

THE DEATH OF JUDICIAL CONSERVATISM

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If we are talking about what happened during the Bush Administration, “The Death of Judicial Conservatism” looks like it is either a misprint or the deluded ramblings of a liberal who did not get the memo. But I think it is fair to say that one of the lessons we have learned in the wake of the Bush Administration’s appointments to the Supreme Court is that judicial conservatism no longer exists in any significant form. Or at least so I argue here.

To say that judicial conservatism has died is not to say that its opposite, judicial liberalism or progressivism, has flourished. It is clearer than ever that people who hoped for the revival of the Warren Court—a court that had an agenda to be at the forefront of what it considered to be social reform in a generally liberal direction—had better give up that hope for at least a generation. That is an obvious lesson of the Bush appointments. President Bush’s appointees, Chief Justice Roberts and Justice Alito, are young (by the standards of Supreme Court appointees)¹ and extremely able. We can expect them to be on the Court for a long time, and we can expect them to write important and influential opinions. Those Justices quite clearly have no interest in reviving Warren Court liberalism.

It has also become clear that, when a Republican is President, the judicial appointments process is controlled by a wing of the Republican Party that is, to say the least, hostile to the kind of Supreme Court that liberals or progressives might want.² That wing of

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1. See Kevin T. McGuire, *Are the Justices Serving Too Long? An Assessment of Tenure on the U.S. Supreme Court*, <http://www.unc.edu/~kmcguire/papers/tenure.pdf> (finding the average age of Supreme Court appointees between 1851 and 2005 is in the mid-50s).

2. Cf. William G. Ross, *The Role of Judicial Issues in Presidential Campaigns*, 42 SANTA CLARA L. REV. 391, 462–72 (2001) (discussing the role that judicial nominations played in the 2000 election, including pre-election predictions that, if elected president,

the Republican Party is also deeply committed to making sure that judicial appointments carry out its principles.³ This is not a judgment; it is just a fact. Presidents of both political parties have used their Supreme Court appointments to pursue a political agenda,⁴ and there is not necessarily anything wrong with that. I do think, however, it is accurate to say that people with a clear agenda dominated the judicial appointments process in the Bush Administration.

When President Bush tried to appoint his counsel, Harriet Miers, to the Supreme Court, he was rebuffed not by the Democrats but by people in his own party. These Republicans were concerned not just about whether she was distinguished enough to be appointed to the Supreme Court but also about whether she was sufficiently “reliable” and committed to certain views.⁵ Meanwhile, the Democratic Party did not have the inclination or the ability to fight the conservative appointments that the President’s party wanted him to make.

Put all of those things together—the exceptional ability and relative youth of the two most recent appointments, the already conservative character of the Court, the Republican Party’s commitment to making conservative appointments, and the Democrats’ relative lack of ability to use the Court to advance an agenda—and the idea that there might be a revival of something like the Warren Court in the next generation is, in a word, chimerical. That is pretty obvious. What is less obvious—and a little paradoxical—is that we are also dealing with something that can fairly be characterized as the end of judicial conservatism.

George W. Bush would appoint “strict constructionists” who would likely decide cases in a manner well-received by Republicans).

3. Cf. Cliff Schecter, *Extremely Motivated: The Republican Party’s March to the Right*, 29 FORDHAM URB. L.J. 1663, 1667 (2002) (finding that the predominant vocal members of the Republican Party since the early Clinton years have been increasingly right-wing on issues connected with the Court such as “abortion, guns, and minority rights”).

4. Franklin Roosevelt used his extensive tenure in the White House to make appointments that secured his New Deal programs. Ronald Reagan tried to achieve the same goal in a “Conservative Revolution.” See Graeme Browning, *Reagan Molds the Federal Court in His Own Image*, 71 A.B.A. J. 60, 60 (1985) (analyzing President Roosevelt’s and President Reagan’s judicial appointments).

5. See David K. Kirkpatrick, *After Miers, the Right Is Expecting More*, N.Y. TIMES, Oct. 30, 2005, available at http://www.nytimes.com/2005/10/30/politics/politicsspecial1/30confirm.html?_r=1&scp=1&sq=After Miers, the Right is Expecting More&st=cse (quoting various conservative commentators and politicians regarding their distrust of Miers’ political agenda).

