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CONSTITUTIONAL LAW AND THE MYTH OF THE GREAT JUDGE

MICHAEL S. ARIENS*

I.

Twenty-five years ago, in June 1968, lame-duck President Lyndon Johnson nominated Associate Justice Abe Fortas to replace Earl Warren as Chief Justice of the United States Supreme Court, and Texas federal appellate court judge Homer Thornberry to replace Justice Fortas. Justice Fortas's portrait made the cover of the July 5, 1968, issue of *Time* magazine under the caption, "The Changing Court." By October 1, the Fortas/Thornberry nominations were dead, and, shortly thereafter, President Johnson announced that Earl Warren would remain as Chief Justice through the end of President Johnson's term in office. In May 1969, Justice Fortas resigned from the Court.[1]

Nineteen years later, on July 1, 1987, President Ronald Reagan nominated federal appellate court judge Robert Bork to replace retiring Justice Louis Powell on the Court. Nearly four months later, the Senate voted to reject Bork's nomination.[2]

On June 14, 1993, President Bill Clinton nominated Judge Ruth Bader Ginsburg to replace retiring Justice Byron White on the

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1. Much of the information in this paragraph was taken from LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 319-58 (1990), an excellent biography of Fortas.

2. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 267-349 (1990). *See generally* ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA (1989) (describing bitter partisan battle over Bork nomination); Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1164-84 (1988) (discussing wisdom and effectiveness of using Court appointments to change political course); Stephen Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185, 1185-1201 (1988) (addressing Senate's muddled role in confirmation process).

Court.[3] On August 3, 1993, Judge Ginsburg was confirmed by a vote of 96-3, becoming the 107th Justice of the Supreme Court. As the first nominee to the Court by a Democratic President in a quarter of a century, and the first successful Democratic nominee since President Johnson nominated the late Justice Thurgood Marshall, Justice Ginsburg's is perceived by many as a symbol of the remaking the Court.[4]

In a more than trivial sense this perception is true: Justice Ginsburg's appointment will make some difference. She is only the second woman appointed to the Court and is the first Jewish Justice since Justice Fortas resigned in 1969; her work as a constitutional litigator in cases attacking discrimination on the basis of gender provides her with experience that will be helpful to her as a Justice; and her nearly thirteen years' service as a judge of the United States Court of Appeals for the District of Columbia Circuit suggests Justice Ginsburg will likely need little or no time to adjust to the Court's docket. In a larger sense, however, I think this perception is false. The thesis of this essay is that the investment in Supreme Court nominations is based on a misguided view of the Court.

II.

Justice White was the last member of the Court sitting during the October 1967 Term to retire. His retirement marks a time to reflect on the meaning and impact of the Court in American society during the past twenty-five years.

Two standard stories of the Court have emerged during this period. One story claims that a conservative majority of the Court has attempted to roll back the progress made by the Warren Court during the late 1950s and through most of the 1960s. While it has not always been successful, that conservative majority has tried its best to frustrate the advances made by racial and ethnic minorities, the poor and oppressed, and other politically powerless groups in American society, including the criminally accused. A second story

3. *See generally* Richard L. Berke, *Clinton Names Ruth Ginsburg, Advocate for Women, to Court*, N.Y. TIMES, June 15, 1993, at A1 (national edition).

4. *See Mr. Clinton Picks a Justice*, N.Y. TIMES, June 15, 1993, at A16 (national edition) (editorial) ("It is the first chance in a generation to arrest the Court's reactionary course on issues of civil rights and liberties.").

argues that the real story of the last twenty-five years is the attempt to return the Court to its proper role of interpreting the Constitution as written, not as Supreme Court Justices would prefer it be written.

For those to whom either story rings true, a Supreme Court nomination becomes a battleground[5] contested by partisans. In this zero-sum game, there must be winners and losers. There is no middle ground.

Since 1968, the Senate has refused to confirm three nominees to the Court. President Nixon's first two nominees for the seat vacated by Justice Fortas, Judges Clement Haynsworth, Jr., and G. Harold Carswell, were rejected by the Senate. President Reagan's nomination of Judge Robert Bork was also rejected by the Senate. President Reagan's subsequent nomination of Judge Douglas Ginsburg was withdrawn after it was reported that Ginsburg had smoked marijuana while a professor at Harvard Law School.

