

Comments on Roundtable, “Explaining the Rehnquist Court”
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The title of this roundtable is “Explaining the Rehnquist Court.” What is to be explained? Let me suggest the following: the failure of the Rehnquist Court as a conservative court, despite the appointment of six of its members by conservative Republican presidents.

What is the evidence of failure?

First, not a single major precedent of the Warren Court Era has been overturned.

Second, on the signal issue of abortion – itself the creation of the Burger Court in the Warren Court spirit, so to speak – and again, despite the implied if not explicit pledges of the appointing presidents, the Rehnquist Court has established abortion rights as more secure than ever, and now extends constitutional protection to the heinous procedure of partial-birth abortion, despite the language in *Roe v. Wade* about trimesters and a state interest in potential life. Moreover, the activism that created abortion rights is now being duplicated to create “an autonomy of the self” which includes a constitutional right to homosexual conduct that – though defended as an aspect of the privacy of the home – is exploding jurisprudentially as a movement to redefine marriage in every state of the Union without a vote in any one of them and against the statutory law of all. This is not to mention obscenity law, where the Court has allowed a whole new technology that reaches into every home to be saturated with pornography; nor to mention the extension of the Warren Court school prayer cases on the theory that it is more coercive for one person to have to listen to a prayer than for many to be forced to be silent.

Third, despite lip service to the principles of judicial restraint, the Rehnquist Court has made regular pronouncements of its final authority as interpreter of the Constitution – and gave its formulations real punch when it took the initiative to settle the disputed election of 2000.

Now, I admit that I overstate the matter in a number of ways. First, if no major Warren Court precedent has been overturned, some have been confined, especially in matters relating to criminal rights, restrictions on the police, and the like; perhaps also relating to affirmative action and aid to parochial schools; and welfare rights are no longer even on the table.

Second, if there has been liberal activism still from the Court, there have been a few areas where conservatives have been active, if not activist – again, concerning racial redistricting, zoning regulation, and protecting state sovereign immunity.

Thirdly, a conservative case for *Bush v. Gore* has been made, and even for assertions of judicial supremacy, as favoring law and order, institutional stability, and the like. One example is Keith Whittington’s fine essay on Chief Justice Rehnquist himself in the collection edited by Earl Maltz on the Rehnquist Court.

Still, from a conservative point of view, or at least from the point of view of an outside-the-beltway-and-the-boardroom conservative, the Rehnquist Court has been a disappointment. For all the presidential elections we won, we get...what? the exemption of the states from a few lawsuits?...and the humiliation, to a self-governing people, of holding our breath each June to see whether longstanding practices or innovative reforms happen to suit the mood this year of...a couple justices Ronald Reagan picked!

Now, if what is to be explained is the failure of the Rehnquist Court as a conservative court, what is the explanation? Well, there are good political reasons why moderate Republicans got appointed to the Court in the Reagan years, not least the Democratic victory in the Senate race in 1986, and even the lag-time in political realignment might explain why judges, appointed in middle-age or later, reflect their party's allegiances a generation before. But what I want to focus on in my few minutes remaining is what I would call a failure of jurisprudential imagination. I think there is validity in each of the arguments typically raised against liberal activism – originalism, textualism, judicial restraint or deference to democratic decision, tradition or precedent, and structuralism – but the whole package is bound to fail unless conservatives argue the substantive justice of their cause in court. That means that conservatives have to conceive of plausible constitutional rights of their own, not the “namby, pamby” immunity of the states from a few lawsuits, but, say, a serious constitutional right to life, that would make even statutes legalizing abortion unconstitutional; or a right to be free from assault by pornographic imagery; or a right to public expression of nondenominational prayer; or the like. On historical and philosophical grounds I think the case for any of these could be as strong as the case for their opposites. But when that case is never made in court, issues increasingly appear as justice versus some formalism (whether original intent, textual meaning, etc.) – and it is no surprise that the democratic heart goes for justice rather than the forms, if not all the time, at least now and again, or at least far enough as to sow serious doubts about whether in the case at hand the forms really matter or instead provide cover for injustice (or, to use Justice Kennedy's phrase, “animus.”)

But if courts were faced with truly rival claims for justice, then at the very least, the specter of such deep division makes again the case for constitutionalism – for the forms and formalities, the reference back to the language of agreed-upon texts, to principles that are truly consensual rather than partisan, to historical arguments or plain and settled victories, and the like. Even if no conservative on the Court is ready to insist on a constitutional right to life, still someone could moot it, the way Chief Justice Marshall mooted the dormant commerce clause in *Gibbons v. Ogden* before resting on the coastal licensing statute.

Why haven't conservative lawyers made such a case?

First, in property rights cases, they have – and while the Court's actions in Takings Clause cases have been tentative (to get relief, you have to have lost effectively all the value of your land because of a regulation), making the case more fully and with evident (if not adequate) reason has probably pulled the Court to a reasonable middle.

Second, old common-law habits probably have inhibited stronger arguments. The common-law baseline used to create such a strong presumption in favor of tradition that one didn't have to give reasons, so reasons were forgotten, so to speak, or not developed when arguments against traditions first were made. Indeed, the common-law presumption in favor of tradition is itself no longer defended.

Third, early twentieth-century progressive historicism weakened the confidence of conservatives, at least for a long time. Now, I think, the assumption is no longer widely held that society was so profoundly transformed by modern life that old thought doesn't matter. My evidence is that, if free market economics and orthodox Christian theology can make a comeback – two subjects thought dead at the beginning of the twentieth century – probably more issues are open than we think.

Fourth has been an absence of adequately rigorous and acceptably modern philosophical tools – but as I argue in another paper delivered at this conference, in the natural law philosophy of John Finnis conservatives ought to be able to find principles at least as strong as those in John Rawls or Ronald Dworkin.

Fifth, there has been a failure to think through, jurisprudentially, either the historical or philosophical basis even for the principles of originalism and textualism that conservative judges draw upon. These develop, I would say, out of long-established principles of interpretation in the common law, whereas the principle that nothing against reason is lawful predates the Enlightenment and the individualist rationality it portended.

Sixth is skepticism, which can be conservative as well as liberal, and maybe it always points to the constitutional, but a fruitful skepticism is always parasitic on strong truth claims or else it degenerates into mere nihilism and becomes susceptible to new claims for justice built on nihilism itself.

In short, conservatives need not fear jurisprudential arguments based on reason, unless they are too complacent to think things through. And if this means making the case for real conservative activism in order to win effective restraint, then it ought to be done. Judith Baer, who spoke just before, said that liberals need a “great dissenter” on the Rehnquist Court and don't have one. I say that conservatives need one, too.

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