Beyond the Burger Court

Four Supreme Court Candidates Who Could Lead a Judicial Counterrevolution

Richard Vigilante

One of the most important issues at stake in the 1984 presidential election is the future of the Supreme Court. Five of the nine justices currently sitting—Harry Blackmun, William Brennan, Chief Justice Warren Burger, Thurgood Marshall, and Lewis Powell—are 75 or over, and not all are as healthy as Ronald Reagan. Whoever wins in November may well have the opportunity to appoint at least three and perhaps as many as five new justices. That President will therefore be able to determine the direction of the Supreme Court over the next 10 to 20 years.

Should Ronald Reagan or another conservative win the election, he will have an excellent opportunity to reverse the intellectual drift, the liberal interventionism, and the antireligious bias of the Warren and Burger courts. Opposition to "legal realism"—the belief that neutral interpretations of the Constitution are impossible and that judges must therefore impose a collage of sociological assertion and personal opinions on the Constitution—is more sophisticated than 20 years ago. An impressive battery of conservative legal minds in prominent law schools, on the federal circuit, and in state courts is preparing to challenge much of what the Court has wrought in the last 50 years.

A conservative victor in 1984's presidential election would have the chance to appoint one of the most intellectually powerful Supreme Courts in history. Should this happen, we could expect conservative judicial ideas to become suddenly fashionable in places where they are now ignored.

I recently asked prominent legal conservatives around the country what candidates they would recommend for the Supreme Court. They made clear that there are at least two dozen qualified conservatives whose appointments would raise the quality of the current Court.

What is needed, however, is not simply improvement but a judicial counterrevolution. And in conversations with conservative legal scholars and judges, four candidates keep coming up as having the intellectual stature and the fighting spirit to change the Court's direction despite the weight of judicial precedent. They are Robert Bork, Antonin Scalia, Richard Epstein, and William Bentley Ball.

John Marshall
Chief Justice of the Supreme Court, 1801–1835

Robert Bork

Judge Bork, now sitting on the U.S. Court of Appeals for the D.C. Circuit, the second most prestigious and powerful court in the country, former professor at the Yale law school, solicitor general under Presidents Nixon and Ford, has for so long been considered the obvious candidate for the next conservative appointment that he has been a "justice-in-waiting" for at least a decade. Liberal and conservative colleagues are united in recognition of his ability.

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Mr. Bork is widely regarded as the most prominent and intellectually powerful advocate of "judicial restraint." He has long criticized the judiciary for interfering in policy and political questions by redrawing them as constitutional or procedural issues. Unless rights that are found in the Constitution by standard means of interpretation are violated, he argues, the courts should defer on matters of policy to democratic majorities in the states and in the political branches of the federal government.

In determining how it is proper for courts to intervene, he is an "interpretivist." Judges, in his view, should interpret the Constitution as they would a statute or any other legal document—by focusing on the meaning of the text and the history of its writing, without bringing in their own policy preferences and personal values. Thus, for example, he has publicly criticized the Supreme Court's use of the right to privacy—a right to be found nowhere in the Constitution—as the basis for overturning state prohibitions on abortion in its 1973 decision *Roe v. Wade*.

Mr. Bork's judicial interpretivism would restore to legislatures and the people such questions as whether and how pornography should be restricted. It would provide a coherent basis for sustaining state laws on capital punishment. It would keep the Court from imposing one man, one vote in reapportionment cases. It would keep the courts from running school systems, prisons, and mental hospitals under the guise of enforcing civil rights. It would uphold state legislation regulating the sale of contraceptives to minors or requiring that parents be notified when a minor seeks an abortion.

Mr. Bork says he was a New Deal liberal when he entered the University of Chicago law school in 1948. But at Chicago he was heavily influenced by Aaron Director, founder of the "law and economics" school of jurisprudence, which analyzes legal principles in terms of their economic efficiency, and by free-market economist George Stigler.

Mr. Bork applied the principles of economic efficiency and cost-benefit analysis to antitrust law, first as a partner in the Chicago law firm of Kirkland & Ellis, which he entered after law school, and then on the faculty of Yale law school, which he joined in 1962. In his book, *The Antitrust Paradox*, published in 1978, he argued that many antitrust policies, including some court decisions, have often been contradictory: Though designed to protect the consumer and promote competition, these antitrust policies have in practice often hurt consumers and discouraged competition by protecting inefficient enterprises.

