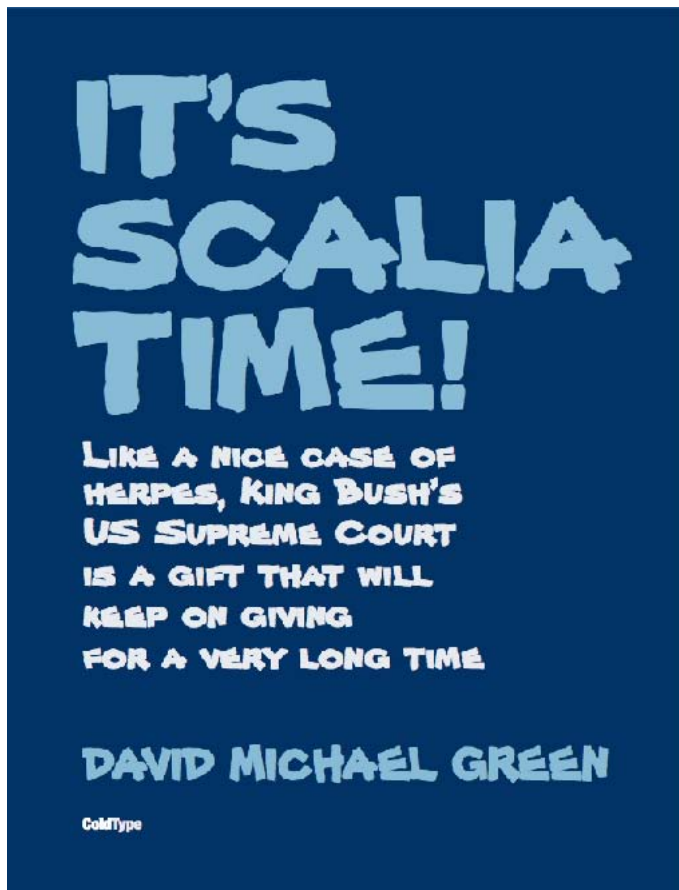


IT'S SCALIA TIME!

LIKE A NICE CASE OF
HERPES, KING BUSH'S
US SUPREME COURT
IS A GIFT THAT WILL
KEEP ON GIVING
FOR A VERY LONG TIME

DAVID MICHAEL GREEN



David Michael Green is a professor of political science at Hofstra University in New York. He is delighted to receive readers' reactions to his articles (mailto:dmg@regressiveantidote.net), but regrets that time constraints do not always allow him to respond.

More of his work can be found at his website, www.regressiveantidote.net.

© David Michael Green 2007

ColdType

WRITING WORTH READING FROM AROUND THE WORLD
www.coldtype.net

IT'S SCALIA TIME! | DAVID MICHAEL GREEN



Thirty-three years ago, on assuming the presidency in the wake of Richard Nixon's resignation, Gerald Ford famously sought to ease the worries of a troubled nation with these words: "My fellow Americans, our long national nightmare is over".

Today, I am tempted to offer a warning, not a palliative: My fellow Americans, our long national nightmare is just beginning.

I say this because, just as the Bush administration and the regressive political movement of which it has been the most recent and most potent manifestation are recessing into a toxic pool of failure, incompetence, disaster and public abhorrence – purely of their own making – the politics they represent have now been all but firmly established on the Supreme Court for the foreseeable future. Like a nice case of herpes, this is a gift that will keep on giving for a very long time.

It is also precisely according to plan. The Supreme Court is arguably the most powerful lawmaking institution in American government – the be-all, end-all and final stop for any policy debate in which the country is engaged – and was therefore always the great prize for the cancer of regressive politics which has been metastasizing in America since Reagan, if not earlier. The presidency was always important to the right, and Congress too, especially the Senate. But the chief importance of these institutions was ultimately their capacity to serve as vehicles for remaking the third branch of government, by loading it up with young reactionaries serving lifetime terms, who would therefore sit on the bench making policy for a very, very long time. And who, by virtue of the Constitution's design, would be all but untouchable by any influence, check or balance, likely including public opinion.

