For Real Picture of High-Court Hopefuls, Review Past Opinions

By Timothy J. Dowling

In certain quarters on the left and the right, it is conventional wisdom that everyone on George W. Bush's short list for the U.S. Supreme Court is cut from the same ideological cloth. For each pro-Bush pundit who paints all potential nominees as mainstream, there is a Bush-basher who depicts them all as radical extremists. The truth is far more interesting.

Compelling evidence of jurisprudential diversity among plausible candidates for the Supreme Court can be found in the highly charged dispute between two short-listers over the Interstate Commerce Clause as applied to environmental safeguards. One cutting-edge issue under the clause — which empowers Congress to regulate commerce "among the several states" — is whether federal regulators may use this authority to protect an endangered species that lives in only one state.

Fourth U.S. Circuit Court of Appeals Judge J. Harvie Wilkinson III, a potential Supreme Court nominee, wrote an opinion rejecting a Commerce Clause challenge to federal protections for red wolves in *Gibbs v. Babbitt*, 214 F.3d 483 (2000). The wolves, originally found throughout the southeast, currently live only in North Carolina. The *Gibbs* court upheld the wolf protections as substantially affecting interstate commerce because people kill the wolves to protect commercial assets such as livestock and crops.

Wilkinson also cited wolf-related scientific research and possible commercial trade in fur pelts as establishing an adequate connection to interstate commerce. Alternatively, he ruled the challenged protections were sustainable as part of a comprehensive federal program for the protection of all endangered species.

Fourth Circuit Judge J. Michael Luttig, also on the Supreme Court short list, blasted the majority in a full-throated dissent. The dispute between Luttig and Wilkinson was not merely legal but philosophical, and it brimmed with mutual censure. Luttig charged the majority with casually ignoring the Supreme Court's most recent rulings that cut back on the scope of Commerce Clause authority.

In response, Wilkinson went for the trifecta, accusing Luttig of undermining three core conservative values: federalism, deference to legislative prerogatives, and respect for the law. First, he excoriated Luttig for "turn[ing] federalism on its head" by ignoring the long-standing role of the federal government in protecting endangered wildlife. He then accused his fellow short-lister of "rework[ing] the relationship between the judiciary and its coordinate branches," and "open[ing] the door to standardless judicial rejection of democratic initiatives of all sorts."

Finally, Wilkinson leveled the ultimate reprimand for any principled jurist, suggesting that Luttig's personal policy preferences — his "mere expression of judicial derision" for the law — drove his analysis. Describing the dispute as a classic clash between landowners and environmentalists, Wilkinson concluded his opinion by asserting: "Why the judicial branch should place its thumb on either side of this old political scale is simply beyond our comprehension."

There is little doubt whose thumb Wilkinson saw on the scale. Whatever one might think of the respective positions espoused by Wilkinson and Luttig, they demonstrate a striking dissimilarity in judicial philosophy.

Another short-lister — Judge John G. Roberts Jr. of the U.S. Court of Appeals for the D.C. Circuit — created a stir by opining on the same issue. In *Rancho Viejo v. Norton*, 323 F.3d 1062 (2003), the court upheld federal species protections as applied to a real estate developer whose proposed housing project threatened endangered arroyo toads. The panel had little trouble concluding that the commercial housing development fell within the Commerce Clause power.

In dissent from a denial of rehearing en banc, however, Roberts criticized the panel for focusing on the developer's overall conduct rather than asking whether the specific activity being regulated — harming the toads — is commercial or would substantially affect interstate commerce.

According to Roberts, applicable Supreme Court precedent compels the latter inquiry. Moreover, he viewed the panel's approach as in tension with the 5th Circuit, which used a much different rationale in upholding federal species protections.

Needless to say, Roberts' dissent was not well received by the environmental community. But it should be viewed in context. He did not express a position on the constitutionality of single-state species protections, but instead insisted that additional review would "afford the opportunity to consider alternative grounds for sustaining" them. And it is indisputable that federal appellate courts have adopted different rationales in upholding these protections, a relevant consideration in deciding whether to grant a full-court rehearing.

Moreover, Roberts has shown a willingness to part company with his more ideological colleagues. In *Barbour v. WMATA*, 374 F.3d 1161 (2004), a case implicating hot-button issues regarding Congress' authority under the Spending Clause and 14th Amendment, Roberts broke from Judge David Sentelle, whose dissent rejected rulings by 11 other circuits and concluded that Congress may not condition acceptance of federal funds on a state's consent to private damages suits for disability discrimination. Roberts instead joined the opinion of Judge Merrick Garland upholding the condition.