At Yale, Mr. Bork became a close friend and colleague of Alexander Bickel, a moderate "legal realist" and in his day the dominant intellectual force on the Yale law faculty. Mr. Bickel saw the judge as scholar-king who would interpret the Constitution in the light of the lasting values of Western civilization: "The function of the Justices . . . is to immerse themselves in the tradition of our society and of kindred societies that have gone before, in history and in the sediment of history which is law, and . . . in the thought and the vision of the philosophers and the poets.

Robert Bork

The Justices will then be fit to extract 'fundamental presuppositions' from their deepest selves, but in fact from the evolving morality of our tradition." While greatly admiring Mr. Bickel, Mr. Bork learned from him mostly by disagreeing. "The choice [by the Court] of fundamental values cannot be justified," Mr. Bork argued. "Where constitutional materials do not clearly specify the value to be preferred, there is no principled way [for the Court] to prefer any claimed human value to any other."

Mr. Bork set forth the essence of his judicial philosophy in "Neutral Principles and Some First Amendment Problems," a now-classic article published in 1971. Always aggressive intellectually, he picked the most controversial possible ground on which to make his argument that judges should not impose their personal values on the Constitution: He argued that the freedom of speech provision of the First Amendment protects only "explicitly political speech." And he challenged the nearly sacrosanct writings of Justices Brandeis and Holmes that have been used to defend this century's expanded First Amendment protections. The Brandeis-Holmes arguments, Mr. Bork contended, weren't constitutional arguments at all but simply paeans to the worth of free discourse.

Mr. Bork could hardly have written anything better

calculated to infuriate the liberal judicial community. The article is still controversial today. Just recently, a headline in the American Bar Association *Journal*, summarizing an article in *The Nation*, compared Mr. Bork to Attila the Hun. He has been accused of being against free speech. He is not. And today he admits that the First Amendment covers a broader ground than "explicitly political" speech.

Some conservatives, too, have been worried by Mr. Bork's relentless disapproval of courts that make value judgments. He is sometimes accused of moral skepticism or relativism.

But Mr. Bork is entirely innocent of the charge. He is not a moral skeptic; instead, he has a strong faith in the moral sense of the electorate. What he forbids to courts, he endorses in legislatures because it is the job of the elected representatives "to make value choices . . . these are matters of morality, of judgment, of prudence. They belong, therefore, to the political community." And as for freedom of speech not protected by the First Amendment, it rests, "as does freedom for other valuable forms of behavior, upon the enlightenment of society and its elected representatives."

Judicial activists would argue that Mr. Bork's "judicial restraint" would minimize constitutional protections. It would be more accurate to say that judicial restraint expands the number of questions open to discussion by citizens and their legislatures.

As Mr. Bork said in a recent address, judicial activism causes the "area of judicial power [to] continually grow and the area of democratic choice [to] continually contract . . . Activism . . . is said to be the means by which courts add to our constitutional freedom and never subtract from it. That is wrong. Among our constitutional freedoms or rights . . . is the power to govern ourselves democratically . . . G. K. Chesterton might have been addressing this very controversy when he wrote: 'What is the good of telling a community it has every liberty except the liberty to make laws? The liberty to make laws is what constitutes a free people.' "

Mr. Bork left Yale temporarily in 1973 to become solicitor general of the United States. In this role he is best remembered as the man who, at Richard Nixon's order, fired Watergate Special Prosecutor Archibald Cox after Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus resigned rather than do so. Even today it is rare for Mr. Bork to be mentioned in a newspaper story without being linked to the Cox firing.

It is a credit to Judge Bork's reputation for integrity and the respect he has among his peers that his perfectly correct explanation for his decision—Mr. Nixon had every legal right to fire Mr. Cox, and government could not function if legal orders were not carried out—has been widely accepted. Watergate came up at his confirmation hearings for his appointment to the D.C. Circuit in 1982 but provided little difficulty.

Judge Bork's reputation, his writing and public statements, and even his speaking style suggest that he would be an aggressive justice. He is intellectually aggressive—an imposing man to speak with. As a writer his inclination is toward sharpening rather than blunting points of possible disagreement. He would presumably be willing to reverse bad precedents.

