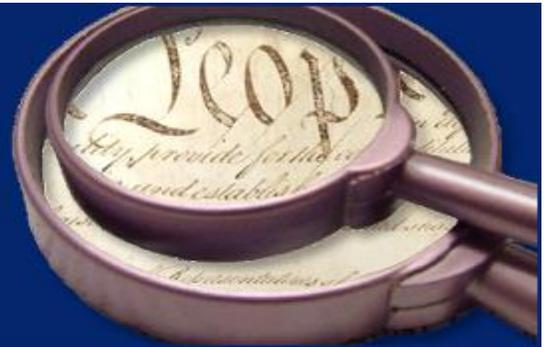




AMERICAN  
CONSTITUTION  
SOCIETY FOR  
LAW AND POLICY



Issue Brief

## **The Behavior of Supreme Court Justices When Their Behavior Counts the Most**

**By Geoffrey R. Stone**

**September 2013**

**All expressions of opinion are those of the author or authors.  
The American Constitution Society (ACS) takes no position on specific legal or policy initiatives.**

**American Constitution Society | 1333 H Street, NW, 11th Floor | Washington, DC 20005**

# The Behavior of Supreme Court Justices When Their Behavior Counts the Most

Geoffrey R. Stone\*

In *The Behavior of Federal Judges*, Lee Epstein, William Landes and Richard Posner offer an illuminating analysis of judicial decision making. In light of my own interest in constitutional law, I was particularly intrigued by Table 3.2, which ranks the justices who have served on the Supreme Court since 1937 in terms of the percentage of “conservative” votes they cast in several different types of cases. The column in Table 3.2 that is most interesting to me is the one dealing with cases involving what the authors term “adjusted civil liberties,” which focuses on decisions most likely to reflect ideological differences among the justices in the domain of constitutional law.

That Table made me especially curious about the behavior of the justices who have served on the Court in recent years – specifically, about the behavior of the thirteen justices who have served on the Court since 2000. According to conventional wisdom, five of these justices (Alito, Rehnquist, Roberts, Scalia and Thomas) are generally thought to be very conservative; two (Kennedy and O’Connor) are generally thought to be moderately conservative, and six (Breyer, Ginsburg, Kagan Sotomayor, Souter and Stevens) are generally thought to be moderately liberal.

Table 3.2 bears out this conventional wisdom. The very conservative justices cast an average of 83.3 percent of their votes in “adjusted civil liberties” cases for what Epstein, Landes and Posner deem the “conservative” position, the two moderately conservative justices cast an average of 69.9 percent of their votes in support of the “conservative” position, and the moderately liberal justices cast an average of only 26.7 percent of their votes for the “conservative” position. (The “moderately liberal” justices are not “very liberal” because there is a significant group of justices, including Black, Brennan, Douglas, Fortas, Goldberg, Marshall, Murphy and Warren, who have more “liberal” scores in Table 3.2 than any of the more recent “liberal” justices.)

In thinking about these data, I grew especially curious about two questions. First, to what extent might these figures – which reveal considerable polarization within the Court – actually *understate* the degree of polarization in the *most important* constitutional cases? Second, what does any of this tell us about the distinction between judicial activism and judicial restraint, which is often seen as central to the difference between “liberal” and “conservative” judicial approaches to constitutional interpretation?

## I. The Most “Important” Cases

I asked several of my professional colleagues, (without telling them why I was asking) to identify what they thought to be the most important constitutional decisions since 2000. I then

---

\* Edward H. Levi Distinguished Service Professor of Law, The University of Chicago.

culled from their lists the twenty decisions that received the most “votes.” These twenty decisions range across a broad spectrum of constitutional issues, including the 2000 presidential election, gun control, voter disenfranchisement, affirmative action, search and seizure, abortion, habeas corpus, due process for persons suspected of terrorism, takings of private property, the death penalty, campaign finance regulations, the freedom of religion, the rights of gays and lesbians, and the Commerce Clause.