That this was crucial to movement conservatives became obvious in one of the rare episodes where actions taken by King Bush manage to enrage them, and where they abandoned and reviled him across the miasma of their noxious talk radio swamp-land. When a second vacancy on the Supreme Court opened up, Bush's instinct was to choose someone he could count on to stand foursquare behind his single most important issue in all of American politics. So he chose Harriet Miers, a sycophant's sycophant, whose most compelling credential was unquestioning loyalty to The Man, a loyalty that even a guy with Bush's level of prescience could foresee would

IT'S SCALIA TIME! | DAVID MICHAEL GREEN

be very necessary in the years to come. That was his issue – not abortion, not Guantánamo, not school prayer not stem cells – just finding a reliable vote to keep George out of jail no matter what.

Conservatives went crazy at this real and apparent betrayal. This was supposed to be their big moment, the opportunity they had been scheming and striving toward for decades, and what does Bush do (after they had spent years backing him, right down the line)? He nominates a candidate for the court who was all about George, not about regressivism. Miers possessed neither the dependability of a solid conservative record to assure them she wouldn't become another Blackmun, Stevens or Souter and move to the left while on the Court, nor the intellectual heft to shape its decisions or to persuade other justices to vote for regressive policies. So the movement hammered its own president, Miers withdrew her name from consideration, and they got Sam Alito instead.

Then we all got Alito. Stupidly, and with great cowardice aforethought, Senate Democrats helped confirm both Alito and Roberts before him, both of whom had learned from Robert Bork's experience that honesty is, ahem, not always the best policy. Are you a Neanderthal who wants to be on the Court? My advice is to hide your politics well while testifying before the Senate. There'll be a lifetime of opportunity later to swing your wrecking ball as wide as you want. Meanwhile, though, refuse to take any position (even previously articulated positions) on the principle that every case is unique and you can't commit to a decision on future matters. Be sure, also, to hide behind vague judicial platitudes like your general respect for honoring precedent. If you want to really do it up right, like Clarence Thomas did, you can even pretend that you've never really thought much about abortion, probably the single most controversial issue in American politics prior to the Iraq war. Trust me, Democrats in the Senate will not block your confirmation. Many will even vote for you. Some will go so far as to publicly sing your praises. Then, once the vote is in, you can party down all you like. There's no going back.

And so it was that the regressive movement got its great and long sought after prize – a Supreme Court so backward that many of its decisions would have looked retro even in the nineteenth century. And not just the Supreme Court, either. Between Reagan and the two Bushes – not to mention classic Clintonian centrism in judicial appointments – the entire federal judiciary is now heavily stacked with right-wingers pledged to maintain their destructive march to the sea, and all of them sitting in jobs with lifetime appointments. This was the movement's great quest all along, and the decisions of the Supreme Court this year demonstrate the scope of their victory, with far more to come.

There is now a relatively solid five-member reactionary majority on the Court for

IT'S SCALIA TIME! | DAVID MICHAEL GREEN

almost every question put before it. Where Sandra Day O'Connor was once the swing vote on the center-right of the court who would curb some of its worse excesses, that position – but not with the same politics – is now occupied by Anthony Kennedy, arguably the most influential and powerful person in American government today, at least on domestic policy questions.

The current Supreme Court is today comprised of two more or less solid blocs. On the right is the really scary Scalia camp, which also includes clones Clarence Thomas and Samuel Alito, and which also gets the vote – albeit usually dressed up in a pretty bow to appear less threatening – of Chief Justice John Roberts. There is no left on the Court, with the possible exception of John Paul Stevens, and the reference by many commentators to the 'liberal' Supreme Court faction is a misnomer. Souter, Ginsburg and Breyer are classic centrists, very much in the manner of the presidents – George H. W. Bush and Bill Clinton – who appointed them. Perhaps from the distant perspective of Scaliaville they may appear liberal, but then so also might Augusto Pinochet.