In each instance, the vote against confirmation led to the nomination and confirmation of a Justice whose decisions have been regarded as crucial by contestants for control of the Court. After the failed Haynsworth and Carswell nominations, Nixon nominated then-Judge Harry A. Blackmun. It was Justice Blackmun who wrote the majority's opinion in the 1973 case of *Roe v. Wade*,[6] an opinion that seemed unlikely from either Haynsworth or Carswell. President Reagan eventually nominated Judge Anthony M. Kennedy, whose vote was crucial in retaining the *Roe* precedent,[7] to replace Powell. Bork, of course, had stated his opposition to *Roe* before and during his confirmation hearings.

If the test of the importance of fighting nominations to the Supreme Court of the United States is the retention of *Roe* in constitutional law, my thesis may be wrong.[8] If, however, Court nominations are viewed more broadly as battlegrounds for resolving (or

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5. I suppose it was the catchiness of the phrase that led W.W. Norton, the publisher of journalist Ethan Bronner's book on the Bork nomination, to entitle it, "Battle for Justice." ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA (1989). It is this apocalyptic sense that I am trying to dispel in this essay.

6. 410 U.S. 113 (1973).

7. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2804 (1992).

8. Since *Roe* was a 7-2 decision, however, Justice Blackmun's presence on the Court was not crucial in 1973 to making a majority. As the Court changed composition over the years, Justice Blackmun's presence and vote became more important.

retaining the resolution of) contentious political issues, my thesis is defensible. I am not suggesting that members of the Court are not influenced by politics, either their own or that of the nation, and I am not suggesting that the Court does not decide political issues or issues "politically." I am suggesting the irrelevance of the Court in resolving these issues.

III.

Those who have defended or criticized the paths taken by the Court during the past twenty-five years hold two central tenets: first, both sides believe that what the Court decides has a substantial impact on the lives of Americans; and, second, both believe in the "Great Man" model of the Justices of the Supreme Court. These central tenets are usually packaged with two additional standard beliefs: a Court nominee should be the "most qualified" candidate available, and Court decisions have a particular legal and moral authority. For both parties, then, because the Court has a substantial impact on the lives of Americans, the nomination of a person to the Court is a crucial event in the governance of the United States. It is these assumptions that I contest.

One of the enduring myths of American history, including constitutional history, is that of the "Great Man" or, today, the "Great Man" or "Great Woman." The idea is that, to understand the history of America, and of other parts of the world, one needs to understand the impact made by Great Men whose actions affected the course of history. In political history, one assays the development of the United States through the lives of great Americans, from the "Founders" to Abraham Lincoln to Franklin Delano Roosevelt to John F. Kennedy. Similarly, in constitutional history, the story is told through key figures, from John Marshall to Oliver Wendell Holmes to Earl Warren.

The story of the history of the Constitution, or, possibly more accurately, constitutional law, goes as follows: from Justice Marshall's opinion confirming the Court's power of judicial review and declaring our government "a government of laws, and not of men,"[9] to Justice Holmes's dissents concerning substantive due

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9. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

process[10] and freedom of speech,[11] which would become law a generation later, to Chief Justice Warren's skill in fashioning a unanimous Court in *Brown v. Board of Education*,[12] it is the Great Judge who leads us almost inexorably down the path of progress.

The notion of the Great Judge fits within the best American romantic tradition. The very idea that one person, given the opportunity, can favorably change American society better comports with our romantic notion of both the primacy of the individual in, and the plasticity of, American society. Instead of concerning ourselves with ideas (or worse, ideologies), the myth of the Great Judge allows us to think about personalities, about history, as biography. In addition, the myth of the Great Judge permits those persons disappointed at any given time with the Court the optimism of "tomorrow."

The problem with travelling down the Great Judge-led path of progress, of course, is that we can only look behind us to see where we've been, not ahead to see where we're going. As a result, the Great Judge becomes a "Great Judge" only after the *cognoscenti* weigh in with an evaluation of the decisions of and opinions by the member of the Court, an evaluation which is then communicated to the larger public. For example, Chief Justice Marshall's only use of the power of judicial review to strike down congressional action[13] is largely accepted as both proper and necessary; the exercise by his successor, Roger Brooke Taney, of the same power in *Dred Scott v. Sandford*[14] is roundly condemned as one of the worst abuses of power in American history. Chief Justice Marshall is remembered as a Great Judge; Chief Justice Taney is remembered, if at all, only for his defense of slavery. Justice Holmes is considered a Great Judge because, during his tenure on the Court (1902-32), he looked to validate constitutionally the exercise of power by

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10. Lochner v. New York, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

11. *E.g.*, Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919); *see* Abrams v. New York, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("The best test of truth is the power of the thought to get itself accepted in the competition of the market and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.").

