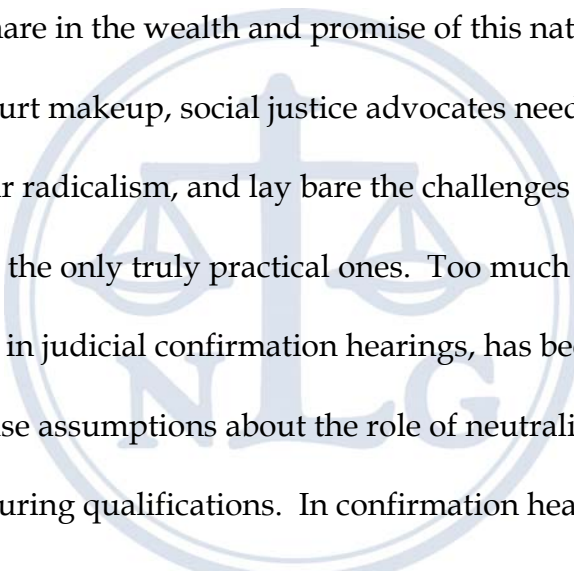


RECLAIMING THE JUDICIARY: NOTES FOR THE NEXT SUPREME COURT NOMINATION

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We need Supreme Court Justices who view the Constitution as a vibrant document and powerful defender of the oppressed, embodying sometimes conflicting principles: protecting minority voices and views because the system is far from perfect, but also embracing a vision that government can be a force for equalizing society and allowing everyone to share in the wealth and promise of this nation. As we enter a new battle over Supreme Court makeup, social justice advocates need to return to first principles, embrace their radicalism, and lay bare the challenges and the necessarily broad solutions that are the only truly practical ones. Too much of the language of social debate, including in judicial confirmation hearings, has been ceded to the right wing. It has created false assumptions about the role of neutrality in judging and a false construct for measuring qualifications. In confirmation hearings, the view of the Constitution as a document stuck in the 18th Century, informed only by the experience of privileged straight white males, is seen as neutral. Arguments are being waged on their terms, with “neutral application of the law” being the hallmark of judicial qualification, and colorblindness being the primary attribute of equal protection. Progressives need to confront directly the right wing’s language on race, diversity, and the role of law and the courts. Until then, the left will continue to see troubling appointments and decisions.

Beyond failing to protect minorities, the Court has the power to block social progress. In perhaps its most discussed decision this term, the Court ruled that corporate money equals speech, and that this “corporate right” is above regulation by

the people.¹ Historically, the Court's legacy includes such propositions as wage and hour laws unconstitutionally infringe on the rights of bosses to set the terms of employment,² and free states have to recognize the "property rights" of slaveowners.³ Next, we should expect challenges to healthcare reform, the Voting Rights Act, and corporate regulation of any stripe. We need Justices who understand that Constitutional principles evolve with time, and who know the difference between protection of the oppressed and the manipulation of core principles that results in "corporate personhood" and other legal fictions from a Court that betrays its promise.

Lessons from the last nomination

It is impossible to escape noting, at least initially, that many on the left were disappointed by the squandering of the opportunity presented by Justice Souter's decision to retire from the Supreme Court. The Bush 41 appointee was no liberal, and many had hoped that President Obama would bring the Court slightly closer to balance by appointing a progressive voice. Although the highest hopes in this regard appear to have been frustrated, with her first term still in process, judgment on Justice Sonia Sotomayor is rightly reserved. Her confirmation, on the other hand, deserves thoughtful critique before we repeat the process.

¹ *Citizens United v. FEC*, 558 U.S. --- (Jan. 21, 2010).

² *Lochner v. New York*, 198 U.S. 45 (1905). The Court also never rejected the doctrine that unions were unlawful conspiracies against this same right of the employer. See Patrick Hardin, *The Developing Labor Law* (2001) at 4-5, citing "the Philadelphia Cordwainers case," *Commonwealth v. Pullis* (Phila. Mayor's Ct. 1806) (reprinted in 3 A Documentary History of American Industrial Society 59-248 (1958)) and *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111 (1842).

³ *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) ("the Dred Scott Decision").