The twenty cases are, in chronological order:

- *United States v. Morrison* invalidating the federal Violence Against Women Act;<sup>1</sup>
- *Bush v. Gore*, invalidating the actions of Florida in the 2000 presidential election;<sup>2</sup>
- *Zelman v. Simmon-Harris*, upholding school vouchers for students attending parochial schools;<sup>3</sup>
- *Lockyer v. Andrade*, upholding denial of habeas corpus for a challenge to a “three strikes” law;<sup>4</sup>
- *Grutter v. Bollinger*, upholding an affirmative action program in higher education;<sup>5</sup>
- *Lawrence v. Texas*, invalidating a law prohibiting same-sex sodomy;<sup>6</sup>
- *Hamdi v. Rumsfeld*, invalidating a law denying U.S. citizens the right to challenge their detention as alleged enemy combatants;<sup>7</sup>
- *Roper v. Simmons*, invalidating a law authorizing the death penalty for crimes committed by minors;<sup>8</sup>
- *McCreary County v. American Civil Liberties Union*, invalidating the display of the Ten Commandments in a county courthouse;<sup>9</sup>
- *Kelo v. City of New London*, upholding a redevelopment plan that affected property rights;<sup>10</sup>

---

<sup>1</sup> 529 U.S. 598 (2000).

<sup>2</sup> 531 U.S. 98 (2000).

<sup>3</sup> 536 U.S. 639 (2002).

<sup>4</sup> 538 U.S. 63 (2003).

<sup>5</sup> 539 U.S. 306 (2003).

<sup>6</sup> 539 U.S. 558 (2003).

<sup>7</sup> 542 U.S. 507 (2004).

<sup>8</sup> 543 U.S. 551 (2005).

<sup>9</sup> 545 U.S. 844 (2005).

<sup>10</sup> 545 U.S. 469 (2005).

- *Hamdan v. Rumsfeld*, invalidating the military commissions set up for Guantanamo detainees;<sup>11</sup>
- *Gonzales v. Carhart*, upholding a law prohibiting “partial-birth abortion;”<sup>12</sup>
- *Parents Involved in Community Schools v. Seattle School District No.1*, invalidating the use of race to create greater integration in public schools;<sup>13</sup>
- *Crawford v. Marion County Election Board*, upholding a law requiring voters to provide photo IDs in order to vote;<sup>14</sup>
- *Boumediene v. Bush*, invalidating a law denying habeas corpus to Guantanamo detainees;<sup>15</sup>
- *District of Columbia v. Heller*, invalidating a law regulating guns;<sup>16</sup>
- *Citizens United v. Federal Election Commission*, invalidating a law limiting the amount corporations could spend in political campaigns;<sup>17</sup>
- *National Federation of Independent Business v. Sebelius*, upholding the Affordable Care Act of 2010;<sup>18</sup>
- *Shelby County v. Holder*, invalidating a provision of the Voting Rights Act of 1965;<sup>19</sup> and
- *United States v. Windsor*, invalidating the federal Defense of Marriage Act.<sup>20</sup>

To determine whether each of these cases was decided in a “liberal” or a “conservative” manner, I undertook another informal survey. Without disclosing what I was up to, I gave several of my non-lawyer acquaintances a list of the laws at issue in each of these twenty cases and asked them whether they thought a conservative *legislator* would be inclined to support or oppose each of the challenged laws. As it turned out, their judgments were quite uniform.

I then compared their assessments of how a conservative legislator would vote on each of these laws with the actual votes of the justices on the *constitutionality* of those same laws. I counted as a “conservative” vote one that either upheld a law that a conservative legislator would support or that invalidated a law that a conservative legislator would oppose. I counted as a

---

<sup>11</sup> 548 U.S. 557 (2006).

<sup>12</sup> 550 U.S. 124 (2007).

<sup>13</sup> 551 U.S. 701 (2007).

<sup>14</sup> 553 U.S. 181 (2008).

<sup>15</sup> 553 U.S. 723 (2008).

<sup>16</sup> 554 U.S. 570 (2008).

<sup>17</sup> 558 U.S. 310 (2010).

<sup>18</sup> 567 U.S. --- (2012).

<sup>19</sup> 570 U.S. --- (2013).