Nevertheless, his brief career on the D.C. Circuit so far has been relatively quiet. From July 1982, when he wrote his first opinion, through March 1984 he had written about 30 majority opinions, somewhat fewer than might be expected. He dissents fairly often, but few of the cases have been controversial.

Judge Bork is 56. His first wife died in 1980 after an illness that lasted many years. He remarried in 1982. He has three children.

Antonin Scalia

Along with Mr. Bork, the most respected advocate of judicial restraint interpretivism is Judge Antonin Scalia, also of the D.C. Circuit and recently of the University of Chicago law school.

If Mr. Bork's emphasis is on democracy, Mr. Scalia's is on separation of powers. He would bring to the Court an acute sensitivity to the role of institutions and procedures in the preservation of liberty.

As Mr. Scalia would explain, the separation of powers is vital to the preservation of liberty because the different branches are suited to protecting different sorts of rights. The courts, in which there is no voting, no marshaling of forces, just one litigant against another, are uniquely well designed to protect the rights even of one man against the entire state. During that one man's day in court the entire power of the state will be focused on the resolution of his problem, the vindication of his rights. That solitary man with just one vote and no friends would get little help from a legislature.

For exactly the same reason, courts are no good at

Antonin Scalia

providing for the needs of majorities—organizing society, spending money, getting things done. The state's budget is determined not by disputing the rights of individuals but by resolving the differences of overlapping interest groups.

Let this scheme of not only separation but also specialization of powers break down and both sorts of decisions—those about individual rights and those about majority needs—will become increasingly arbitrary and government will become increasingly cruel.

Mr. Scalia's experience has been largely in administrative law, the rules that govern regulatory agencies. Graduating from Harvard law school in 1960, he joined a prestigious Cleveland law firm, taught at the University of Virginia law school, and in 1971 entered government, "just to see how the big monster works."

He had every opportunity to find out because he chose some of the most monstrous parts, laboring mostly in jobs where the issues involved were at best even more complex than they were dry. From 1971 through 1977 he was successively general counsel to the President's Office of Telecommunications Policy, chairman of the Administrative Conference of the United States, and assistant attorney general for the Office of Legal Counsel. He started teaching at the University of Chicago in 1977 but continued to dabble in government, serving as a consultant to the Federal Communications Commission and the Federal Trade Commission.

From 1977 until his appointment to the D.C. Circuit in mid-1982, he also served as editor of the American Enterprise Institute's scholarly but sprightly *Regulation* magazine. His editorials were marked not only by a coherence that made their subject matter accessible to any layman but also by a sharp sense of humor that was all the more welcome for being completely unexpected in a magazine that chronicled the doings of bureaucrats.

In a recent law review article, "The Doctrine of Standing as an Element of the Separation of Powers," Mr. Scalia drew on his vast experience in administrative law to give a full-bodied expression of his constitutional ideas. He argued that one of the primary purposes of the traditional rule of standing—which forbids lawsuits that do not allege a concrete injury—is to prevent courts from becoming legislatures of last resort.

Recently, however, courts have allowed increasingly broad interpretations of standing, consequently increasing their own "legislative authority." Mr. Scalia focused on one recent case under the liberalized doctrine of standing, the S.C.R.A.P. case, in which a group of Georgetown law students sued to stop the Interstate Commerce Commission (an administrative agency) from granting an increase in rail freight rates. They claimed standing on the basis of a dubious economic analysis purporting to show that higher freight rates would cause a drop in the use of recyclable goods and a correspondent increase in litter and pollution.

Stressing his separation of powers theme, Mr. Scalia argued that the Georgetown students' desire for less pollution was not an individual legal right of the sort the courts enforce but an interest shared by a majority of society. Similarly, a majority of society, including many of the same people, shares an interest in good railroads and thus perhaps in approving the rate increase. The conflicting interests of the majority are supposed to be balanced in the political process by the political branches.

Courts exist not to balance *majority* interests but to defend a short list of unassailable *minority* rights. By intervening in the students' behalf, the courts would be elevating one particular interest to the status of a right and making it uncontestable in the political process.

