

REVIEW & OUTLOOK

The New Supreme Court

Everyone still wonders just who David Souter will turn out to be, but one sure bet is that he won't be William Brennan. With the leader of the liberal wing gone from the scene and yesterday's confirmation of Judge Souter, the key question is how quickly the conservatives will push back against the world view of the activist Warren, Burger and Brennan courts.

The answer will depend largely on how the conservatives understand *stare decisis*. The unwritten rule is that conservative judges follow precedent, which liberal judges ignore. This double standard does more than build a leftward ratchet into the law. It also runs the risk of original-intent judges validating cases decided during an aberrant era of judicial lawmaking. The conservative wing should view the obligation to precedent as a way of ensuring legitimate rules and decisions, not as a straitjacket to lock in illegitimate opinions.

As with many other questions he was asked during his hearings, Judge Souter gave brilliantly diplomatic answers on the role of precedent. We will know soon, however, which way the court will go. On Monday, the justices voted to reconsider one of the more outrageous opinions of the Brennan era. In a 1987 case, the court ruled that a jury could not see a victim impact statement when considering the death penalty in a murder case. Why? The court said it would be unfair because jurors might be more likely to order the death penalty if they knew something about the victim and the victim's family.

As it happens, Justice Antonin Scalia offered his view of *stare decisis* in a case on victim impact statements last year. He said in his dissent that the 1987 case was wrong, that his duty was to uphold the Constitution and that "we provide far greater reassurance of the rule of law by eliminating than by retaining such a decision." We will see if Justice Souter agrees.

A road map of wrong turns taken by the activist court would fill an atlas. Judge Souter gave an enticing reaction to the key abuse by activist judges, which has been picking and choosing which constitutional rights to protect and which to ignore.

Since the New Deal, the court has created three classes of rights, with economic liberties at the bottom and "preferred" rights such as the First Amendment and privacy at the top. The Constitution nowhere says judges can give unequal protection to rights.

Judge Souter said he understood this approach by the court, but left open the possibility "of saying we ought to scrap the whole notion of three tiers."

It's worth noting that a change in the outlook of the court could have a huge effect on American business. The court in recent years has had little room on its docket for commercial cases, preferring endless cases on issues such as creches on public land. One result is the unchecked liability explosion, whose cost to the economy is now an estimated \$300 billion.

The justices gave false assurances to Texaco that it would get its day in court before being driven into bankruptcy by the absurd multibillion-dollar award to Pennzoil. The Supreme Court today will again hear a case that argues punitive damages can be so outrageous that they violate the due-process clause. Punitive damages became common in run-of-the-mill cases after the justices in earlier cases failed to see any constitutional issue. It's only money, after all.

The court has also failed to control RICO despite several justices complaining bitterly about its clear abuses. Maybe one of the absurd cases where heirs fighting over a will sue each other as "racketeers" will persuade the justices to put RICO out of its misery. RICO is also a good example of how prosecutors of white-collar defendants—whether a Robert Wallach or a Michael Milken—seem to think there are no limits on their power. In contrast, liberal justices have created endless exclusionary rules to burden the fight against violent criminals and drug dealers.

The justices this week announced they wouldn't hear the appeal of poor John Poszgai, who faces three years in jail for the horrible crime of cleaning up a waste dump that the EPA says was a "protected wetland." In this hothouse atmosphere, we wouldn't be surprised to find amid the cases of real savings-and-loan fraud that there'll also be prosecutions in which the regulators turn out to have created the mess.

A new Supreme Court of restrained justices will have some room on their docket if they leave the great social issues to the political branches where they usually belong. There are more than enough problems in the law itself to keep the justices busy with their own knitting of defending the common law, punishing the guilty and freeing the innocent.