<sup>20</sup> 570 U.S. --- (2013).

“liberal” vote one that either upheld a law that a conservative legislator would oppose or invalidated a law that a conservator legislator would support.

The results were striking. The six moderately liberal justices voted for the “liberal” policy position 97.5 percent of the time (seventy-eight of eighty votes — Justice Stevens jumped ship in *Hamdi* and *Crawford*). The five very conservative justices voted the conservative line 98.5 percent of the time (sixty-seven of sixty-eight votes — Chief Justice Roberts broke ranks in *Sebelius*). Thus, in the twenty most important constitutional cases decided since 2000, these eleven justices cast 145 of 148 votes in a manner that tracked the presumed policy preferences of conservative and liberal legislators. Put simply, they voted in what seems to have been an ideologically result-oriented manner 98 percent of the time.

What, though, of the all-important “swing” justices – Sandra Day O’Connor and Anthony Kennedy? Predictably, given their characterization as “moderately conservative,” they cast twenty of their thirty-one votes in line with the presumed policy preferences of conservative legislators and joined the very conservative justices 64.5 percent of the time. (O’Connor voted with the moderate liberals in *Grutter*, *Lawrence*, *Hamdi*, and *McCreary*; Kennedy voted with the moderate liberals in *Lawrence*, *Kelo*, *Hamdi*, *Hamdan*, *Boumediene*, *Roper* and *Windsor*). Kennedy voted with the very conservative justices in thirteen of the twenty cases, or 65 percent of the time; O’Connor voted with the very conservative justices in seven of eleven cases, or 64 percent of the time.

When all the dust settled, then, from 2000 to 2013 both the very conservative justices and the moderately liberal justices were in the majority in ten of the twenty cases. Because the two swing justices were relatively conservative, however, the ten liberal victories tended to be more narrowly crafted decisions that were often more important for their *rejection* of the positions put forth by the very conservative justices than for their embrace of more liberal visions of constitutional law.

## II. Deciding the Most Important Cases

What are we to make of all this? Based on this informal study, it seems clear that the justices are much more likely to embrace what appear to be ideologically-determined results in the more important constitutional cases than in more routine ones. Extrapolating from the data in Table 3.2, it seems that, on average, the very conservative justices and the moderately liberal justices agree in constitutional cases approximately 32 percent of the time. But in the *most important* constitutional cases, the very conservative justices and the moderately liberal justices agree less than 3 percent of the time.

This suggests two closely-related and fairly obvious observations: First, the justices are much more polarized along ideological lines in the most important constitutional cases. Second, the justices appear to vote in a much more result-oriented manner in the most important constitutional cases.

Why are these patterns so much more pronounced in the Court’s most important decisions? One possibility is that the most “important” cases are thought to be most important,

not because the stakes are especially high, but because they pose novel issues that are not governed by any clear precedents. Certainly, in such cases we might reasonably expect the justices to be more likely to fall back on their own personal predilections, values and preferences. That, in turn, might produce a much higher than usual degree of result-orientated decision making and ideological polarization.

This seems a plausible factor in at least some of the twenty cases. In *Bush v. Gore* and *Hamdan v. Rumsfeld*, for example, there were no clearly governing precedents to constrain the justices. But this was not the situation in many of the other cases. In *Citizens United* and *Gonzales v. Carhart*, for example, there were clear governing precedents, but that failed to constrain at least some of the justices' seeming determination to reach their preferred outcomes.

Another and more convincing explanation for the voting pattern in these twenty cases is that the same factors that led my panel of experts to identify these decisions as especially important also led the justices themselves to care deeply – perhaps too deeply – about reaching the “right” result. It goes without saying, of course, that judges should want to reach the “right” result. But if the results they reach seem explicable primarily in terms of their own policy preferences, rather than in terms of some consistent and principled theory of constitutional adjudication, then there is clearly reason for concern.

Put simply, the extraordinarily high correlation between the votes cast by the justices in these cases and their presumed policy preferences as individuals seems to raise serious questions about their willingness or ability to “apply the law” in a principled, fair-minded, and objective manner, especially when they care deeply about reaching particular outcomes that conform with their own policy preferences.