When that happens, Mr. Scalia says, almost inevitably the interests thus elevated are those the judges find worthy. "Where the courts do enforce . . . adherence to legislative policies that the political process itself would not enforce, they are likely . . . to be enforcing the prejudices of their own class. Their greatest success in such an enterprise—ensuring strict enforcement of the environmental laws . . . met with approval in the classrooms of Cambridge and New Haven, but not, I think, in the factories of Detroit and in the mines of West Virginia."

Everything about Mr. Scalia's first year and a half on the bench indicates that he would be not only a conservative justice but also an influential one.

Circuit court decisions are initially issued by three-judge panels, though they sometimes are reversed by the entire court voting *en banc*. No majority opinion filed by Mr. Scalia has ever been reversed *en banc*. But of the nine cases in which Mr. Scalia had written dissents as of December 1983, four had been accepted by the Supreme Court for review. That is an impressive record. One of those dissents was to the Community for Creative Non-Violence case, in which the D.C. Circuit decided that sleeping in a federal park was a form of speech and thus protected by the First Amendment.

Mr. Scalia is also one of the best writers on the federal bench, and history shows that a well-written opinion can have far more influence even than it deserves. In one recent case Mr. Scalia, responding to a colleague's vague references to the tradition of respect for individual rights, wrote: "But that tradition has not come to us from La Mancha, and does not impel us to right the unrightable wrong by thrusting the sharpest of our judicial lances heedlessly and in perilous directions." That sort of remark is calculated perfectly to embarrass and intimidate generations of judicial Don Quixotes.

Judge Scalia is 47. He and his wife have nine children, which may or may not be the reason his first involvement in politics was in a fight for tuition tax credits. He is a principled critic of racial goals and quotas on both constitutional and political grounds.

A Catholic, he is personally opposed to abortion. He would be the first Italian-American ever appointed to the Court.

Richard Epstein

"Judicial restraint" does have its conservative critics. Some conservative legal scholars think that there is a sound constitutional basis to overturn much restrictive economic regulation on the ground that economic liberties are entitled to protection similar to that afforded to freedom of speech and religion.

Richard Epstein

Perhaps the most impressive of these is Richard Epstein of the University of Chicago. Mr. Epstein is a brilliant young legal philosopher who would bring to the Court constitutional arguments for overruling many liberal restrictions on economic freedom, for restoring a concept of genuine justice to those areas of the law where justice has been supplanted by redistributionism, and for systematically defending individual rights as conservatives tend to understand them, including the rights of unborn children.

His appointment to the Court would accomplish a great deal precisely because he represents a different strand of conservative legal theory, a minority within a minority. Like the judicial restraint conservatives, he is an interpretivist who has a great deal of respect for the Constitution and believes in a close interpretation of it. He does not want to impose his own moderately libertarian views as an act of raw judicial power.

But he believes that the Constitution provides more direct guidance than judicial restraint conservatives. He is critical that economic regulation and other intrusions on individual rights get a free ride in the courts because liberal judicial realists like such legislation and conservative judicial restraint types don't have the heart to strike it down.

The key to Mr. Epstein is that he is a philosopher as much as a lawyer. As an undergraduate at Columbia, he was particularly influenced by the philosopher Ernest Nagel, whom he describes as a "tough, no-nonsense man." Professor Nagel believed that a philosopher's role was not to heap ridicule on common-sense beliefs but to find compelling philosophical arguments for ordinary beliefs and intuitions. That is an approach Mr. Epstein carries over into his legal scholarship. Thus, Mr. Epstein is comfortable with the ordinary meaning of justice—allowing each person to retain what is rightfully his. He rejects, as most ordinary people would, the equation by many modern legal theorists of justice with the equality of wealth or social status.

Though he considered becoming an academic philosopher, Mr. Epstein decided "the way to do philosophy was to go to law school, where a philosopher could depend on a constant infusion of new issues" on which to work. He studied law first at Oxford and then at Yale. He started teaching law at the University of Southern California in 1968 but in 1972 moved to the University of Chicago. Since 1981 he has been editor of the *Journal of Legal Studies*, which specializes in historical analysis of the common law as well as the descriptive and normative implications of modern economic theory.

His philosophical inclinations cause him to paint with a broader brush than the judicial restraint conservatives. The key to his approach is his belief in respecting "the theory of governance that inspired [the Constitution]."

Despite differences of detail among the Founders, that theory of governance, he would argue, rests comfortably on classical 18th-century liberalism. It thus has a great deal in common with the moderate libertarianism shared by most conservatives today.