12. 347 U.S. 483 (1954).

13. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

14. 60 U.S. (19 How.) 393 (1857). The *Dred Scott* decision was only the second time the Court used its power of judicial review to hold unconstitutional an Act of Congress.

the state and federal legislatures. Felix Frankfurter, one of Holmes's fiercest defenders,[15] attempted to follow in Holmes's footsteps during his years as a Supreme Court Justice, from 1939 to 1962, and to judge in the same fashion, but Justice Frankfurter is not generally perceived today as a Great Judge.[16] Chief Justice Earl Warren is considered a Great Judge for his efforts in *Brown* and in interpreting the Fourth, Fifth, and Sixth Amendments, but Warren can also be viewed as one who did little to rectify issues of state-based discrimination against women, particularly in comparison to Chief Justice Warren Burger, who is not generally considered to be a Great Judge.[17] To intervene or not to intervene, then, depends on the perspective of the interested party; whether it is nobler to praise or condemn judicial intervention via the Constitution requires a judgment made after the fact based on one's (dis)agreement with the Court's latest decision(s). The Great Judge is a creature of history, not of the present.

One consequence of the myth of the Great Judge is that recent nominations to the Court have been accompanied by claims that the nominee is or is not "eminently qualified" or the "best" person for the job. If the Great Judge has the power to (re)shape history, then nominees must provide evidence of qualifications enabling them to do so. The debate is then structured along lines of merit or desert. In a country that proclaims itself opposed to class-based hierarchies, and open to all on the basis of individual effort, the

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15. *See* Felix Frankfurter, *Oliver Wendell Holmes, Jr.*, *in* DICTIONARY OF AMERICAN BIOGRAPHY 417 (Harris E. Starr ed., Supp. I 1944) (essay lauding Holmes as Justice).

16. The historical judgment regarding Justice Frankfurter is still in flux, and I am basing this conclusion on the opinions of some who may not represent the prevalent view. *See, e.g.*, Mark Tushnet & Katya Lezin, *What Really Happened in* Brown v. Board of Education, 91 COLUM. L. REV. 1867, 1883-84 (1991) (suggesting that legal scholars who were taught in 1960s have viewed Justice Frankfurter in different and lesser light than older scholars). For some, of course, the reverse is true: Justice Frankfurter was a Great Judge because he tried conscientiously to follow Justice Holmes's path, and Justices who have failed to do so, like Chief Justice Warren, are not Great Judges because they trod a different path.

17. The decisions of the Warren Court and the Burger Court regarding discrimination against women are varied in both scope and analysis. *Compare* Hoyt v. Florida, 368 U.S. 57, 69 (1961) (Warren Court) (holding constitutional Florida law that excluded women from jury selection who did not affirmatively indicate interest in serving as jurors) *with* Reed v. Reed, 404 U.S. 71, 76-77 (1971) (Burger Court) (finding unconstitutional statute that allowed court to appoint administrator rather than administratrix for no other reason than convenience of court).

"qualifications" issue fits snugly within the myth of the Great Judge. As a matter of history, however, this myth is wholly fictitious. Few Supreme Court Justices have been intellectually distinguished when nominated to the Court. But a handful of the remainder have surprised those who have studied the Court. Of the 107 Justices in the history of the Court, only the nomination of Benjamin N. Cardozo by Herbert Hoover, in 1932, was made as a consequence of a groundswell of support for the "best" judge.[18] Most Justices are chosen for the same reasons that executive officers are chosen: they have explicitly or implicitly supported the political goals of the President making the nomination, or have rendered service to the political party occupying the White House; or they represent a choice based on geographical, political, or electoral concerns.

And that is probably how it should be. We can turn to Justice Holmes as authority for the proper pithy phrase: "The life of the law has not been logic; it has been experience."[19] The President chooses from a number of qualified individuals, and the determining factor is often based on "extralegal" or "political" reasons, not because the nominee is a "Great Man" who will become a Great Judge.