How can it be that, if the liberals have been vanquished, the conservatives have not triumphed? To begin thinking about that question, we must ask: what exactly *is* judicial conservatism? What does it mean to be a conservative Supreme Court Justice?

Let me start with three things that judicial conservatism cannot be. First, some conservatives say that being a judicial conservative means following the original understandings of the Constitution.⁶ This means that conservative judges should adhere to the intentions or the understandings of the people who drafted or ratified the Constitution; in the most common current formulation, they should look at how the Constitution was understood at the time when its various provisions were ratified.⁷ But originalism cannot be what it means to be a judicial conservative, for several reasons.

For one thing, the idea that Justices can interpret the Constitution by uncovering the understandings or intentions of the Framers has been repeatedly discredited, beginning with Thomas Jefferson.⁸ The first problem is that it is not doable.⁹ It is hard enough to figure out what the Framers were thinking more than two hundred years ago. Then even if you do figure that out, you have to apply the Framers' thoughts to our completely different world—one which the Framers could not possibly have foreseen.¹⁰ Even if you could do all of that, why would it be a good idea? To paraphrase Jefferson, why should we be ruled by people who are long dead?¹¹ Underlying all of this is an even bigger risk: not that we will be ruled by the dead, but rather that

6. Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 626 (1994) (describing conservatism as originalism but not endorsing this view).

7. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 133, 143 (1990).

8. See, e.g., David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717, 1721–22 (2003) (analyzing Thomas Jefferson's belief that "[t]he earth belongs in usufruct to the living" and that laws from one generation should not bind another generation).

9. See H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 659–66 (1987) (arguing that an interpreter, no matter how intellectually responsible, necessarily imposes his own historical judgments when contextualizing the Framers' intents).

10. *Id.* at 665.

11. "Can one generation bind another and all others in succession forever? I think not. The Creator has made the earth for the living, not the dead. Rights and powers can only belong to persons, not to things, not to mere matter unendowed with will." Letter from Thomas Jefferson to John Cartwright, Major in the British Royal Navy (1824), *in* THE WRITINGS OF THOMAS JEFFERSON MEMORIAL EDITION 16, 48 (Lipscomb & Bergh eds., 1903–04).

living people will claim to be following the original understandings when, in fact, they are just following their own views.¹²

But even if originalism could somehow be justified, and made to work, there is no reason to view it as a conservative approach to the Constitution. Originalism is by no means something that has historically been identified with people who are called conservatives.¹³ The most influential originalist judge of the last hundred years was Justice Hugo Black, and he was not a conservative at all: he was a mainstay of the Warren Court. Justice Black was far more influential in carrying out what he saw as the original understandings than any of the present-day conservative originalists.¹⁴ That does not prove that originalism is a distinctively liberal approach—it may just be a highly manipulable approach—but it is not a distinctively conservative approach either.

The two Bush appointees show no signs of being tempted to be originalists. In their confirmation hearings they did not embrace originalism.¹⁵ In his confirmation hearings, Chief Justice Roberts did not ever say something like, “I believe the Constitution should be interpreted according to the original understandings.”¹⁶ Justice Alito made a fleeting reference to the original understandings in a list of things that he would take into account.¹⁷ But neither Justice identified himself as an originalist, as Justice Scalia and Justice Thomas would (and have).¹⁸ My hypothesis is that originalism proved useful to conservatives when they were attacking what they saw as a mistaken

12. Powell, *supra* note 9, at 661.

13. Young, *supra* note 6, at 619.

14. David A. Strauss, *Symposium Essays on Originalism: II. Originalism and Precedent: Why Conservatives Shouldn't Be Originalists*, 31 HARV. J.L. & PUB. POL'Y 969, 975 (2008).

15. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr., To Be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary United States Senate*, 109th Cong. 55 (2005); *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr., To Be an Associate Justice of the United States, Hearing Before the Comm. on the Judiciary United States Senate*, 109th Cong. (2006), available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/10/AR2006011000781.html>.

16. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr., To Be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary United States Senate*, 109th Cong. 55 (2005).

17. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr., To Be an Associate Justice of the United States, Hearing Before the Comm. on the Judiciary United States Senate*, 109th Cong. (2006), available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/10/AR2006011000781.html>.

18. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989).

status quo, just as originalism proved useful to Justice Black when he was attacking the pre-New Deal status quo.¹⁹ But Chief Justice Roberts and Justice Alito have spent their careers in a period when the Supreme Court was resolutely conservative, so they are mostly comfortable with the status quo, and originalism does not appeal to them.

So judicial conservatism is not a commitment to the original understandings. The second thing that judicial conservatism is not, is so-called “strict constructionism.” Often, a conservative politician will call for judges to be strict constructionists. But what does strict constructionism mean? What is the antonym of strict constructionism? If strict constructionism means following the law, then saying a judge is not a strict constructionist just means that you disagree with his or her decisions. At one time in our history, strict constructionism had a fairly clear meaning: in the early days of the Republic, it meant that the powers of the federal government would be narrowly confined.²⁰ That was the Jeffersonian position,²¹ in opposition to the view of Alexander Hamilton and Hamilton’s allies, who thought the powers of the federal government should be given a more expansive interpretation.²² Whether Jefferson’s view was right or not, it was a coherent view of what strict construction means: the federal government’s powers should be strictly limited.

That, however, is not where today’s conservatives are going when they call for strict construction. I will return to this point later, but I think what “strict construction” usually means today is: “*Roe v. Wade* was wrong.”²³ There are reputable people who think *Roe v. Wade* is

19. Strauss, *supra* note 14, at 975.

20. See DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 196 (Univ. Press of Virginia 1994) (describing Jefferson’s strict theory of constitutional interpretation); CALEB PERRY PATTERSON, *THE CONSTITUTIONAL PRINCIPLES OF THOMAS JEFFERSON* 70 (Peter Smith 1967) (1953) (“Jefferson insisted on a strict construction of the Constitution and founded a party to perpetuate his constitutional principles.”).

21. MAYER, *supra* note 20, at 196; PATTERSON, *supra* note 20, at 70.

22. MAYER, *supra* note 20, at 196 (describing the divergence in Jefferson and Hamilton’s theories of constitutional interpretation); PATTERSON, *supra* note 20, at 126 (contrasting Jefferson’s strict-construction theory of constitutional interpretation with Hamilton’s loose-construction theory of constitutional interpretation).

23. See David R. Stras, *Understanding the New Politics of Judicial Appointments*, 86 TEX. L. REV. 1033, 1037 (2008) (reviewing BENJAMIN WITTES, *CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES* (2006) and JAN CRAWFORD, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* (2007)) (“Other times references to the abortion issue are masked by

wrong; the constitutional status of the right to abortion is an important and complex issue. But if what you want to say is that *Roe v. Wade* is wrong, then say that. Don't start talking about strict construction, which either means something entirely different or has no useful meaning at all.

The third meaning that judicial conservatism might have is something like "just follow the law." Liberals, according to this account, make up new law to fit their moral and political views, while conservatives decide cases in accordance with the law. If we put aside the talk about liberals and conservatives for a moment, there is an interesting issue here. Why does a Court or a Justice need a theory, an approach, or an ideology? Why not just be a judge and decide the cases? That is a powerful question, and I will try to answer it before I am done—although it will be only a partial answer. For now the thing to bear in mind is that in most of the cases that reach the Supreme Court, good lawyers will disagree about what the right answer is. Of course there are plenty of legal questions to which a good lawyer can give only one answer. But most of those questions do not find their way to the Supreme Court; most of them do not find their way into court at all. In almost any high-profile, controversial case in the Supreme Court, good lawyers can disagree about the answer and still be good lawyers.²⁴

For that reason, just saying "I am going to decide the cases in accordance with the law" only gets a judge so far. When it comes to Supreme Court cases, people can share that commitment, act conscientiously and in complete good faith, and still disagree most of

obfuscation, such as when presidents like George W. Bush talk about appointing nominees who are 'strict constructionists' or those who will not 'use the bench to write social policy.'"); Ward Farnsworth, *The Regulation of Turnover on the Supreme Court*, 2005 U. ILL. L. REV. 407, 423 (2005) (citing Stephen L. Carter, *Bork Redux, or How the Tempting of America Led the People to Rise and Battle for Justice*, 69 TEX. L. REV. 759, 776 (1991)) ("'Strict construction' is a slogan, a signaling device to denote types of judges who will produce certain outcomes."); see also Vice President Albert Gore, Jr., Presidential Debate (October 3, 2000) (transcript available at 2000 WL 1466168 (F.D.C.H.)) ("And when the phrase 'strict constructionist' is used, and when the names of Scalia and Thomas are used as benchmarks for who would be appointed, those are code words . . . for saying that the governor would appoint people who would overturn *Roe v. Wade*.").