The Founders were about the business of creating a commercial republic. As Mr. Epstein writes, they "came to the [constitutional] convention with a powerful presumption that trade and commerce was a social good, best fostered by institutions that restrained the use of force and stood behind private contractual arrangements."

Thus, much of Mr. Epstein's work is devoted to reinvigorating two mostly moribund clauses of the Constitution: the contracts clause—"no state shall . . . pass any . . . law impairing the obligation of contracts"; and the just compensation clause—"nor shall private property be taken for public use, without just compensation." These he reads as part of the Founders' attempt to guard the republic against the dangers of faction by limiting the power of government.

Mr. Epstein argues that a prime reason the Founders endorsed the principle of limited government was their fear that a too-powerful government might tempt factions to use the government to deprive men of their liberty and property. Give legislators too much power over property not their own and they may seek to dispose of "property of minority interests for personal gain," including reelection.

We see this evil in the present plague of interest-group politics, he maintains. Because we have given the government too much power over private property, we are encountering precisely the evils of faction that the Founders, in the *Federalist Papers*, argued the new Constitution

was designed to avoid. He argues that within close limits—and Mr. Epstein is a cautious analyst—the Court would be justified in reversing that trend and restoring the Founders' intent.

Citing the contracts and takings clauses, he has, for instance, broached the possibility that minimum wage laws and rent controls may be unconstitutional. Indeed, he thinks that the contracts clause places extensive limitation on the state power to restrict commercial agreements between consenting adults. He also believes that the government is limited in its ability to use the power of eminent domain to aid private business interests.

Mr. Epstein's full-bodied philosophical approach to the Constitution shows up in social issues as well. *Roe v. Wade* has been widely criticized, and Mr. Epstein joins in the criticism. But where much interpretivist scholarship has been devoted to debunking Justice Blackmun's assertion of a constitutional right to privacy, Mr. Epstein's criticism goes directly to the impropriety of deciding the case without considering the legitimate claims of the unborn child.

Mr. Epstein is 40 years old. He is married and has two children. He is probably too young to be on the administration's "short list," and his unusual views may keep him from having the sponsorship he would need to get appointed.

Nevertheless, appointing Mr. Epstein would accomplish a great deal. He is a brilliant advocate of a conservative view of the Constitution that is useful, more than respectable, and largely ignored. An Epstein appointment would not only produce an excellent justice, it would also give Mr. Epstein's ideas the status that only power can confer—a very useful thing for a conservative administration to do.

William Bentley Ball

Another leading conservative legal figure wary of judicial restraint is William Bentley Ball. Mr. Ball has become famous arguing free-exercise-of-religion cases before the Supreme Court, including the landmark *Wisconsin v. Yoder*, in which he successfully defended the rights of a group of Amish parents to keep their children out of state-accredited school systems, and the Bob Jones University case, in which he unsuccessfully argued that the college had a right to retain its tax exemption despite a religiously inspired rule against interracial dating among students. Though he was a *pro bono* lawyer for civil rights groups during the 1960s, Mr. Ball defended Bob Jones because he believes that the free-exercise clause of the First Amendment requires tax exemptions for religious institutions.

Like Mr. Epstein, Mr. Ball would bring to the Court an aggressive willingness to defend individual rights as many conservatives tend to define them. He would provide a powerful voice against the Court's antireligious bias, particularly its reading of the establishment clause of the First Amendment. He would also bring to the Court long experience as a litigator. He describes himself as "primarily an advocate." Colleagues call him brilliant. And he has spent decades devising practical legal strategies for defending liberty.

Mr. Ball has, in some ways, had an odd career. He has argued before the Supreme Court seven times and has been counsel for appellee or appellant in 20 cases considered for review by the Court—a remarkable record. But he is a graduate of Case Western Reserve University who got his law degree from Notre Dame, not—at least not in 1948—the conventional route to becoming one of the most important constitutional lawyers in the country.

After leaving Notre Dame, he went to New York and joined the legal staff of W. R. Grace, the multimillion-dollar firm founded by one of Notre Dame's greatest patrons. It was a good job but, especially in New York, did not carry the prestige of a place in a major law firm, where great legal careers are made.