In any case, those four quite frequently vote together in an attempt to block the worse excesses of the radical right. Nowadays they usually lose, because kingmaker Kennedy – who almost single-handedly, by casting his vote with one or the other of these blocs, decides the law of the land – mostly votes with the regressives, especially on the important issues, and certainly more so than O'Connor did when she occupied the catbird seat.

What does that mean in terms of the law of the land in America? What best characterizes the Roberts Court (or should we call it the Scalia Court?, or the Kennedy Court?), more than anything else, is its worship of power. If one is looking for a single narrative theme by which to draw a thread through the Court's decisions, the best summary concept of the majority's position is that the powerful in society should be even more powerful, and the little guy should be squeezed and squashed at every opportunity.

That means that the very doors to the courts themselves should be slammed in the face of many of those who formerly might have had a day in court. Looking back at the record of the last term, this theme was so pronounced that Yale Law School professor Judith Resnik dubbed it "the year they closed the courts". That means that opportunities to be heard for potential appellants rotting away in jail or facing the death penalty have diminished to the point of near extinction. Even, remarkably, in situations where they suffer due to little or no fault of their own. In one case this year, an inmate's lawyer filed a brief three days later than the standard deadline, because a federal judge had given the lawyer the wrong date. Too bad, said the hard-

IT'S SCALIA TIME! | DAVID MICHAEL GREEN

core right. Motion rejected without consideration. (The story is, of course, a little different if your name is Libby, though.)

It means that business, especially big business, grows ever more untouchable with every decision handed down by this court, leading Robin Conrad of the US Chamber of Commerce to remark, "It's our best Supreme Court term ever". Indeed. Somehow, though, I don't think the same will be said by investors and shareholders who are now less able to hold company management culpable for their misdeeds than they used to be, on the basis of Court decisions this term. I don't think it will be said by consumers who will pay the literal price for the court overturning a century-old antitrust precedent which has long blocked price-fixing collusion between manufacturers and retailers. And I don't think the widow of a smoker who was awarded massive damages against Philip Morris, only to have those tossed out by the Supreme Court, will be calling this the best term ever.

The bias toward power in this court means that racial minorities will no longer benefit from school integration programs seeking to promote opportunity, integration and diversity. Those days are now over, by a five to four vote. It means that abortion access was narrowed this year, also 5-4. It means – in a truly absurd and highly revealing stretch – that the Court has now made it impossible for employees to sue for salary discrimination any time beyond 180 days from the receipt of each paycheck. So if you find out years or decades later that your pay was considerably lower than that of your coworkers because, say, you're a woman – which was precisely what happened in this particular case – too bad. Thus making it almost impossible for workers to get what is owed them, and providing enormous incentives for employers to discriminate rampantly with little potential cost for doing so. Can you guess the vote on this case? Hey, you're catching on!

The list goes on and on. There is even the occasional exception, but the theme is powerful and dominant. This is your Court. This is your Court on regressivism. Any questions?

We should probably get used (which does not mean lay down) to more of the same, and very likely worse to come for the foreseeable future. Anything can happen to anyone at any time, but most of the members of the Court look like they can remain there for a long time if they choose to. The right-wingers were purposely chosen in part for their youth, and only Scalia (71) and Kennedy (70) from that crowd are at all up in years. Yet they could have another twenty years on the Court at that age, and of course, even were either of them to leave now, their replacement would be a Bush appointee. Meanwhile, those progressive readers of this article who are disposed to making appeals to supernatural deities may wish to include John Paul Stevens in their prayers. He is both by far the oldest member of the Court and its

IT'S SCALIA TIME! | DAVID MICHAEL GREEN

most liberal. I doubt seriously he could be pried away from his position while George W. Bush is in the White House, a supreme act of patriotism for a man who might want to retire for a few final years of rest. How old is Stevens? He was appointed by Gerald Ford, a president not so many Americans could today distinguish from Millard Fillmore. He wears bow ties, okay? He's 87. To say we're lucky to have him is the understatement of the decade.