### III. Principled Explanations?

But this may be too cynical. Perhaps the voting pattern in these cases can be explained in terms of a principled theory of constitutional interpretation – a theory that just happens to produce outcomes that comport with the justices' own presumed policy preferences. Of course, given the dramatically different results reached in these cases by the very conservative justices, on the one hand, and the moderately liberal justices, on the other, there must be at least *two* quite distinct theories of constitutional interpretation, employed by these two quite distinct sets of justices, to justify and explain their votes in a principled manner. Do such theories exist?

#### A. Judicial Activism v. Judicial Restraint

This brings me to the second issue I want to address, which concerns the distinction between judicial activism and judicial restraint. Because none of these twenty cases presented an “easy” question, as demonstrated by the sharp divisions within the Court, it seems clear that in each case a reasonable argument could be made for the constitutionality of the challenged law. That being so, it seems sensible to conclude that every decision that invalidated the challenged law in these cases can be characterized as an example of “judicial activism.” This is, of course, an imperfect definition, but it seems a reasonable use of the concept for this particular set of cases.

The first thing worth noting is that the Court invalidated the challenged law in fourteen of the twenty cases, or 70 percent. The Court in these cases was therefore quite aggressive, rather than deferential, in its analysis of these issues. This is not surprising, because, on average, decisions are more likely to be thought “important” when the Court holds a law unconstitutional than when it upholds a law. Thus, the relatively high degree of judicial activism in these cases may be more the product of the label “important” than of the more general disposition of the justices. On the other hand, we shouldn’t make too much of this point, because almost all these cases were understood to be important even before the Court decided them. In most instances, it was the issue, rather than the result, that made these cases at least presumptively “important.”

Perhaps more interesting is the behavior of the three different groups of justices. The traditional understanding -- that liberals are judicial activists and conservatives are committed to judicial restraint -- would lead one to expect that the moderately liberal justices in these cases would have been the most activist, the moderately conservative justices would have been in the middle, and the very conservative justices would have been the most restrained.

Not so. In these twenty decisions, the moderately liberal justices cast 53 percent of their votes to invalidate the challenged law, the very conservative justices cast 53 percent of their votes to invalidate the challenged law, and the moderately conservative justices cast 76 percent of their votes to invalidate the challenged law. Thus, the very conservative justices were every bit as activist as the moderately liberal justices. Moreover, if one combines the very conservative justices and the moderately conservative justices, it turns out that the conservative justices as a group were appreciably *more* likely to take activist positions in these cases than the more liberal justices (60 percent to 53 percent). Thus, at least in the Court’s most important recent constitutional decisions, the traditional understanding of how liberal and conservative justices behave is clearly belied.

Is there any *principled* theory of constitutional interpretation that might explain why these justices were activist in some cases, but not in others? What, if anything, can we discern from their voting patterns about their respective approaches to constitutional interpretation? As we have seen, the very conservative justices and the moderately liberal justices voted in direct opposition to one another more than 97 percent of the time. Although they were equally activist, they were activist on diametrically opposed issues.

The moderately liberal justices were activist in voting to strike down laws that restricted the rights of gays and lesbians (*Lawrence*, *Windsor*), restricted the rights of women (*Gonzales*), restricted the rights of religious minorities (*McCreary County*, *Zelman*), restricted the rights of persons accused of crime or terrorism (*Boumediene*, *Hamdan*, *Hamdi*, *Lockyer*, *Roper*), and restricted the right to vote (*Crawford*).

The very conservative justices were activist in voting to strike down the Voting Rights Act (*Shelby County*), the Violence Against Women Act (*Morrison*), the Affordable Care Act (*Sebelius*), laws restricting the right of individuals to own guns (*Heller*), laws restricting the right of corporations to spend unlimited amounts in the political process (*Citizens United*), laws restricting the rights of property owners (*Kelo*), laws promoting affirmative action and

integration for African Americans (*Grutter, Parents Involved*), and laws that might have led to the election of Al Gore as president in 2000 (*Bush v. Gore*).