One reason why the Great Judge model is favored is that this better lends itself to the authoritativeness of the Court. If the Court was regarded as the least dangerous branch of government because it was possessed of neither purse nor sword,[20] its decisions remained authoritative because they were based on "neither FORCE NOR WILL but merely judgment."[21] In other words, what the Justices on the Court do in deciding cases is different from what Congress or the President does in making or enforcing laws. This difference suggests that the Court's interpretation of the Constitution *is* the Constitution, and thus an authoritative declara-

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18. Arguably, President Hoover's nomination of Charles Evans Hughes as Chief Justice in 1930 can, in hindsight, be placed in that category, but Justice Hughes's nomination surprisingly was opposed by a substantial number of senators. The vote to confirm Hughes was 52 in favor and 26 opposed.

19. OLIVER W. HOLMES, THE COMMON LAW 1 (1881). The phrase is used here in a sense much different than Justice Holmes probably intended.

20. THE FEDERALIST No. 78, at 137 (Alexander Hamilton) (John P. Kaninski & Richard Leffler eds., 1989).

21. *Id.*

tion of our fundamental form of government. Deference to this authority is based on the Great Judge model, because the Great Judge exemplifies all the best traits of an expert. All judges, however, are imbued with the authority of being the "expert" on law. What the Great Judge model suggests is a further kind of authority in the Supreme Court: Not only does the Court possess an authority to interpret law (or the Constitution, or constitutional law), but what the Court does deserves more respect. In 1962, the late Alpheus T. Mason, a noted political scientist whose many works focused on the Court, wrote, "[The Supreme Court's] decisions, based on reason and authority, have a moral force far exceeding that of the purse or sword."[22]

The "moral authority" claim made by Mason has been greatly contested over the past twenty-five years, from both the left and the right. In some sense, though, the contest has not been about the truth of Mason's claim, but about the application of the claim to the "Warren" Court, the "Burger" Court, or the "Rehnquist" Court.[23] That is, the contest is about *which* decisions are properly understood as morally authoritative, not *whether* any decisions should be so considered.

This contest for moral authority in the Court is, in turn, a consequence of the view that the decisions of the Court have a substantial impact on the lives of Americans. Clearly, in academic circles, constitutional law is accepted as one of the most "important" areas of law. The subject is no longer about the Dormant Commerce Clause or interstate taxation, but about the most precious rights and liberties in our constitutional constellation. More popularly, the Court is treated as an important journalistic beat, as "news" which affects us all.

Again, in some sense this is true. Whether practitioners of Santería will be allowed to kill animals ritually as part of a religious sacrifice practically matters to only a few of us, but may mean something about the manner in which more persons may exercise their religious beliefs.[24] The expenditure of monies by the federal

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22. ALPHEUS T. MASON, THE SUPREME COURT: PALLADIUM OF FREEDOM 178 (1962).

23. These terms are, of course, extremely misleading, but are themselves evidence that the Great Judge model is pervasive in constitutional law.

24. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2233-34 (1993) (holding unconstitutional city ordinances prohibiting animal sacrifice).

government to assist a deaf student attending a religious school affects that student, others similarly situated, and those of us who pay federal taxes.[25] In a larger sense, however, this perception is terrifically misleading. The top-down approach of political history has taken a beating from social historians. Yet this seems to be ignored when discussing constitutional law.

The authoritativeness of a Supreme Court decision, particularly its moral authoritativeness, depends little on what the Court says. Instead, the decision's authoritativeness depends on the reaction of both those who must implement the constitutional law (or rule) and the citizenry. The value of the *Miranda*[26] "warning" in ensuring constitutional liberties, or the Fourth Amendment's requirement of the existence of probable cause before engaging in a search or seizure, depends upon the police officers who implement those constitutional rules and upon the judges who must ascertain whether the officers are abiding by the rules. Persons who disagree with the Court's decisions concerning prayer in public school either look for ways around the decisions or ignore the Court.[27]

I think it highly unlikely that persons decide to accept a decision of the Court simply on the basis of the legal or moral authority of the "Great Judge." Instead, if a decision reaches public consciousness, our felt political or philosophical sense will give us a standard by which to judge the Court's ruling. In many areas of constitutional law, I am confident that the public's overall trust in the Court's authority or expertise leads the public to accept unthinkingly the Court's ruling. The more controversial the issue, however, the greater the likelihood that the Court's decision will be accepted not because it has been rendered from the highest court in the land empowered with the authority to interpret the Constitution, but for one of four reasons: (1) the decision is in accordance with our political or philosophical views; (2) the executive branch

25. *See* Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462, 2469 (1993) (upholding against constitutional challenge based on establishment clause, federal and state laws providing deaf student with interpreter, even though student attended Catholic high school).