After another corporate job with Pfizer Inc. he taught constitutional law on Villanova's first law faculty. In 1968 he founded his own firm, Ball & Skelly, in Harrisburg, Pennsylvania.

Today the firm has a grand total of six attorneys. Yet it is one of the most important constitutional law firms in the country and has done more in recent years to defend religious liberty than any other firm in America.

Long before he became famous for his free-exercise cases, Mr. Ball was involved in civil rights litigation. In 1967 he entered a brief on behalf of 25 Catholic bishops in *Loving v. Virginia*, where the Court for the first time

William Bentley Ball

struck down a state law against interracial marriage. He argued for the Court's eventual position, which denied "the constitutionality of measures which restrict the rights of citizens on account of race."

During the same period he served, typically *pro bono*, as counsel to the Pennsylvania Equal Rights Council, which was defending the civil rights of blacks. Of himself he says that he has always been primarily interested in "human rights and individual liberty."

There is no doubt that Mr. Ball is a conservative. "We are," he says, "drowning in government, greatly overtaxed and desperately in need of evenhanded justice to protect free citizens from unnecessary government intrusion."

He is critical of the Warren Court, saying that though "it did go to great lengths to protect some citizens, it would be nice if future Courts would consider the civil liberties even of those citizens who are not pornographers, subversives, or accused criminals."

But in that criticism there is some grudging respect. However erratic the Warren Court might have been, he will explain, willy-nilly it ended up finding ways to protect some rights that ought to have been protected. He is now deeply concerned that a new judicial conservatism will be narrow and niggardly where religious liberty is concerned. "Religious civil rights cases," he says, "must be treated with all the liberality accorded racial civil rights cases."

As in the 1960s, when he was arguing against racial discrimination, Mr. Ball is still wary of the judicial conservatives' tendency to defer to Congress or the states. In free-exercise cases the rights of religious schools often turn on the courts' attitude toward general state education statutes that do not specifically attack religious schools but dictate what they must do to meet educational standards.

This is a thorny area. All parties agree to the states' right to impose safety and health regulations and minimal curriculum standards—that is, required classes in English, math, and civics. But once that is admitted, can the states impose detailed and aggressive curriculum standards, licensing, and methodological standards?

Judicial restraint conservatives might overrule such detailed regulations, but they might not. Because of their justified wariness of turning political questions into constitutional ones, they would tend to ask whether the regulations were contrived to discriminate against religious schools, or whether they were impartially imposed on the entire state education system. In the latter case the judicial restraint conservatives *might* say that the regulations were legitimate exercises of the same authority by which the states impose mandatory education requirements.

Mr. Ball, on the other hand, and probably Mr. Epstein, would argue that detailed instructions to religious schools would be unconstitutional even if they were the same regulations imposed on state schools.

In voicing his fears about judicial restraint, Mr. Ball points to one of his recent cases, the Grace Brethren case, in which the Court refused to interfere with state imposition of unemployment taxes on nonchurch religious schools. The Court, with the concurrence of several relatively conservative justices, essentially decided to defer to the relevant state courts.

Mr. Ball is firmly antiabortion and was one of the attorneys for the 238 members of Congress who filed an *amicus* brief with the Supreme Court defending the Hyde Amendment's restriction against using Medicare funds to pay for abortions. One of his hopes for a new Court is that it would overrule *Roe v. Wade* as well as *Bob Jones*.

Mr. Ball is married and has one daughter. He is 67 years old, older than any other candidate recommended here. But he is a "daily five-miler" who, like President Reagan, does not look or act his age. He is extraordinarily well respected by his colleagues. His addition to the Court, like Mr. Epstein's, would significantly advance a conservative judicial point of view that is insufficiently noticed at present.

The appointments of Messrs. Bork and Scalia would do a great deal to persuade both the lower courts, and more importantly, the nation's prestige law schools, to take the Constitution more seriously. The more aggressive attitude of Messrs. Epstein and Ball would fill in some of the gaps left by the judicial restraint school and would quickly come to represent the point position in conservative jurisprudence. With Messrs. Epstein and Ball arguing for an aggressively conservative Court, judicial restraint suddenly becomes the moderate position.

Strategically, Messrs. Bork, Scalia, Epstein, and Ball would make a great combination. Add Justice Rehnquist's own powerful intellect and the five would together dominate one of the most distinguished Courts in American history. ■