So the best-case scenario for progressives right now is not very good at all. It involves essential stasis, with perhaps Stevens being replaced two to five years from now by a Democratic president's choice, if we're moderately lucky. And unless that president is Al Gore, chances are such a replacement will be another Clintonian centrist, less progressive than Stevens, but nevertheless part of the non-troglodyte bloc. Then, of course, there is the question of whether Republican senators, assuming there are enough left after the tsunamis of 2006 and 2008 take them out, would allow even a centrist nominee, let alone a progressive, to be considered (in the Senate, sixty votes are effectively required to do anything). But even after all that, we're still left with a largely solid regressive majority of five on the Court, continually turning the clock back to Great Grandpa's golden years, when economic and political elites were all powerful. No more of this middle-class BS anymore. No more of this equality crap. That was all so very twentieth century.

The great ironies of all this are at least two-fold. The first is that this regressive judiciary has now only fully consolidated its power at the very moment when its core ideology is being repudiated by the public, and that repudiation is showing up powerfully nowadays in the other two branches of American government. Congressional Republicans got a "thumpin'" in 2006, and now see that 2008 looks far worse. Accordingly, they are opening up Grand Canyon-like fissures between themselves and a Republican president who is in the process of transitioning from just plain unpopular to truly despised. And yet it is this very same loser ideology which will continue to determine public policy because of lifetime appointments to the federal court system, and the very intentional program of populating it with ideological clones. It's sort of like a latter-day version of the Boys From Brazil. Only even more fun, because these nice young fellows have control of the world's sole superpower.

The other great irony here emerges from the first. Americans love to believe that they are proud owners of the world's greatest democracy. But the final arbiter of much policy making in the United States is the Supreme Court, not only the least democratic of the three branches of government, but in fact almost completely non-democratic at all. Consider the present case. Policy in this country is now being decided by five individuals clothed in black robes, meeting in secret, and offering whatever explanation or criteria they choose to offer (or not) to justify their deci-

IT'S SCALIA TIME! | DAVID MICHAEL GREEN

sions. They are chosen through a process which might be described, at best, as indirectly quasi-democratic in nature. They serve for life. They cannot be removed from office except by impeachment, which almost no one considers to be justified for the crime of possessing bad judicial politics. Or even – like Scalia or Thomas – horribly bad politics. You basically have to be caught with a bag of cash or a law clerk under your robes to be impeached, and probably neither of those would actually be sufficient. And, if you think that is bad, consider this. Changing the ‘five’ in the above scenario to just one would not be an inaccurate description of our current governing arrangement. Indeed, because of existing political configurations, there is quite arguably just one person – robed in black, serving for life, chosen through a non-democratic process, unanswerable to anyone, and almost completely untouchable – who sets policy in this country. His name is Anthony Kennedy and, just about every time it counts, he is very regressive.

All of which begs some important questions about the nature of America’s form of government as construed by the Constitution and two centuries of practice. Not that any change of this magnitude is imaginable (unless, of course, the Court were liberal and Vice President Dick Cheney decided to wave his magic and seemingly endlessly potent Constitutional wand and declare it nonexistent), but it is nevertheless worth wondering at this juncture, just what is the point of the Supreme Court?

Conservatives will accuse me of being a fair-weather friend to the Court. They are actually not correct in this accusation – in fact, I’ve been wondering about this for some time now, well before the judicial coup of the regressive right was brought to fruition this year. And, of course, their hypocrisy on this score (what? – conservative hypocrisy? – the mind fairly reels!) is far more potent, if not as obvious as it should be. For decades, faced with a liberal or moderate Court, the right has been screaming its many code words for enervating the institution in any way possible. The federalism or states’ rights ploy, for example, was meant purely to relocate authority to judicial fora more conducive to regressive victories. The hysteria about ‘activist’ judges was meant to intimidate courts from modernizing backward policies in cases which came before them. The ‘respect for precedent’ rap was cut from the same cloth.