First, there was the attack on empathy. Loud voices in the conservative and mainstream press and political establishment expressed outrage at President Obama's claim to value empathy in a jurist.⁴ Then, there was the question of background, and the "wise Latina woman" comment.⁵ Senators pressed her again and again, always with the implicit assumption that a background like hers is somehow suspect, and that acknowledging a background like hers is tantamount to a promise to judge unfairly. Ultimately, nominee Sotomayor had to distance herself from the trait of empathy⁶ and from the notion that her background is an important factor in decision making, claiming instead a "fidelity to the law."⁷

Those attacks and Justice Sotomayor's response, which has become the only acceptable one under the current version of the confirmation process, each proceeded on utterly false premises. It simply is not possible to determine judicial inclinations by whether or not a nominee acknowledges her background. Obviously, one's experiences influence personal and political views, but in a way that is so complex and unpredictable as to render consideration of the influences themselves essentially useless in a confirmation setting. Just imagine how strongly the unqualified psychoanalysts in the Senate might oppose the nomination of an African American who grew up impoverished in the segregated south -- until they learned the nominee was an arch-conservative like Justice Clarence Thomas. Recognizing the race, sex, and background

⁴ See e.g., "The 'Empathy' Nominee," *Wall Street Journal*, May 27, 2009.

⁵ "'Latina woman' Remark May Dominate Sotomayor Hearings," *CNN*, May 28, 2009.

⁶ Ari Shapiro, "Sotomayor Differs With Obama On 'Empathy' Issue." *National Public Radio*, July 14, 2009.

⁷ "Sotomayor Pledges 'Fidelity to the Law' During First Day of Confirmation Hearing," *Fox News*, July 13, 2009.

of a nominee, and acknowledging that we are all, in some sense, the product of our influences, simply does not tell us anything useful about what sort of Justice a nominee would be.

In the end, the only revelation from the focus on Justice Sotomayor's background was that a large number of people in positions of power (in the Senate and media, most demonstrably) still think that the only neutral background is that of a financially secure white male (who is presumably straight, although we have yet to see a President willing to test that bias). To some, growing up with those experiences is "typical" and rears one to be fairly devoid of "biases" about how the world and the law works. In reality, only a minority of our nation actually experiences this sort of life and set of life-lessons, and thus, all things being equal, most of us should not expect to be best served by justices who have such divergent understandings.

"The law" is only understandable when filtered through core values

Senators and commentators rely on a false bifurcation between judges who would "apply the law" and those who would allow "ideology" to play a role.⁸ But the challenge of the law, and especially Constitutional principles, is that the dry language has to be filtered through ideology and personal experience to be given meaning in the

⁸ See e.g. "Sotomayor Pledges 'Fidelity to the Law' During First Day of Confirmation Hearing," Fox News, July 13, 2009; "Senators Debate Sotomayor's Qualifications," *upi.com*, Aug. 5, 2009 ("Sen. Richard Burr, R-N.C., said he would vote against her nomination because 'she has not stuck to the letter of the law.'") The claim is nothing new to the Sotomayor hearings. See e.g. John S. Baker, Jr., *Ideology and the Confirmation of Federal Judges*, 43 S. Tex. L. Rev. 177 (2001); Richard D. Freidman, *Tribal Myths: Ideology and the Confirmation of Supreme Court Nominations*, 95 Yale L.J. 1283 (1986).

real world. No Supreme Court Justice can understand a “hostile work environment”⁹ without some ability to put oneself in the place of the employees (i.e, practice empathy). Moreover, Justices are called upon to divine deprivations of “equal protection of the laws”¹⁰ and of “liberty . . . without due process of law,”¹¹ and to strike down statutes “respecting an establishment of religion [or] prohibiting the free exercise thereof,”¹² to give just a few examples. A purely abstract and theoretical knowledge of these terms simply is not enough when confronting the challenges of a complex case.

For example, in 2007 the Supreme Court held that nondiscrimination policies are not entitled to Constitutional protection as either forms of speech or means of exercising the right to freedom of association.¹³ That decision was possible only because the Justices lacked an understanding of what real-world struggles against discrimination look like.¹⁴ In other words, “the law” lacks any real meaning unless the judges have a visceral understanding of both basic principles and what it means to practice them.

The difficulties inherent in giving meaning and effect to the esoteric words of the Constitution, statutes, and precedential decisions is made harder by the violence done to the language and concepts by a concerted right-wing effort to manipulate the terms of the debate. This is most apparent in the insistence upon governmental “color-blindness” and hostility to any governmental program that recognizes race, even for the

⁹ 42 U.S.C. § 2000e; *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).

¹⁰ U.S. Const., Amend. XIV.

¹¹ U.S. Const., Amend. V, XIV.

¹² U.S. Const., Amend. I.

¹³ *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47 (2006) (“the conduct regulated by the Solomon Amendment is not inherently expressive”).