Former colleagues across the political spectrum have showered bouquets upon Roberts, characterizing him as "possibly the foremost appellate lawyer of his generation" and "one of the two or three best lawyers I have seen in more than 30 years." They extol not only his intellect, but also his balanced approach to the law. And his opinions are blessedly free of ideological blather.

In stark contrast to Roberts' dulcet tones is the jarring rhetoric of short-lister Justice Janice Rogers Brown, who sits on the California Supreme Court and stands in a league of her own. Her intemperate pronouncements include the assertion that "today's senior citizens blithely cannibalize their grandchildren because they have a right to get as much 'free' stuff as the political system will permit them to extract." She also has denounced the city of San Francisco as a "kleptocracy" in which "private property is now entirely extinct," an assertion difficult to square with the million-dollar lofts dotting the metropolis.

Far more disturbing than her rhetoric, however, are her ideas. In an April 2000 speech to the Federalist Society, Brown praised the infamous *Lochner v. New York*, 198 U.S. 45 (1905), a ruling in which the court invalidated a state health statute imposing maximum-hour limits on bakers because it purportedly violated extra-constitutional economic rights. She condemned the court's 1937 repudiation of *Lochner* as "the triumph of our own socialist revolution." She ridiculed the famous dissent penned by Justice Oliver Wendell Holmes Jr. in *Lochner* as "all too famous" and "simply wrong." She criticized *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) — which overruled *Lochner* — as having "consumed much of the classical conception of the Constitution."

In an August 2000 speech to the Institute for Justice, Brown acknowledged that "the idea that there is an extra constitutional dimension to constitutional law is heresy" among other conservative legal theorists. Indeed, many conservatives have denounced *Lochner*, including Robert Bork, Justice Antonin Scalia, former U.S. Attorney General Edwin Meese and Sen. Orrin Hatch, R-Utah. In Brown's view, however, conservatives need to overcome their "dread" of judicial activism.

Brown's supporters note she criticized *Lochner* in a 1999 dissent, but they fail to recognize that in her August 2000 speech, she explained she previously disagreed with *Lochner* but now supports judicial imposition of extra-constitutional rights to promote limited government. And she has applauded three recent regulatory takings rulings as holding "out the promising possibility of a revival of what might be called *Lochnerism*-lite."

Brown's defenders also contend her views on *Lochner* should be given little weight in considering her pending nomination to the D.C. Circuit because, as a federal appellate judge, she would be subject to review by the U.S. Supreme Court. But this possibility of review is cold comfort because the Supreme Court agrees to hear less than 2 percent of the certiorari petitions filed each year. And because a "*Lochnerism*-lite" ruling (to use Brown's phraseology) can be disguised as a decision under the Takings Clause or other constitutional provisions, the need for review might not be readily apparent.

More to the point, whatever one thinks about putting a *Lochner*-ite on a federal appeals court, the thought of putting one on the U.S. Supreme Court should be nightmarish to conservatives and liberals alike.

Brown also adheres to an extreme view of regulatory takings. In her dissent in *San Remo Hotel v. San Francisco*, 27 Cal. 4th 643 (2002), she wrote that any "restriction of any one of the several rights that constitute private property in effect takes that property," unless the restriction addresses a nuisance or provides an offsetting benefit to the landowner.

This breathtakingly broad reading of the Takings Clause bears no semblance to mainstream takings jurisprudence, and it threatens myriad environmental protections, zoning laws and other land-use controls. And because the Takings Clause applies to all property (not just real property), her views endanger minimum wage laws, pension plan protections and many other community protections. In articulating her approach, Brown cited with approval the writings of radical legal theorist Richard Epstein, who acknowledges his theories would invalidate vast chunks of modern legislation.

After examining the respective records of those on the short list, one is struck not by the similarities, but by the differences. A real choice exists with respect to ideology, temperament and respect for the rule of law, if only our leaders in the White House and the Senate have eyes to see it.

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Governor's Words on Immigration Reflect Shift in U.S. Tradition

By Irshad Manji

Usually, the views of a California governor don't matter to the rest of the world. But Arnold Schwarzenegger carries weight. Who else could compel American conservatives to consider amending the constitution so that a foreign-born bodybuilder can run for president? Like it or not, Arnie gives us a glimpse into America's future.

That's why his recent statements about illegal immigrants should trouble anyone with an interest in making globalization work. When Schwarzenegger declared that Washington ought to "close the borders," he wasn't just choosing the wrong word. (He claims he meant "secure" the borders.) Schwarzenegger was also choosing the wrong side of the Atlantic to inform his perspective on immigration.