24. See Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 621–22 n.39 (2000) (citing George Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEG. STUD. 1 (1984)) ("[C]ases wind up in court in direct proportion to their legal difficulty . . . since litigation presupposes two mutually exclusive positions each of whose adherents has some reason to believe that she will prevail.").

the time. Their disagreement is the result not of a difference in legal skill, but of a difference in vision, in their sense of fairness, in their ideas about the role the Court should play. That is why it is not enough to say that a judicial conservative is someone who decides the case in a lawyer-like fashion. The important question is: what does judicial conservatism mean at the point where good lawyers disagree?

None of those three approaches—originalism, “strict construction,” or just-follow-the-law—gives a plausible account of what judicial conservatism might be. What might a plausible form of judicial conservatism consist of, then? One important and time-honored view is that judicial conservatives believe in judicial restraint.²⁵ Now, when you talk about “judicial restraint” and “judicial activism,” you are at the risk of just engaging in rhetoric and attaching labels. But judicial restraint can be given a coherent content; it is a view that was clearly and forcefully articulated at one point in our history.²⁶ The view is that the courts should not overturn the decisions of the people’s elected representatives except in extreme cases.²⁷ If Congress or the state legislatures do something truly irrational or truly indefensible, then, but only then, the courts should step in and declare it unconstitutional.²⁸ This is sometimes characterized as the “rule of the clear mistake.”²⁹ It has to be a clear mistake by the elected branches of government or else the Court should not get involved.³⁰

Probably the most vigorous proponent of this view in the Supreme Court’s history was Justice Felix Frankfurter,³¹ a Franklin Roosevelt

25. See Young, *supra* note 6, at 626–27 (describing judicial restraint as one of “three primary methodological themes that . . . represent the basic tenets of modern conservative constitutionalism”).

26. See Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 12 (1996) (“The position can be found as well in the writings of Justice Holmes, the first Justice Harlan, Justice Frankfurter, and, most recently, Chief Justice Rehnquist.”).

27. Young, *supra* note 6, at 626–27.

28. See Sunstein, *supra* note 26, at 11–12 (citing James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 139–52 (1893)).

29. *Id.*

30. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (limiting judicial action to those occasions “when those who have the right to make laws have not merely made a mistake, but have made a very clear one—so clear that it is not open to rational question”).

31. See FELIX FRANKFURTER REMINISCES 301 (Harlan B. Phillips ed., Reynal & Company, Inc. 1960) (“I regard Thayer’s essay [about the limited role of the judiciary] as the most important single essay. . . . He was a very great man.”).

appointee, and possibly the most famous statement of this view is Justice Frankfurter's dissenting opinion in *West Virginia State Board of Education v. Barnette*.³² The majority of the Supreme Court, in fact everybody but Justice Frankfurter, voted to strike down a West Virginia law that required schoolchildren to say the Pledge of Allegiance.³³ Justice Frankfurter wrote an emotional and personal dissent in which he said that while he sympathized with religious minorities—the children in the case were Jehovah's Witnesses whose religious creed forbade them to salute the flag—he simply did not think it was the Court's job to strike down the law.³⁴ The judgment of the people of West Virginia was that schoolchildren should be saying the Pledge of Allegiance, and that, Justice Frankfurter said, was not obviously unconstitutional—in fact, the Court, with mostly different members, had upheld a compulsory flag salute law just a few years earlier.³⁵ Justice Frankfurter disapproved of the law, and there was a plausible argument that the law was unconstitutional, but, because it was not entirely clear that the law was unconstitutional, Justice Frankfurter voted to uphold it.

Even Justice Frankfurter did not practice this form of judicial restraint consistently throughout his career on the Court, and since he left the Court in 1962, the number of Justices who have practiced judicial restraint of this kind is zero.³⁶ Certainly nobody on the Court today holds this view of the Court's role. Every Justice since Frankfurter has voted to declare measures unconstitutional that were not obviously unconstitutional. We are accustomed to the idea that the Court will do this, and no Justice since Frankfurter has even advocated his form of judicial restraint.