¹⁴ See, Zachary Wolfe, “The Right To Say No To Discrimination: A Commentary on *Rumsfeld v. Fair*,” 2 Mod. Am. 3, 30-31 (2006).

purposes of creating diversity or removing historical obstacles. It is this ideology that made possible the Court's 2007 holding that forbade Seattle's considered efforts to create racially diverse schools when possible¹⁵ as well as the Chief Justice's recent *dicta* questioning the validity of the Voting Rights Act and setting forth the test that "the Act imposes current burdens and must be justified by current needs,"¹⁶ to give just two more examples. Importantly, we know where the notion that government cannot be involved in actively supporting equality comes from: today's conservative rubric for interpreting the equal protection clause is still rooted in *Plessy v. Ferguson* and the rejection of the claim "that social prejudices may be overcome by legislation."¹⁷ The bottom-line goal of the white supremacists, to keep government out of the business of ensuring equality, has not changed. Other modern democracies soundly reject that goal, as reflected in international legal instruments that call for states to take affirmative steps to secure real equality¹⁸; but conservative Justices have kept it alive from *Plessy* until today.

Masked as expositions of "the law," these doctrines are in fact expressions of a conservative ideological belief that the Constitution requires government to be ignorant of each individual's race and the role of racism in society as a whole. Under their view,

¹⁵ *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 511 U.S. 701 (2007).

¹⁶ *Northwest Austin Muni. Util. Dist. No. 1 v. Holder*, 577 U.S. ---, 129 S.Ct. 2504, 2512, 174 L. Ed.2d 140, 150 (2009).

¹⁷ *Plessy v. Ferguson*, 163 U.S. 537, 551 (1986).

¹⁸ See e.g. Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 993 U.N.T.S. 3 (1966).

governmental efforts that take seriously the promise of *Brown*¹⁹ and other iconic legal principles, and attempt to create opportunities for school children of different races to learn together or voters to pool their electoral power, are unconstitutional simply because consideration of race is part of the policy. They have convinced people that “reverse racism” is the most serious racial problem of the day, despite hard evidence to the contrary, even if one were to accept the dubious premise.²⁰ These are not propositions that appear anywhere in the text of the Constitution itself. The very people who celebrate “original intent” when referring to the original text and first set of amendments (apparently untroubled that the original intent was to keep voting limited to landowning white males, evade the moral challenges of maintaining slavery, and enshrine other principles that have no place in any modern democracy) ignore it when interpreting provision written a century later, insisting instead that the very legal provisions created during Reconstruction by Radical Republicans who were doing everything imaginable to empower the federal government to eliminate all vestiges of white supremacy should now be interpreted as strict limits on government’s power to eliminate the vestiges of white supremacy.

When conservatives demand that a judicial nominee “follow the law,” what they are really calling for is acceptance of the ideological baggage that the right wing has,

¹⁹ In finally prohibiting racial segregation in public schools, the Court spoke in absolute terms about the harm of segregation: “To separate [school children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954). Whether this segregation comes *de facto* or *de jure* is scarcely the point.

²⁰ See e.g. Fred L. Pincus, *Reverse Racism: Dismantling the Myth* (2003).

from the Great Betrayal²¹ to today, used to weigh down and all but incapacitate the power of the promise of legally enforced equality. It is this dynamic that progressives must confront. A Justice who sees the equal protection clause as no obstacle to governmental efforts to achieve equality is far less an ideologue than the right-wingers who think “the law” requires the opposite, absurd result.

The institution of the Court itself cannot survive the latest right-wing ideology

Conservatives have also shifted the spectrum of the types of judges we might have on the bench. The left end of who we might reasonably expect to be appointed, much less confirmed, is not only further to the right than a Warren or Burger (i.e., beyond what was the political will under Presidents Eisenhower and Nixon) but is in fact a new breed: the “democratic constitutionalist.”²² This version of a liberal jurist disclaims as hasty and ill-supported any bold declarations of rights, preferring instead to engage in dialogue with the other branches of government and civil society in order to influence public opinion, until the time comes that a declaration of rights will enjoy public support. As Prof. Rosen noted, President Obama wrote about these ideas in *The*

²¹ “The Compromise of 1877,” which resolved the disputed presidential election of 1876 by installing Hayes in office in exchange for the removal of federal troops from the south and thus effectively ending Reconstruction, is better termed “the Great Betrayal.” Some also apply the term to a Supreme Court decision twenty-two years later, when Justice Harlan -- arguably responsible for coining the notion that “the Constitution is colorblind” -- sided with the segregationists in denying relief when Richmond, Virginia closed its black high school. See e.g. C. Ellen Connally, *Justice Harlan's "Great Betrayal"? A Reconsideration of Cumming v. Richmond County Board of Education* [175 U.S. 528 (1899)], 25 J. Sup. Ct. Hist. 72 (2002).