What he said is more the attitude of Western Europe than of the American West. On many matters, from health care to women's rights, the United States can learn from Europe. On immigration, though, it's exactly the other way around.

Today, countries such as France, Germany, Italy and the Netherlands are scrambling to catch up with the changes wrought by migrants. Particularly Muslim migrants from North Africa and Turkey. As they flood in seeking jobs and education, the old social contract — our home is your home as long as you consider it your home, too — looks downright naive.

"They want to immigrate," say non-Muslims about the newcomers, "but they don't want to integrate." In other words, too many Muslim immigrants insist on having their own language, their own family law, their own schools, their own neighborhoods — and their own ways of dealing with those who defy Islam.

When a critic like Theo van Gogh can be murdered in the streets of Amsterdam, and when a Muslim woman who has abandoned her arranged marriage can be shot dead by her brothers near a playground in Berlin, then what's next? And who's next? If they don't wish to be among us, goes the common complaint, why come here at all?

"We want to integrate," say many of the immigrants, "but we don't want to assimilate." The way to integrate is to secure jobs, pay our taxes, finance unemployment insurance, hospital beds, pensions — all the things you Europeans desperately need because of your own low birthrates, aging populations and expectation of material comforts. In short, our contract with you is to keep the welfare state intact without losing our sense of self. If you recognized all that we can contribute, then we wouldn't need to express rage at a society that demonizes us. Quit your grumbling and hire us.

With identities threatened on both sides, the most frantic voices have gained traction. Some politicians in the Netherlands want a moratorium on immigration, proclaiming their country "full up."

It's a small piece of land (unlike California), so I can see why large numbers of Dutch feel saturated and frustrated by people who put the fear of God into their otherwise happily humanist souls. Meanwhile, Muslim leaders cry racism and plead to journalists like me, "Do you see why we feel driven into the arms of fundamentalists?"

It doesn't take long before I hear something else from European Muslims: This wouldn't happen in America. We would belong in America. As incredible as that sounds in the era of the Patriot Act and Guantanamo Bay, dozens of Muslims in Western Europe have told me that the United States has a genius for inclusion because of how it treats the question of social status. The question being: Can you earn status rather than merely be born into it? The answer, in America, is still yes.

Given their hunger to achieve, Americans are disposed to jostling with the "other" and they expect the "other" to jostle right back. What makes someone a real American is not so much his color or faith as his willingness to compete. Just ask the South Asian and Chinese immigrants who made up one-third of Silicon Valley's scientists and engineers during the dot-com craze.

In Western Europe, by contrast, heredity, hierarchy and entitlement trump achievement as guiding aspirations. One's past remains far more important than one's future.

No wonder countless Muslim laborers who have been living in Europe for two or three generations continue to be referred to as immigrants, even when they're bona fide citizens. This difference between America and Europe feeds into the perception that immigrant communities have about whether they can ever be good enough for their host societies. That, in turn, can only influence how hard (or not) they try to integrate in each place.

Thus, the Islamic Center of Beverly Hills sends out e-bulletins announcing "God bless America." In a recent bulletin, the center requested that we all pray for President Bush, agree or disagree with his policies.

I've never heard such patriotism trumpeted by a mosque in Western Europe. Nor have Muslims there confided to me that they appreciate their precious freedoms. In America, I get this assurance regularly — unprompted.

Which brings me back to Arnold Schwarzenegger. When he calls for a clamping of the borders, he's abandoning the frontier mentality — the one that screams, "We, too, can do, and we'll show you!" He's hinting that America no longer has the entrepreneurialism to figure out how to invest in immigrants, even the illegal ones. He's implying the nation is bankrupt of its most precious resource: imagination.

If he's right, all the more reason to welcome immigrants. Because history shows that diversity of individuals breeds pluralism of idea, and ideas will be needed to re-invent the American Dream in a century when technology, money and people are moving faster.

On this score, both the United States and Western Europe can take pointers from the old Islamic empire. Between the 8th and 14th centuries, Muslim civilization led the world in innovation precisely because it let all manner of outsiders in — despite the threats they posed to order.

The result? Several hundred years of creativity in agriculture, astronomy, chemistry, medicine, linguistics, commerce, math, even fashion. It's when the empire became insular to "protect" itself that the motivation to remain robust, and the talent to do so, disappeared.

(Memo to the Governor of California: If you're going to flirt with the fortress mentality, avoid the mistakes of your European siblings and my Muslim forefathers. Better to make new mistakes.)

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