Is there any principled theory of constitutional interpretation that explains the justices' highly *selective* use of judicial activism in these cases?

## B. Our Moderately Liberal Justices

Let me begin with the six moderate liberal justices – Breyer, Ginsburg, Kagan, Sotomayor, Souter and Stevens. Their votes in these cases reflect almost perfectly the theory of judicial review enunciated by Chief Justice Harlan Fiske Stone in 1938 in the Supreme Court's famous footnote 4 in *United States v. Carolene Products Co.*<sup>21</sup>

While burying the doctrine of economic substantive due process,<sup>22</sup> Chief Justice Stone at the same time suggested that “there may be narrower scope for operation of the presumption of constitutionality when legislation . . . restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation” or when it discriminates “against discrete and insular minorities” in circumstances in which it is reasonable to infer that prejudice, intolerance or indifference might seriously have curtailed “the operation of those political processes ordinarily to be relied upon to protect minorities.”<sup>23</sup>

This conception of *selective* judicial activism is deeply rooted in the original understanding of the essential purpose of judicial review in our system of constitutional governance. The Framers of our Constitution wrestled with the problem of how to cabin the dangers of overbearing and intolerant majorities. For example, those who initially opposed a bill of rights argued that a list of rights would serve little, if any, practical purpose, for in a self-governing society the majority could simply disregard whatever rights might be “guaranteed” in the Constitution. In the face of strenuous objections from the Anti-Federalists during the ratification debates, however, it became necessary to reconsider the issue.

On December 20, 1787, Thomas Jefferson wrote James Madison from Paris that, after reviewing the proposed Constitution, he regretted “the omission of a bill of rights.”<sup>24</sup> In response, Madison expressed doubt that a bill of rights would “provide any check on the passions and interests of the popular majorities.” He maintained that “experience proves the inefficacy of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State” that already had a bill of rights. In such circumstances, he asked, “What use . . . can a bill of rights serve in popular Governments?”<sup>25</sup>

---

<sup>21</sup> 304 U.S. 144 (1938).

<sup>22</sup> *See, e.g.,* *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>23</sup> 304 U.S. at 152 n.4.

<sup>24</sup> Thomas Jefferson to James Madison, December 20, 1787, in JACK N. RAKOVE, *DECLARING RIGHTS: A BRIEF HISTORY WITH DOCUMENTS* at 154, 156 (Bedford 1997).

<sup>25</sup> James Madison to Thomas Jefferson, October 17, 1788, in RAKOVE, *DECLARING RIGHTS*, *supra* note 24, at 160-162.

Jefferson replied, “Your thoughts on the subject of the Declaration of rights” fail to address one consideration “which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent . . . merits great confidence for their learning and integrity.”<sup>26</sup> This exchange apparently carried some weight with Madison.

On June 8, 1789, Madison proposed a bill of rights to the House of Representatives. At the outset, he reminded his colleagues that “the greatest danger” to liberty was found “in the body of the people, operating by the majority against the minority.”<sup>27</sup> Echoing Jefferson’s letter, he stated the position for judicial review, contending that if these rights are “incorporated into the constitution, independent tribunals of justice will consider themselves . . . the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.”<sup>28</sup>

This reliance on judges, whose lifetime tenure would hopefully insulate them from the need to curry favor with the governing majority, was central to the Framers’ understanding. Alexander Hamilton, for example, strongly endorsed judicial review as “obvious and uncontroversial.” The “independence of the judges,” he reasoned, is “requisite to guard the constitution and the rights of individuals from the effects of those ill humours which . . . sometimes disseminate among the people themselves.” Judges, he insisted, have a duty to resist invasions of constitutional rights even if they are “instigated by the major voice of the community.”<sup>29</sup>

It was this “originalist” conception of judicial review that informed the Warren Court’s selective judicial activism. As a rule, the Warren Court gave a great deal of deference to the elected branches of government – except when such deference would effectively abdicate the responsibility the Framers had imposed upon the judiciary to serve as an essential check against the inherent dangers of democratic majoritarianism. They therefore invoked activist judicial review primarily in two situations: (1) when the governing majority systematically disregarded the interests of a historically underrepresented group (such as blacks, ethnic minorities, political dissidents, religious dissenters, and persons accused of crime), and (2) when there was a risk that a governing majority was using its authority to stifle its critics, entrench the political status quo, and/or perpetuate its own political power.