It is theoretically possible that this form of “clear mistake” judicial restraint could be revived: it has some important academic

32. *W.Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 646–71 (1943) (Frankfurter, J. dissenting).

33. *Id.*

34. *Id.* at 646–71.

35. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

36. *Cf.* Sunstein, *supra* note 26, at 13 (“Chief Justice Rehnquist has often endorsed the rule of clear mistake, and he is probably the most consistent proponent of this view in recent decades. But in cases involving affirmative action, the Chief Justice speaks in quite different terms; here his method is more like a form of independent interpretive judgment.”).

advocates.³⁷ As far as Acts of Congress are concerned, such an approach might amount to the effective end of judicial review, because it is hard to imagine Congress passing a law so extreme that it would be obviously unconstitutional. It is more likely that a local government, or conceivably a state government, might do something that makes you shake your head in embarrassment and amazement.³⁸ But the current Court, including the so-called conservatives on the current Court, is nowhere near being so restrained.³⁹

There are many examples, but two recent ones are especially notable. The Court has struck down two significant provisions of the McCain-Feingold Campaign Finance Reform Act,⁴⁰ an important statute that was the product of extensive deliberation in Congress⁴¹ and that, whatever else might be said of it, was not irrational or transparently unconstitutional.⁴² Both George W. Bush appointees voted to invalidate these provisions.⁴³ In one of the cases, Chief Justice Roberts led the charge with an opinion saying that when in doubt the Court should err on the side of protecting political speech.⁴⁴ That credo may be an admirable one, but it is exactly the opposite of judicial restraint.

In the 2007-2008 Supreme Court term, the most dramatic example of a decision that tossed judicial restraint overboard was *District of Columbia v. Heller*, the case in which the Court struck down the District of Columbia's gun control ordinance on the ground that it

37. *E.g.*, ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 254–84 (Harvard Univ. Press 2006).

38. *See* Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 *UCLA L. REV.* 233, 264 (1988) (citing the possibility that “Congress and the state legislatures might not be equally likely to enact unconstitutional statutes” as creating a difference in the content of litigation in state and federal courts).

39. *Cf.* Sunstein, *supra* note 26, at 13 (describing Rehnquist’s selective application of the rule of clear mistake).

40. *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (holding that restrictions on issue ads in the months preceding elections are unconstitutional); *Davis v. FEC*, 128 S. Ct. 2759 (2008) (holding that the so-called “Millionaire’s Amendment” violated the First Amendment by imposing a substantial burden on the right to use personal funds for campaign speech).

41. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002).

42. *Wis. Right to Life*, 127 S. Ct. at 2704 (Souter, J., dissenting) (“The Court (and, I think, the country) loses when important precedent is overruled without good reason, and there is no justification for departing from our usual rule of *stare decisis* here.”).

43. *Id.*

44. *Id.* at 2659 (“[T]he First Amendment requires us to err on the side of protecting political speech rather than suppressing it.”).

violated the Second Amendment right to keep and bear arms.⁴⁵ Maybe that decision was right; maybe it was wrong—that is an argument we can have on another day. But no one, I believe, can seriously say that the statute was *obviously* unconstitutional.⁴⁶ There are many other examples, but those two examples should be enough to dispel any idea that judicial conservatism today takes the form of severe Frankfurter-like judicial restraint.

If judicial conservatives today do not believe in judicial restraint, then what do they believe in? Perhaps the core of judicial conservatism is protecting federalism and states' rights. The idea would be that the Court's most important job is to protect state and local governments—the forms of government closest to the people—from the remote, overbearing federal government.⁴⁷ There were hints, during the Rehnquist era, that the Supreme Court was moving in this direction; in some celebrated cases, the Rehnquist Court, reversing a trend that had existed since the New Deal, struck down acts of Congress on the grounds that they exceeded Congress' powers under the Commerce Clause.⁴⁸

I am pretty confident that the Court will not continue to move seriously in that direction. The two Justices who believed most strongly in federalism have both left the Court—Chief Justice Rehnquist and Justice O'Connor.⁴⁹ Their replacements' careers have been, in both cases, focused almost exclusively on the federal government,⁵⁰ and Justices Roberts and Alito do not seem to be

45. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

46. *Cf. id.* at 2816 (holding that the right secured by the Second Amendment is not unlimited).