But now that the inmates have gained control of the asylum, you won’t be hearing any of those lines from the bonkers crowd anymore. Now that they own the judiciary, ‘judicial restraint’ is for sissies. (Which, by the way, is essentially what Scalia has been calling Roberts in a series of remarkable separate opinions on cases where they otherwise agree with each other on the outcome. If ever you needed an indicator of how far gone these cats are, the idea that John Roberts’ jurisprudence is insufficiently rabid to satisfy the mainstream of today’s conservative movement ought to

IT'S SCALIA TIME! | DAVID MICHAEL GREEN

send shivers up your spine.)

In any case, when I wonder aloud about the purpose of having a Supreme Court, it is not because my politics are now on the losing side of the Court's majority, and my thoughts do not therefore represent a mirror image of their abandonment of the judicial restraint mantra now that they own the Court. Rather, it is a question of comparative politics and genuine constitutional engineering. As far as I can see, such a high court in a given polity could – and in our case, does – have two essential functions. One is chiefly appellate in nature. That is, the institution serves to supervise, correct and unify the application of garden variety rules of law in the practice of the lower courts. Thus, if the law of the land is that each defendant in a criminal case has the right to counsel, then there needs to be a place for an individual who believes he or she was denied that right to file an appeal. This is very basic jurisprudence – or even the administration of jurisprudence – and as such, I have no problem with a court designed to serve this function, as many do in other democracies, such as the Law Lords in the British system.

The second possible function of such a court is far more akin to actual lawmaking, or, minimally, law reversing. This capacity, which includes the power known as judicial review, makes the court an equal governing partner with the legislature, whether that is a parliament or Congress, allowing the judiciary to strike down duly enacted legislation for being unconstitutional or somehow otherwise unsuitable, according to the wisdom of the justices. This is a far more potent and robust power for any high court to possess, and most of them, in fact, do not. American democracy is rather unique in the substantial degree of legislative power vested in the courts. In most other democracies, parliament – the representative expression of the public's political will – rules, almost or even completely unchallenged by any court. And, depending on one's particular vision of democracy, that makes a lot of sense for reasons already discussed above. After all, if you're going to call it a democracy, shouldn't democratic institutions make policy, and non-democratic ones do something else?

I mostly agree with that philosophy, though there is one valid rationale I can see for allowing a non-democratic high court to possess such powers. And that is that democratic institutions can sometimes arguably be 'too democratic'. How is that possible? Shouldn't the will of the people be the fundamental law of the land? Yes and no. Suppose your country has as among its bedrock and constitutional principles the notions of freedom, equality and due process. Now suppose there is some out-group – blacks, Jews, gays, communists, whatever – who are in fact being subjected to a treatment that is in gross violation of these principles, but nevertheless very popular with the majority of the public. Who's going to protect those minorities? Members of Congress? The president? Probably not, especially if they want to

IT'S SCALIA TIME! | DAVID MICHAEL GREEN

keep their jobs. But how about a court of jurists who are charged with acting in the name of defending just such ideas, and who are insulated from the public wrath their decisions would engender by virtue of their lifetime appointments?