Consider, for example, *Brown v. Board of Education*,<sup>30</sup> which prohibited racial segregation in public schools, *Loving v. Virginia*,<sup>31</sup> which invalidated laws forbidding interracial marriage, *Engel v. Vitale*,<sup>32</sup> which prohibited school prayer, *Goldberg v. Kelly*,<sup>33</sup> which

---

<sup>26</sup> Thomas Jefferson to James Madison, March 15, 1789, in RAKOVE, DECLARING RIGHTS, *supra* note 24, at 165.

<sup>27</sup> James Madison, Speech to the House of Representatives, June 8, 1789, in 12 THE PAPERS OF JAMES MADISON 204 (Charles F. Hobson, Robert A. Rutland, William M. E. Rachal, eds., University of Virginia Press 1979).

<sup>28</sup> James Madison, Speech to the House of Representatives, June 8, 1789, in RAKOVE, DECLARING RIGHTS *supra* note 24, at 170, 179.

<sup>29</sup> THE FEDERALIST NO. 78 (Alexander Hamilton).

<sup>30</sup> 347 U.S. 483 (1954).

<sup>31</sup> 388 U.S. 1 (1967).

<sup>32</sup> 370 U.S. 421 (1962).

<sup>33</sup> 397 U.S. 254 (1970).

guaranteed a hearing before an individual's welfare benefits could be terminated, *Reynolds v. Sims*,<sup>34</sup> which guaranteed "one person, one vote," *Miranda v. Arizona*,<sup>35</sup> which gave effect to the prohibition of compelled self-incrimination, *Gideon v. Wainwright*,<sup>36</sup> which guaranteed all persons accused of crime the right to effective assistance of counsel, *New York Times v. Sullivan*,<sup>37</sup> which limited the ability of public officials to use libel actions to silence their critics, and *Elfbrandt v. Russell*,<sup>38</sup> which protected the First Amendment rights of members of the Communist Party. Each of these decisions clearly reflected the central purpose of judicial review – to guard against the distinctive dangers of majoritarian abuse.

By definition, anti-majoritarian decisions generally do not sit well with the majority. It is therefore hardly surprising that this jurisprudence excited biting criticism, especially in the political arena, where candidates curry favor with the very same majority whose "unconstitutional" political preferences are being thwarted. By the late 1960s, Richard Nixon was able to make the Court's "judicial activism" a significant issue in national politics. During his nomination acceptance speech in 1968, for example, he insisted that the Court had "gone too far" and that "we must act to restore" a proper "balance."<sup>39</sup> Nixon decried the activism of the Warren Court and pledged to appoint "strict constructionists" rather than "judicial activists" to the Court. In the discourse of the time, a strict constructionist was a judge committed to judicial restraint. In a few short years, Nixon appointed Warren Burger, Harry Blackmun, Lewis Powell, and William Rehnquist. Although these justices varied over time in their adherence to "strict constructionism," their presence soon transformed the Court, leaving the vision of the Warren Court in its wake.

But it is that vision of constitutional law that has continued to shape and inform the behavior of the moderately liberal justices on the modern Supreme Court and that explains – in a principled manner – their selective invocation of judicial activism. A review of the votes of the moderately liberal justices in the twenty most important constitutional decisions since 2000 reveals that they continue to adhere to this approach. Indeed, in one additional "experiment," I described to several non-lawyers the criteria for special concern under footnote 4, gave them a list of the laws at issue in the twenty cases, and asked them to identify those that best fit the footnote 4 criteria. Their judgments matched almost perfectly the cases in which the moderately liberal justices engaged in judicial activism. Thus, in my view, the approach reflected in the voting patterns of Justices Stevens, Souter, Ginsburg, Breyer, Sotomayor and Kagan in these twenty cases seems well grounded in the footnote 4 theory and thus in the original concerns of the Framers of the Constitution and in their distinctive understanding of the special responsibility of courts in our constitutional system.

