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On the Wrong Side of 5 to 4, Liberals Talk Tactics

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In the old Shel Silverstein cartoon, two inmates stand side by side, spread-eagled and shackled hand and foot to the wall of a windowless and impossibly tall prison cell. One turns his head and says to the other, hopefully: “Now here’s my plan.”

Liberals talking about the Supreme Court in recent days are a bit like those cellmates — both in the dire nature of their plight, now that the conservative victory at the court has revealed itself in full dimension, and in their belief that there must be something they can do about it.

Political activists within the liberal camp came up with a plan quickly enough: to “take back the court,” in the words of Norman Lear, a founder of People for the American Way, which sent 400,000 e-mail messages last week as part of a campaign to make the court a central issue in the 2008 Senate and presidential elections.

In mid-June, before the final flood of decisions but after the court voted 5 to 4 to uphold the federal Partial-Birth Abortion Ban Act, the American Civil Liberties Union Foundation mailed an appeal in envelopes with a line from Justice Ruth Bader Ginsburg’s dissenting opinion in that case, her complaint about the majority’s resurrection of “ancient notions about women’s place.”

Such efforts may help raise money and win elections, but the chance that they will actually change the court, in the near or medium term, is remote. Even if the Democrats win the White House and hold the Senate, the court’s demographics are likely to trump politics. The average age of the four more liberal justices is 74; the five conservatives average a youthful (for federal judges) 61, with Chief Justice John G. Roberts Jr. the youngest at 52.

Confronting that reality, some liberal legal scholars suggest that beyond political tactics, what the left urgently needs is a long-term strategy built around an affirmative message of what the Constitution means and what the enterprise of constitutional interpretation should be about.

It is a tall order. Judicial liberals have been playing defense for close to 40 years, since Richard M. Nixon made the Warren court a campaign issue and ran on a vow to replace liberal justices with “strict constructionists.” That he did not fully succeed — *Roe v. Wade*, for example, was a product of the Burger court, with three of the four Nixon appointees signing the opinion — only shows how difficult and incremental a task it is to turn the Supreme Court around. And *Roe*’s 7-to-2 majority began to shrink almost before the ink on the opinion was dry.

As the defensive effort became all-consuming, the energy and vision that had animated liberal legal scholarship shriveled to the point that it has been decades since anyone has returned to the ideas that came close to fruition on the Supreme Court of the 1960s: enshrining equal education as a fundamental right or making the alleviation of poverty a constitutional imperative sound like left-over fantasies from a bygone age.

“It’s unclear to me that the left understands what it is to re-imagine a constitutional agenda and sell it to the American people,” said Barry Friedman, a professor at New York University Law School who is completing a history of the relationship between popular opinion and judicial review. “That’s what the right did. They lived for a long time in the diaspora. They found issues and ways to market them, with a single-mindedness of purpose and vision that has served them well.”

Liberals have not been completely passive, of course. In the law schools, they have worked to build their own version of the conservative Federalist Society, the 25-year-old idea-incubating and networking group that confers a valuable credential on young lawyers and that numbers its members among those at the highest levels of law and politics. **The American Constitution Society**, founded six years ago with a single student chapter at the Georgetown University Law Center, now has student chapters at 157 law schools and chapters for lawyers in 25 cities.

“Our project is to make sure that the legal culture doesn’t simply buy today’s rhetoric,” said the group’s founder, Peter J. Rubin, a Georgetown law professor and former clerk to Justice David H. Souter. He attributes the organization’s rapid growth to “an incredible thirst for an alternative vision.”

Exactly what that vision should encompass is now the question. It is easy enough to find consensus on a checklist that would include a robust reading of the guarantees of the Bill of Rights, including the notion that some rights are fundamental; a constitutional interpretation

not tethered to a search for the framers' original intent; invigorating the right to privacy to include personal privacy in the electronic age; restoring the shield of habeas corpus; and recapturing the government's ability to intervene for the benefit of African-Americans and other minority groups without being constrained by the formal and ahistorical neutrality that liberals saw as the conceptual flaw in the chief justice's opinion a little over a week ago invalidating two voluntary school integration plans.

The challenge for those inspired by such an agenda goes beyond the question of where the votes would come from on the current court. The notion that profound social change can be accomplished through judicial action has taken a huge beating, and even liberals, watching the political currents of recent decades, have come to doubt the ability of courts to change the world. The tension is acute between the vision of the Constitution as an engine of social progress, on the one hand, and the fear that harnessing it through judicial action to serve that role is, on the other hand, simply counterproductive.

The tension is apparent even in those liberals who sing the praises of judicial "minimalism," as Cass R. Sunstein of the University of Chicago Law School does. In a provocative posting this spring on The New Republic's Web site, he deplored "the absence of anything like a heroic vision on the court's left," a surprising complaint given his well-known advocacy of judges deciding cases as narrowly as possible.

In an interview, he elaborated. He said he was worried about the imbalance between the defensiveness and caution on the court's liberal side and the "bold, clear strokes" issuing from Justices Antonin Scalia and Clarence Thomas. "There's not a voice on the court for significant social reform that the others have to respond to," he said. "It skews the court's internal processes and public discussion of the court."

ONE such voice belonged to the justice Cass Sunstein clerked for: Thurgood Marshall. It was 40 years ago next month that President Lyndon B. Johnson named the famous civil rights lawyer to the court. There have been only two Democratic appointees from then until now, a fact of history so stark as to sound implausible.

With a tide so long in the running, it is no wonder that some leading liberal scholars are looking to the far horizon. "The idea that one can regroup and come back at the court is not realistic for the foreseeable future," Prof. Laurence H. Tribe of Harvard Law School said the other day.

Two years ago, Professor Tribe suspended work on the third edition of his monumental treatise on constitutional law, declaring that the moment had passed for propounding a “Grand Unified Theory.” His current ambition, he says now, is to “teach to the future,” in ways that will challenge the current climate and “make a difference 20, 30 or 40 years from now.”

Now there’s a plan.