47. *See, e.g.*, Ernest Young, *The Conservative Case for Federalism*, 74 GEO. WASH. L. REV. 874, 883–84 (2006) (noting the special role that federalism plays in protecting individual liberties).

48. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549 (1995) (holding that possession of a firearm near a school is not an economic activity that has a substantial effect on interstate commerce); *United States v. Morrison*, 529 U.S. 598 (2000) (holding that the Violence Against Women Act of 1994 is unconstitutional as exceeding Congressional power under the Commerce Clause).

49. Chief Justice Rehnquist and Justice Sandra Day O'Connor showed their adherence to federalist values by authoring *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), respectively. Chief Justice Rehnquist died on September 3, 2005, and Justice Sandra Day O'Connor retired from the Court on January 31, 2006.

50. *The Justices of the Supreme Court*, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited May 20, 2009).

committed to federalism in anything like the same way as the Justices they replaced.

This kind of biographical speculation is not totally convincing, but what should be convincing is a particularly dramatic and recent example of the current Court's refusal to allow local governments a measure of autonomy to deal with a sensitive and intensely local problem. In 2007, the Court decided a case involving the efforts of two local school boards to bring about racial integration in their schools.⁵¹ The school boards in these cases used racial criteria in order to make their schools less homogeneous.⁵² The Supreme Court said that what the local school boards did was unconstitutional.⁵³ The two Bush appointees voted with the majority, and Chief Justice Roberts wrote the strongly-worded prevailing opinion.

Here you have local school boards, addressing a local problem—an intensely difficult local problem, having to do with sensitive issues of education and racial dynamics—using their judgment and deciding that they wanted to address the problem in a certain way. And the Supreme Court tells them that they cannot do it. Again, whatever the merits of the Supreme Court's decision, the one thing you cannot say is that this is a Court that cares deeply about local prerogatives and protecting local governments from the intrusions of people in Washington, D.C.

What makes this example particularly dramatic is that in two cases—one that the Supreme Court reviewed⁵⁴ and one that was similar but did not reach the Supreme Court⁵⁵—prominent lower court judges with strong conservative credentials voted to uphold race-conscious integration plans precisely because those judges thought that local educational authorities should not have their decisions second-guessed by federal judges. In other words, the Supreme Court had before it the conservative case for keeping the federal government out of the business of local governments. But that kind of judicial conservatism was flatly and unequivocally rejected by

51. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 127 S. Ct. 2738 (2007).

52. *Id.* at 2746–50.

53. *Id.* at 2758.

54. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 426 F.3d 1162, 1193–96 (9th Cir. 2005) (en banc) (Kozinski, J., concurring), *rev'd*, 127 S. Ct. 2738 (2007).

55. *Comfort v. Lynn School Comm.*, 418 F.3d 1, 27–29 (1st Cir. 2005) (Boudin, C.J., concurring).

the conservatives on the Supreme Court, including the two Bush appointees, without, it appears, so much as a second thought.⁵⁶ I think we can be confident in saying that the form of judicial conservatism practiced by this Court is not one that is highly solicitous of the prerogatives of state and local governments.

There are other examples. *Heller*, the Second Amendment case, is one. Although *Heller* did not resolve the question whether the Second Amendment applies to the states, the Court in *Heller* seemed unmoved by the idea that, given the extreme variation in local circumstances and attitudes across the country, gun control is another issue that should be resolved on the local level rather than constitutionalized and resolved by the Supreme Court in Washington.⁵⁷ But, for me at least, the school integration cases are the clearest examples.

If judicial conservatism, post-Bush, is neither judicial restraint of the Frankfurter variety nor federalism of the O'Connor variety, what else might it be? Perhaps it is a libertarian view, the idea that the role of the courts is to keep all government—federal government, state government, and local government—generally in check.⁵⁸ The threat to individual freedom comes from government, and the Court's distinctive role is to protect individuals against government overreaching.

That view of the judicial role is again more or less coherent, although libertarians do have many difficult line-drawing problems that call into question whether there is an underlying principle.⁵⁹ And libertarianism can go much further in cutting back on the government than most of us would be willing to go.⁶⁰ But there is some appeal—

56. *Parents Involved*, 127 S. Ct. at 2755 (“The plans here are not tailored to achieving a degree of diversity necessary to realize the asserted educational benefits . . .”).

57. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2820 (2008) (holding that the Second Amendment to the United States Constitution protects an individual right to possess a firearm for private use).

58. See Jeffrey Rosen, *So What's the 'Right' Pick?*, N.Y. TIMES, July 3, 2005, available at <http://www.nytimes.com/2005/07/03/weekinreview/03rosen.html?scp=3&sq=So What's the 'Right' Pick?&st=cse> (explaining how the libertarian concept of judicial conservatism involves “anti-government and pro-individual liberties”).

59. See *supra* note 58 (quoting Harvard Law Professor Jack Goldsmith, who explains how libertarian conservatives, despite being associated with originalism, sometimes show “real commitment” to individual liberty rather than to “original understanding or judicial restraint”).

60. See Brenda Cossman, *Contesting Conservatism, Family Feuds and the Privatization of Dependency*, 13 AM. U. J. GENDER SOC. POL'Y & L. 415, 433 (2005) (explaining that according

maybe even a lot of appeal—to the idea that protecting against overreaching government is a good role for the courts to play.

Again there were glimmerings in the Rehnquist era that the Court might have been moving in this direction.⁶¹ But again, a lesson of the Bush years is that today's judicial conservatives are not libertarians. Exhibit A is last term's decision in *Boumediene v. Bush*, the case involving the detainees imprisoned in Guantanamo.⁶² In that case, the Court declared unconstitutional the statute that limited the detainees' right to challenge their confinement.⁶³ But there were four dissenters: the two Bush appointees and the two people—Justice Scalia and Justice Thomas—whom President Bush took as his ostensible models for those appointees.⁶⁴ The Bush-era conservatives were comfortable, as a constitutional matter, with what the government was doing in Guantanamo.⁶⁵

I do not want to suggest that the legal issues in *Boumediene* were all straightforward or one-sided. But anyone who believes that the courts' role is to protect individual liberty from overreaching government should find it extremely difficult to accept what the government was doing in that case. The detainees were in Guantanamo because the executive branch of the federal government deliberately decided to hold people in a way that would escape judicial scrutiny.⁶⁶ The government chose Guantanamo because it wanted to keep the detainees in a place where it could control them completely, but where the executive branch lawyers thought the

to classical liberal theory, “this liberty thrives on the economic liberty of a free market, and the political liberty of a minimal state”).

61. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 235 (Vicki Been et al. eds., Aspen Publishers 2006) (1997) (explaining that after 1995, the Supreme Court “limited the scope of Congress’ power under the Commerce Clause and under section 5 of the Fourteenth Amendment” and “revived the Tenth Amendment as a limit on federal power”); see also *United States v. Morrison*, 529 U.S. 598 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Printz v. United States*, 521 U.S. 898 (1997); *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144 (1992).

62. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

63. *Id.* at 2240.

64. *Id.* at 2279.

65. See *id.* at 2280 (Roberts, C.J., dissenting) (describing the Detainee Treatment Act as “the most generous set of procedural protections” and holding that it “adequately protects any constitutional rights aliens captured abroad and detained as enemy combatants may enjoy”).

66. See *id.* at 2252 (majority opinion) (noting that the United States contends that the Suspension Clause affords the detainees no rights because the United States does not claim sovereignty over Guantanamo Bay where the detainees are being held).

courts could not help them.⁶⁷ Guantanamo was just foreign enough so that aliens being held there could not assert their rights under the Constitution, but not so foreign that the government would have, as a practical matter, problems controlling what went on there.⁶⁸

Whether the government's actions in dealing with these individuals were morally acceptable, sensible, admirable, or necessary is a complex question. But if you are a conservative judge who defines judicial conservatism as a matter of using the courts to establish a bulwark against an overreaching government, then your every instinct should rebel against what the government was doing in Guantanamo. You should tell the government that the one thing it cannot do is effectively disable the courts from even entertaining a claim that the government has overreached. Even if there is room for reasonable disagreement about the level of constitutional protection the detainees should receive, you should find it intolerable for the government to choose a stratagem specifically to prevent the courts from deciding that question.

The conservatives who dissented in *Boumediene* did not find the government's position intolerable. Whether the government's position in *Boumediene* was right or wrong is, in fact, a difficult question. But you cannot say that the Justices who voted for that position are libertarians who believe that the principal role of courts is to protect against government—especially executive branch—overreaching. On a major issue, their considered judgment was in favor of giving substantial deference to the executive branch. Maybe that is the right approach to take, but it is not libertarian.