---

<sup>34</sup> 377 U.S. 533 (1964).

<sup>35</sup> 384 U.S. 436 (1966).

<sup>36</sup> 372 U.S. 335 (1963).

<sup>37</sup> 376 U.S. 254 (1964).

<sup>38</sup> 384 U.S. 11 (1966).

<sup>39</sup> Richard M. Nixon, Presidential Nomination Acceptance Speech (August 8, 1968).

### C. Our Very Conservative Justices

What, though, of our very conservative justices? Does any principled theory of constitutional interpretation explain their selective judicial activism? A review of their votes leaves one in a bit of a quandary. Over the years, conservatives have articulated two quite different theories of constitutional interpretation – judicial restraint and originalism. Neither explains in any way the votes of the very conservative justices.

In Richard Nixon's day, a “conservative” justice was a justice committed to judicial restraint. Judicial restraint is, of course, critical to the legitimacy of constitutional law. In general, judges must defer to the reasonable judgments of the elected branches of government. But although judicial restraint in *appropriate* circumstances is essential, its sweeping, reflexive invocation would abdicate a fundamental responsibility that the Framers themselves entrusted to the judiciary and would therefore undermine a critical element of the American constitutional system.

In any event, the voting behavior of the very conservative justices cannot be explained by any commitment to the principle of judicial restraint. To the contrary, as we have seen, the very conservative justices were every bit as activist as the moderate liberal justices in these cases and nothing in their approach to constitutional interpretation in these decisions can reasonably be characterized as restrained or deferential. Thus, whatever the merits of judicial restraint as a general approach to constitutional interpretation, it does not in any way explain the voting pattern of the Rehnquist-Roberts-Scalia-Thomas-Alito faction of the Court.

The second theory of constitutional interpretation often associated with conservative thinkers is originalism. First popularized in the early 1980s, originalism, as promoted by Robert Bork, Antonin Scalia and Clarence Thomas, presumes that courts should exercise restraint unless the “original meaning” of the text mandates a more activist approach.<sup>40</sup> Under this theory, for example, it is appropriate for courts to invoke the Equal Protection Clause to invalidate laws that deny African Americans the right to serve on juries, but not to invalidate laws that deny women that same right, because that was not the “original meaning” of the Equal Protection Clause.

For at least two reasons, originalism is problematic as a theory of constitutional interpretation. First, because those who enacted the broad foundational provisions of our Constitution often did not have any precise and agreed-upon understanding of the *specific* meaning of such phrases as “the freedom of speech,” “due process of law,” “regulate Commerce . . . among the several States,” or “equal protection of the laws,” it is often difficult if not impossible to know with any degree of confidence what they did or did not think about concrete constitutional issues. Originalist inquiries are therefore often much less helpful – and much less constraining -- than their proponents suggest.

The second difficulty with originalism is even more problematic, for it reveals the approach to be internally incoherent. Originalism asserts that those who crafted and ratified our

---

<sup>40</sup> See, e.g., STEVEN G. CALABRESI AND ANTONIN SCALIA, ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Regnery Publishing 2007); ROBERT W. BENNETT AND LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE (Cornell 2011).

Constitution intended the meaning and effect of their handiwork to be limited to the specific understandings of their time. But this view erroneously attributes to the Framers a narrow-mindedness and short-sightedness that belies their true spirit.

The Framers were men of the Enlightenment who were steeped in a common-law tradition that presumed that just as reason, observation, and experience permit us to gain greater insight over time into questions of biology, physics, economics, and human nature, so too would they enable us to learn more over time about the content and meaning of the principles they enshrined in the Constitution. The notion that any particular moment's understanding of the meaning of the Constitution's broad and open-ended provisions should be locked into place and taken as constitutionally definitive would have seemed completely wrong-headed to the Framers, who held a much bolder and more confident understanding of their own achievements and aspirations.