Consider, for example, the case of *Brown versus the Board*, handed down in 1954. That was not an era that was, shall we say, particularly well known for its progressive racial attitudes in America. The controlling case to that point was *Plessy versus Ferguson*, which allowed for racial separation, as long as equality was maintained. Even if we leave aside the absurd contortions we have to twist ourselves into in order to find a way to describe the lot of black Americans then (or now) as remotely equal to that of whites, the Warren Court rightly figured out that separate would always be inherently unequal. Spot on they were, but to say that the *Brown* decision was unpopular would be a bit like describing Lebanon as unlucky. Let's put it this way: My guess is that on any given day of any given year since 1789 no more than one out of ten Americans could name the Chief Justice of the United States Supreme Court. But after *Brown*, "Impeach Earl Warren" bumper stickers were commonly found in the South (and probably Boston too). I'd be pretty shocked if the Warren Court didn't have a pretty decent prior sense of the fury their decision would precipitate. But they did it anyway, because it was the right thing to do, and because they could rest fairly well assured that neither Congress nor any president was going to sacrifice their political careers to get the job done, and thus they had to do it if it was to happen.

The *Miranda* or *Gideon* cases were similar in nature. Just as African Americans were an unloved out-group at the time, so of course, were accused criminals. Which member of Congress or executive branch official was going to go to bat for them, to make sure they got the fair legal process which was their due? Who was going to stand up for the completely just but unpopular principle of providing counsel to defendants, at taxpayer expense, or the idea of throwing out confessions given by arrestees who hadn't been told they had the right to remain silent? If you were looking for a quicker way to commit political suicide, coming out in favor of pedophilia or Maoist revolution in the United States might have been more expeditious, but only just barely. Nobody was going to do this except those few folks insulated from the repercussions of making an unpopular but morally and Constitutionally necessary decision. And sometimes not even they would so dare – as the Court's failure in the *Korematsu* case reminded interned Americans of Japanese descent during World War Two.

So, if a judiciary is going to be given such powers for purposes of protecting those who will otherwise be deprived of the life, liberty and happiness to which they are

IT'S SCALIA TIME! | DAVID MICHAEL GREEN

entitled, then I say, fine, let's give them those powers. If not, however, it is a more than reasonable question to ask why they should possess that degree of authority. And, 'just because they traditionally always have' is really not a very decent answer. Apart from a few small matters like the tremendous inertia of tradition, the massive difficulty in making changes to the Constitution, and the complete indifference of most Americans to the issue, I would nevertheless argue that the philosophical burden for vesting these powers in the judiciary rests with those who would advocate for doing so, for the simple reason that such a choice is so profoundly anti-democratic – even when the Court is using such powers for the 'right' purposes. This concept is not lost on other democracies, by the way, where the American model is generally not employed. In Britain for example, Parliament is supreme. Period, full stop. No court or executive or monarch or any other actor can block the expression of the people's will through their democratically chosen representatives sitting at Westminster. The only institution that can tell today's parliament to stuff it is tomorrow's parliament. That's it. Meaning that the people, through their elected representatives, can legislate any policy they want. If you believe in democracy, that is arguably not only precisely how it should be, but perhaps the only way it can be

So where does that leave us today? Well, Earl Warren is both literally and metaphorically long in his grave. With the occasional unexpected (by definition) exception, it has been a long time since the Supreme Court has acted as an agent of tolerance, principle and protection in America. And, as an echo of the previous epoch's politics, the tendency will be to continue in that direction as the Robert's Court and the rest of the federal judiciary reflect the regressive politics of the last decades, no matter that those ideas are well repudiated now.

To my mind, that is every reason to remove the power of judicial review from the courts. Maybe civics teachers across the land will feel compelled (perhaps, literally, by the same folks who compel them to teach creationist junk science) to tell their sixth-graders that the job of the courts is to 'interpret' the law. I can remember that notion seeming pretty weird to one sixth-grader I knew well back then (like, why couldn't the lawmakers themselves interpret the laws they made?), and it strikes me as almost pure fiction today. You'd have to be a complete ninny to believe that what the federal appellate courts do in America today is not political, ideological or somehow above politics. I guess that's why the reactionaries on the Court always vote together, taking the conservative side of any issue, and the non-regressives usually vote the other way, eh? I guess that's why the regressive movement of the last several decades has made colonizing the courts job number one, at least since *Roe versus Wade*, huh? I don't think so.