²² Jeffrey Rosen, “What’s a Liberal Justice Now?” *New York Times Magazine*, May 26, 2009.

Audacity of Hope, where he was concerned that progressives had relied too much on the courts, and should instead focus on changing minds.²³

Whether or not that may be useful in other venues, such an approach has no place on the bench. It is the role of an independent judiciary to protect unpopular speech and behavior. One wonders what the point is of counter-majoritarian Constitutional rights and an independent judiciary if the judges are not going to enforce rights that lack majority support. But of course, no democratic constitutionalist judge would put herself in the position of recognizing the legal correctness of a minority position and thus exposing the hypocrisy of these tenets. Instead, the judge would evade ruling on the matter and “do the best we can” under the prevailing politics. This means that the democratic constitutionalist is not only exchanging enforcement of rights for dialogue, but for a false dialogue.

The left should demand the Justice it wants -- not the Justice it thinks Republicans might approve

With President Obama about to exercise a presidential power with among the most long-ranging impacts, what should be most clear to the left is that electoral politics are insufficient to fulfill our demands. To put him in office, a massive group of people became activists and community organizers, motivated by a desire to displace an illegitimate administration that violated international and domestic law²⁴ and did

²³ *Id.*

²⁴ See e.g. H. Res. 1258, 110th Cong. (Articles of Impeachment).

everything in its power to reverse decades' worth of gains earned by the labor, civil rights, feminist, LGBT, and disability movements.²⁵ But a year and a quarter into President Obama's term, we are still in Iraq under the same timetable for withdrawal negotiated by George W. Bush, the occupation of Afghanistan grows more intense, Don't Ask, Don't Tell and the Defense of Marriage Act remain the law of the land, and no one but bankers have been excited by any sort of public works or spending program despite a massive appropriation. The people were successful in restaffing the presidential office, but the real work is yet to come; and we know from the past that, as Martin Luther King, Jr., instructs, "it is the people who move their leaders."²⁶ No major change will happen unless the people press for it.

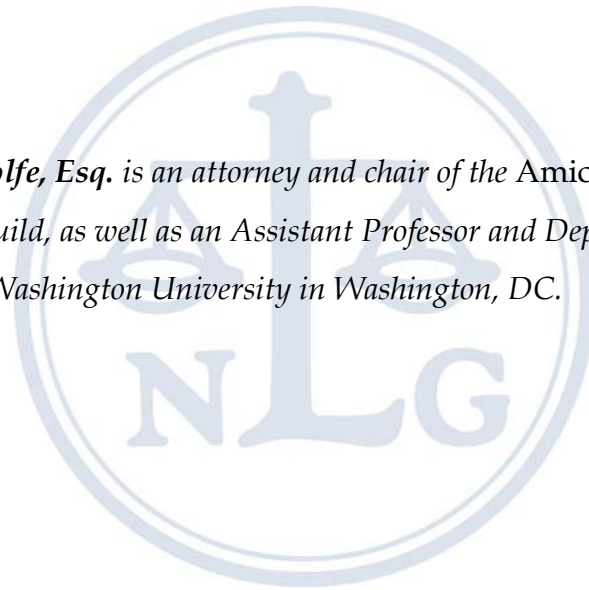
The left must not be timid in demanding a Justice with our vision of the law. It should not be content with, or even credit, superficial characteristics; and we should not be afraid to demand an ideological framework that allows for the kind of judicial interpretation the people need. Seventy-three years ago, progressive attorneys formed the National Lawyers Guild, in part to advocate for the proposition "that human rights shall be regarded as more sacred than property interests," in the words of the organization's constitution. "Our aim is to bring together all those who regard adjustments to new conditions as more important than the veneration of precedent; who recognize the importance of safeguarding and extending the rights of workers, women, farmers, and minority groups upon whom the welfare of the entire nation

²⁵ See e.g. Ann Fagan Ginger, *Undoing the Bush Legacy: A Menu for Congress* (Meikeljohn Civil Liberties Inst. 2009).

²⁶ Martin Luther King, Jr., *Why We Can't Wait* (1964).

depends; who seek actively to eliminate racism; who work to maintain and protect our civil rights and liberties in the face of persistent attacks upon them; and who look upon the law as an instrument for the protection of the people, rather than for their repression."²⁷ That is the outlook of someone qualified to be on the United States Supreme Court.

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²⁷ Constitution of the National Lawyers Guild (1937), available on <http://www.nlg.org/membership/constitution.php>