26. Miranda v. Arizona, 384 U.S. 436, 467-72 (1966).

27. *See* Lubbock Civil Liberties Union v. Lubbock Ind. Sch. Dist., 669 F.2d 1038, 1039-40 (5th Cir. 1982) (noting that school policy allowing religious gatherings and school prayers violated Establishment Clause, and that such gatherings and prayers continued long after school district adopted policy forbidding such activities).

has decided to enforce the Court's decision by force; (3) on balance, the costs of protesting outweigh the benefits; or (4) the decision makes no difference to us. The romantic notion of the Great Judge, then, is dangerously misleading.

In the first two cases, the authority of the Supreme Court, or more romantically, the influence of the Great Judge, makes no difference. We either agree with the result, or the President, not the Court, forces us to agree. The third case requires us to make a utilitarian calculation concerning resistance to the Court's decision. When the Court issues a new rule based on the Constitution, the costs of protesting are relatively high. Reversing this rule requires either a constitutional amendment[28] or a change (or changes) in the composition of the Court.[29] The benefits are usually low, unless the resister is either entwined within the rule or convinced that the decision so tugs at the resister's political or philosophical foundations that resistance is necessary. In the case in which the costs outweigh the benefits, then, protest may be heard but active resistance is unlikely. Acceptance occurs as a result of this internal calculation, not as a result of deference to authority. In the case in which the benefits outweigh the costs, recent history indicates that the Court's legal and moral authority will not settle the controversy, but may in fact lead to greater controversy.[30]

Most important, however, is that these decisions do not affect the way most of us live our lives. Most Americans are unable to name any of the Justices of the Court and are probably even more unlikely to be able to name a decision or state the holding of any case decided by the Court during a given Term.[31] While this lack of knowledge may be traced to a fundamental ignorance of our demo-

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28. In only four instances has the Constitution been amended to reverse a ruling by the Court. *See* U.S.CONST. AMEND. XI (overruling Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793)); U.S. CONST. AMEND. XIV (overruling Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857)); U.S. CONST. AMEND. XVI (overruling Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895)); U.S. CONST. AMEND. XXVI (overruling Oregon v. Mitchell, 400 U.S. 112 (1970)).

29. For those engaged in impact litigation, another avenue is to ask the lower courts to interpret holdings of the Court in a narrow fashion.

30. *See generally* GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991) (suggesting that Court's decisions in *Brown* and *Roe* did not resolve contentious political issues involved in those cases and may have had opposite effect).

31. The October 1992 Term may be a good test of this thesis.

cratic system, I think a better explanation is that the Court's decisions really have no impact on our lives. These decisions are irrelevant in two ways: first, the decisions rarely touch any aspect of the way in which we live; and, second, the decisions, if concerning the way in which we live, require the assistance of intermediaries. For example, if the Court were to decide that police officers could "stop-and-frisk" persons only with good cause, the decision could be irrelevant either because I have not been, and probably will never be, subject to such an encounter, or because those encounters occur at a time and place which give me no realistic legal recourse. Our desire to burn a flag in order to protest our government's actions is, at most, flagging.[32]

IV.

But academics, pundits, and contestants for control of the Court continue to speak of the importance of the Court, and its members, to American society. Not only will the myth of the Great Judge likely continue for some time, but so will the perception that the Court's decisions have some moral authority.

The costs of this belief are, I fear, great. While few of us intend to "speak" by placing a burning cross on the yard of a house owned by an African-American,[33] and while few of us will be "spoken to" in that way, any symbolic reliance on Great Judges for legal and moral guidance means that less is required of us as members of a community. In a society as highly legalistic as ours, any conflation of legal and moral duties presents enormous problems. A decision by the Court in a case such as *R.A.V. v. City of St. Paul*, the burning-cross case mentioned above, may be perceived as an attempt to decide for the entire community the moral relationship between freedom of speech and relations among the races; other cases are viewed as the use by the Court of its moral authority to attempt to silence those whose views are not favored by the majority of the Court. As long as the Court is considered to have a moral author-

32. *See* Texas v. Johnson, 491 U.S. 397, 399 (1989) (holding unconstitutional state law criminalizing flag burning). Calls for a constitutional amendment to ban flag burning have long since ceased.

33. *See* R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2550 (1992) (holding ordinance prohibiting bias-motivated disorderly conduct to be violative of First Amendment).

ity, there must continue to be winners and losers, and the contest for the Court will remain the bitter struggle it has become.