that magnitude, it is difficult to expect that courts will lead the charge in a conservative direction. The Court recently pulled back even further in its civil rights jurisprudence. For example, *City of Richmond v. J.A. Croson Co.*,¹⁵ an important anti-quota decision, was significantly narrowed by the decision in *Metro Broadcasting v. FCC*¹⁶ the following Term. In the past twelve years, the Supreme Court has not functioned as a decisive political institution. Rather, it has been a weak and dependent entity, as its "follow the leader" attitude toward Congress makes clear.

A second reason for the failed conservative rollback is that the Court, as a political institution, tends to aid liberal causes. There are several reasons for this. First, members of the cultural elite are overwhelmingly liberal, and the lawyers populating the Supreme Court are part of that elite. Consequently, a strong tendency toward liberalism permeates the Court. Furthermore, as David Bryden noted in a recent issue of *The Public Interest*, almost all conservative victories in the Court are *defensive* victories.¹⁷ They generally represent failures by liberals to limit congressional or state legislative efforts in certain areas.¹⁸ In contrast, liberal victories in the Court are *offensive* victories. They generally

12. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in 42 U.S.C. § 1981).

13. See, e.g., *Wards Cove Packing v. Antonio*, 490 U.S. 642 (1989), *superseded by* the Civil Rights Act of 1991, Pub. L. No. 102-66, § 101, 105 Stat. 1071 (holding that statistical evidence showing that a high percentage of nonwhite workers in an employer's low-skill jobs and a low percentage of such workers in high-skill and management positions did not violate the Civil Rights Act of 1964).

14. See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in 42 U.S.C. § 2000e-16 (West Supp. 1992)).

15. 488 U.S. 469 (1989) (striking down a municipality's minority set-aside plan in its construction industry).

16. 497 U.S. 547 (1990) (upholding a minority set-aside plan in broadcast licensing on the grounds that the prospect of encouraging diversity of programming is a compelling governmental interest, and that the quota system was narrowly tailored to remedy the effects of prior discrimination).

17. David P. Bryden, *Is the Rehnquist Court Conservative?*, THE PUBLIC INTEREST, Fall 1992, at 73. See also Lino A. Graglia, *Do Judges Have a Policy-Making Role in the American System of Government?*, 17 HARV. J.L. & PUB. POL'Y 119 (1994).

18. See, e.g., *Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (upholding the power of the federal government to prohibit federally funded family planning programs from counseling or providing information about abortion); *Dandridge v. Williams*, 397 U.S. 471 (1970) (up-

establish rights precluding Congress or state legislatures from acting in certain ways.¹⁹ Thus, when conservatives are victorious, the victory simply preserves the possibility of winning in state legislatures or in Congress. When liberals win a Court decision, however, an issue tends to be settled and removed from the political process.²⁰ Even though liberals lack political support for most of the gains they have achieved in the Supreme Court, they do not need popular backing for their agendas ultimately to be carried out. Conservatives do, given the nature of their "victories" before the Court.

Given this analysis, proponents of a limited constitutional government should not be overly concerned about the judiciary. The "Clinton Court" presents less of a threat to conservatives than the Clinton Presidency or the Democratic Congress. After all, the Court has never, in recent times, been hospitable to conservative interests. Though judicial triumphs are helpful at the margins, no substitute exists for real political victories. At the end of the day, politics matter the most, and democracy, for better or worse, does prevail. This is where conservatives must focus their efforts. The real battles over the most contentious issues will be waged during presidential elections or before Congress and state legislative bodies. They always are.

Further, if one contends as I do that fundamental reforms are needed in our method of government, focusing merely on judicial doctrines is not particularly productive either. Instead, we need to change the real constitutional balance of power. Thus, we must think freshly in the spirit of the *Federalist Papers* about what Madison called "republican remed[ies] for the diseases most incident to republican government."²¹ We must consider populist remedies for the diseases of populist government and radical remedies for the diseases of radical government. If conservatives wish to attempt any change in the judiciary at all, the most worthwhile change probably would be to implement term limitations for federal judges.

holding the power of the States to set maximum amounts for welfare benefits regardless of family size or need against an equal protection challenge).

19. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (striking down state regulations on abortion based on the constitutional right to privacy).

20. See *id.* at 75-76 (explaining that "a 'liberal' decision constitutionalizes a portion of the liberal agenda, trumping any conservative victory in the political arena").

21. THE FEDERALIST No. 10, at 84 (James Madison) (Clinton Rossiter ed., 1961).

Federal judicial term limits merit consideration because they address the question of institutional incentives and the balance of political forces. Given the federal judiciary's current, expansive understanding of the Constitution, no good reason exists for allowing federal judges to serve without term limits. According to the *Federalist Papers*, the constitutional grant of lifetime tenure²² is based on a particularly restrained understanding of the Constitution and the function of the courts.²³ Lifetime tenure is not premised on a belief in a "living Constitution" that can expand and contract at judges' will. If we are to have a living Constitution, as the liberals desire, we should have a living judiciary as well.

Term limits for federal judges will prohibit liberal judges from ensconcing themselves as lifetime Platonic Guardians who can create constitutional rights and alter the Constitution's structure at whim. Given that liberal victories in the Supreme Court are more enduring than those won by conservatives,²⁴ it is as important to prevent liberals from remaining for too long on the federal bench as it is to place more conservatives on it. This is the appeal of term limits for federal judges, which will cause more turnover and thus perhaps more diversity in the federal judiciary. Since conservatives can never truly capture the courts, the best they can do is to keep it from serving as a redoubt for liberals.

22. U.S. CONST. art. III, § 1.

23. See THE FEDERALIST No. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that [judges] should be bound down by "strict rules and precedents which serve to define and point out their duty in every particular case that comes before them").

24. See Bryden, *supra* note 17, at 75-76.