If the conservatism of the Bush era is not judicial restraint, federalism, or libertarianism, then what is it? I believe we are left with a set of beliefs that, while it calls itself conservative, is unable to support any coherent conservative creed. There is no coherent, principled conservative explanation of what the role of the Supreme Court should be in our system that corresponds to what so-called conservative Justices—such as the Bush appointees—are committed

67. *See id.* (“The United States exercises ‘complete jurisdiction and control’ [over Guantanamo] . . . [but] contends, nevertheless, that Guantanamo is not within its sovereign control.”).

68. *See id.* (stating that under the terms of the lease between the United States and Cuba, the United States has “complete jurisdiction and control” over Guantanamo Bay, although Cuba has “ultimate sovereignty” over the territory).

to. This lack of a coherent conservative view of the role of the courts is, I think, a lesson that has emerged from the Bush era.

Why does that matter? Academics and journalists like to identify themes and ideologies among the Justices, so maybe it is disappointing to them if today's conservatives cannot articulate a coherent conservative view of the role of the courts. But why should it matter to anyone else? The conservative Justices—all of the Justices, for that matter—go about their business, cast their votes, decide their cases. Who cares that we cannot, as observers, figure out a coherent, identifiably conservative view of what they are up to?

That question—a totally fair question—brings me back to one of the points I began with. I said earlier that judicial conservatism cannot consist of simply deciding cases in the way a good lawyer would, because when a case gets to the Supreme Court, there is usually no agreement among good lawyers on how the case should come out. But suppose we accept that when cases get to the Supreme Court there is usually an element in them that requires the Justices to think about fairness, or public policy, or something like that. Why not just say that, at that point, Justices—conservative or otherwise—should just make the necessary judgment in good faith, as best they can? Who cares if the judgments they make cannot be arranged in an intellectually pleasing pattern that can be given a label like “conservative” or “liberal”?

That view has a lot of common sense appeal. It may, however, leave unanswered some important questions about the appropriateness of the Supreme Court's current role in our system of government. Without a coherent, articulable account of what the Justices should be doing, we may not be able to answer the question of why, exactly, the Supreme Court gets to second-guess the judgments made by the people's elected representatives.

Historically, the most plausible liberal answer to this question is that there are people in our society—political dissenters and racial and religious minorities, for example—who do not get their fair share in the political process, and the Court's job is to stand up for those people.⁶⁹ That was essentially the Warren Court's answer.⁷⁰ The

69. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* 86 (1980) (discussing the proper role of the Supreme Court and explaining that “at least in some situations judicial

possible conservative approaches that I have sketched also provide plausible answers to that question. You can say, for example, that our political system tends to centralize power too much and that without the Court no one will pay sufficient attention to the prerogatives of state and local governments. Alternatively you might say, on a libertarian view, that governments tend to aggrandize themselves; government officials tend to think that the solution to a problem is for the government to exercise more power, and officials do not give enough weight to the rights of individuals—whether they are locking people up or regulating businesses—so judges should step in to protect individuals against that systematic failure of the government. That claim leaves plenty to debate about, but again, it is a plausible answer to the question of how to justify the Supreme Court's role in our system.

Now, maybe we do not need an answer of this kind, either liberal or conservative, to the question about the Supreme Court's role in our system. Maybe it is enough to say that because our system has, for a while now, presupposed that the courts will play a certain role and has worked well enough, we should leave things alone. Or maybe it is enough to say simply that our system works better when significant power is given to people with the background, orientation, and incentives that are characteristic of Supreme Court Justices. But I am uncertain whether either of those is a completely satisfactory justification for the role that the courts play. And I doubt that today's conservatives would want to sign on to either of those justifications.

So Bush-era conservatives seem to be left without a coherent, principled approach and without an explanation of why the Supreme Court should be able to overturn decisions made by elected representatives. The question remains, as we enter a post-Bush period in which supposed judicial conservatives will continue to exercise power, just what judicial conservatism is. If there is no good answer to that question, then what is the justification for conservatives' exercise of the power that they have now gained?

intervention becomes appropriate when the existing processes of representation seem inadequately fitted to the representation of minority interests").

70. *Id.* at 3, 135.