In any event, and whatever the merits of originalism in the abstract, it does not in any way explain the voting behavior of the very conservative justices in these cases. In some of these decisions, such as *Lawrence* and *Windsor*, a strict originalist could quite credibly argue that the Framers did not affirmatively intend the Constitution they enacted to render unconstitutional laws against sodomy or laws limiting marriage to a man and a woman. In such cases, the votes of the very conservative justices were certainly consistent with an originalist conception of constitutional interpretation.

But in many other cases, the votes of the very conservative justices cannot fairly be explained by, or even reconciled with, any meaningful theory of originalism. These would include, for example, their votes to hold unconstitutional laws restricting the amounts that corporations can spend in the electoral process (*Citizens United*), laws authorizing affirmative action in higher education (*Grutter*), laws regulating guns (*Heller*), laws protecting the right of African-Americans to vote (*Shelby County*), laws promoting racial integration in public schools (*Parents Involved*), laws affecting property rights in the context of economic redevelopment plans (*Kelo*), and the laws of the State of Florida in the 2000 presidential election (*Bush v. Gore*). My point is not that one could not justify the votes of the very conservative justices in these cases on some other ground, but that those votes clearly cannot be defended or explained in terms of any fair-minded application of originalism.

What, then, explains the voting pattern of Justices Rehnquist, Roberts, Scalia, Kennedy, Thomas, and Alito in these cases? In my view, their votes cannot be explained by any consistent theory of constitutional interpretation. Rather, to paraphrase Justice Frankfurter's critique of the Court's activism in the *Lochner* era, the selective judicial activism of the very conservative justices in these decisions seems to be born out of "their prejudices and their respective pasts and self-conscious desires."<sup>41</sup>

Their votes in these cases, in short, were determined first-and-foremost by their own personal policy preferences. No other plausible theory explains the otherwise striking pattern of their decisions. That is distressing, to say the least. They are, I am certain, unaware of this.

---

<sup>41</sup> Melvin I. Urofsky, *Conflict Among the Brethren: Felix Frankfurter, William O. Douglas and the Clash of Personalities and Philosophies on the United States Supreme Court*, 1988 Duke L. J. 71, 105 (1988).

They no doubt believe that they decide each case as it comes to them, like umpires calling balls and strikes. But given the strikingly ideological pattern of their votes in these cases, and the absence of any plausible theory to explain them, this is simply not credible.

#### IV. Conclusion

Finally, what about the moderately conservative justices? In 95 percent of these decisions, at least one of the moderately conservative justices was in the majority (the sole exception was *Sebelius*). Justice Kennedy was in the majority in 85 percent of the decisions and Justice O'Connor was in the majority in 80 percent of the cases in which she participated. By contrast, Justices Scalia and Thomas, on the conservative side, and Justices Ginsburg and Breyer, on liberal side, all were in the majority in exactly 50 percent of the cases, even though they disagreed 100 percent of the time. Clearly, then, in terms of Court's most important decisions since 2000, this has been the Kennedy/O'Connor Court. In the end, they called the shots.

Although Justices Kennedy and O'Connor clearly inclined in a conservative direction, they were far from knee-jerk in their voting. In several important decisions, including *Lawrence*, *Windsor*, *Grutter*, *Hamdan* and *McCreary*, one or both of them parted company with their more conservative colleagues. What led Justices Kennedy and O'Connor to vote as they did in these twenty cases is unclear. Unlike the moderately liberal justices, there is no overarching theory that explains why Kennedy and O'Connor were more activist in some cases and more restrained in others. It might be, of course, that their votes were driven by nothing more than their own moderately conservative policy preferences, but one gets more of a sense from their opinions that they were also grappling seriously with the conventional legal sources that are "supposed" to guide judicial decision making.

In the end, though, the most striking thing about my journey into these twenty decisions was the remarkable voting record of the very conservative justices. That, in my view, speaks volumes. In any event, as I hope I have demonstrated, by generating the data presented in *The Behavior of Federal Judges*, Lee Epstein, William Landes and Richard Posner have not only enlightened us with the answers they offer, but they have also raised new and wonderfully intriguing new questions about what makes judges tick.