IT'S SCALIA TIME! | DAVID MICHAEL GREEN

But nobody in America has the foggiest clue about such matters of constitutional engineering, and the 'educational' and political systems of the country have made sure that people are sufficiently dumbed down never to be likely to get there. So what we're looking at in the coming decades is a replay of the residual reruns of the regressive seizure of power in the prior ones, like so much soap scum left ringing the bath tub days after its last use. This could well occur even should a very progressive Congress and president come to power, which is not as inconceivable as it might seem, thanks largely to the experience of the other alternative these last years. Imagine Congress pumping out bill after progressive bill, and the president happily signing those into law, only to have them repeatedly struck down by the Roberts (Scalia) Court. Wouldn't that be fun?

We've actually been there before. This is more or less precisely what happened to Franklin Roosevelt and the Democratic Congress of the New Deal era. Trying to grapple with an economic catastrophe, they passed a flurry of popular legislation which was then discarded by the only non-democratic branch of the government, a Supreme Court that had been populated by conservatives of the Harding/Coolidge/Hoover school of pro-business Republican orthodoxy from that (and our) time. Roosevelt responded with a court-packing scheme that never made it through Congress, despite his personal popularity and the public support for his legislative rescue agenda. Still, many people argue, just the attempt was successful in moving at least one of the votes from the five-member majority into Roosevelt's column, thus isolating the remaining conservative "Four Horsemen" in the minority and creating a new 5-4 majority, this one progressive, though. Perhaps Anthony Kennedy is destined to play this role in the coming decades, if we're lucky.

If not, things could get more drastic. Such a president in such a predicament would not be the first to blow off a recalcitrant court. When he didn't like the Supreme Court protecting Native American tribal lands from the incursions of state legislatures, Andrew Jackson famously responded to their ruling by exclaiming, "John Marshall has made his decision, now let him enforce it!" – knowing full well, of course, that that would be impossible. But such constitutional meltdowns – even for the right reasons – can come at some considerable cost, not least to public respect for the rule of law.

And all of that may be something close to a best case scenario, absent a Kennedy defection from the Dark Side. These cats have been waiting in the wings for this moment, anxiously and with ill humor, for a long, long time. Moreover, after this term, they've tasted blood. Civil rights is just about toast already. Campaign finance reform is gutted. Criminal justice jurisprudence is headed back to the days of the

IT'S SCALIA TIME! | DAVID MICHAEL GREEN

stockade and guillotine. Corporate power is rising to a level that might shock Andrew Carnegie.

And that's just the beginning. Look out Roe. Look out civil liberties. Look out congressional oversight of the executive branch. Remember when the cops used to beat people in New York while laughing, "It's Giuliani Time!"? Well, welcome to Scalia Time. It ain't gonna be pretty, no matter how it goes down. The only question may be how bad it gets.

On the other hand, judicial regressivism is likely to be even less popular in America than has been its overtly political cousin, especially since the former will be following on the noxious heels of the latter. A Supreme Court which matches George Bush every step of the way in terms of both its bad politics and its obstinance could find itself facing some serious public wrath, particularly after a belly-full of eight years of the same from Bush. We may well need to make our policy preferences strongly known to this 'non-political' branch of government so immersed in politics, and so political in its decision making.

After Gerry Ford proclaimed that "our long national nightmare is over", he followed that famous lines with these words: "Our Constitution works; our great Republic is a government of laws and not of men. Here the people rule."

We may have yet another chance to test that proposition in the near future.



READ MORE POLITICAL ESSAYS AT COLDTYPE.NET

Download political essays by many of the best and brightest commentators from around the world, plus books, booklets, essays, newspapers and magazines – all in pdf format – all free of charge, at

www.coldtype.net

(Click on this link to enter web site)



ColdType

WRITING WORTH READING FROM AROUND THE WORLD