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Conservative labels, libertarians and historical jurisprudence

On the Supreme Court, there are conservatives and there are conservatives. Former chief justice William H. Rehnquist and Justice Antonin Scalia are each usually labeled as “conservative.” Yet on Fourth Amendment issues, they can seem quite different.

Take Rehnquist's record. During his 33 years on the court, he participated in 38 cases that decided Fourth Amendment issues by 5-4 votes. Thirty of these cases rejected the defendant's claim. And Rehnquist cast the deciding vote against the defendant in every single one. In fact, in the 196 Fourth Amendment cases in which he participated, only once did he take a position that could be considered more civil libertarian than the position of even one other justice.

With Rehnquist, the government almost always won.

Compare this to Scalia. He wrote the 5-4 decision holding that a police officer's warrantless use of a drug-sniffing dog within a home's curtilage was unconstitutional. *Florida v. Jardines*, 133 S.Ct. 1409 (2013). He wrote the 5-4 decision that the government's use of a thermal imager to measure heat from inside a house was a search under the Fourth Amendment. *Kyllo v. U.S.*, 533 U.S. 27 (2001).

He wrote the pro-defense dissent in a 5-4 case where the majority held that DNA samples could be taken from people merely arrested for serious crimes. *Maryland v. King*, 133 S.Ct. 1958 (2013). And he wrote the pro-defense dissent in a 5-4 case in which the majority made it easier for police to use anonymous tips to support Terry stops on vehicles. *Navarette v. California*, 134 S.Ct. 1683 (2014).

But the reason both Rehnquist and Scalia can generally be called conservative is that their views in this area reflect two different sides of conservative legal philosophy. Damon Root has

provided a concise overview in his new book, “Overruled: The Long War for Control of the U.S. Supreme Court.”

One of the fundamental American constitutional dilemmas is determining when the rights of an individual should trump a decision of the majority. An example is when the Supreme Court in the 1940s had to determine whether a Jehovah's Witness could refuse to follow a law mandating that all students salute the American flag each school day. As you recall, in 1940 the court held in favor of the school board, and then a mere three years later reversed itself.

Critics of the Warren Court in the 1960s accused it of being too solicitous of the rights of individuals while being too dismissive of the rights of majorities. Legal thinkers such as Learned Hand and Alexander Bickel issued withering critiques of the court. They recommended the judicial restraint practiced by a justice such as Oliver Wendell Holmes.

Holmes' deference to the views of the majority was epitomized by his comment, “A law should be called good if it reflects the will of the dominant forces of the community, even if it will take us to hell.” Holmes was the darling

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of liberals for his rulings in favor of progressive state economic regulations, thus helping end the *Lochner* era of judicial interference.

Of course, there was a dark side to this. Holmes had little trouble affirming Eugene Debs' 1918 conviction under the Espionage Law for simply giving an antiwar speech at a socialist picnic. And he spent little time in 1927 in *Buck v. Bell* concluding

CRIMINAL PROCEDURE

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that Virginia's forced sterilization eugenics law was constitutional because, after all, “Three generations of imbeciles are enough.”

Judicial restraint through Holmesian principles became the watchword of many Republicans during the last half of the 20th century. Perhaps the most articulate Holmesian was Robert Bork, who believed that unless a law unequivocally violated a specific constitutional provision, “the only course for a principled court is to let the majority have its way.”

Root contrasts Holmesian deference with a very different strand of conservative thought. He traces it back to Justice Stephen Field and his dissent in the *Slaughterhouse Cases* back in 1873.

There, the majority took a very narrow view of the new 14th Amendment's privileges or immunities clause. It gave the clause a very narrow interpretation and deferred to the Louisiana law that centralized the butchering business with the effect of putting many butchers out of business.

In his dissent, Field emphasized that the Constitution protected economic rights and the “freedom to contract.” For Field, the economic liberty of the individual could not be curtailed by a democratic majority. Field's

views would later prevail in the *Lochner* era when the Supreme Court struck down state and federal health and safety laws for unconstitutionally impinging on the economic liberty of the individual.

And it was the spirit of Field that was reborn with the rise of the second wave of conservatism in the 1980s — the libertarians, in groups such as the Federalist Society and the Cato Institute. This group of conservatives disagreed with Bork that majorities are entitled to rule simply because they are majorities.

For this group, individual liberty came first and majority rule a distant second. Roger Pilon of the Cato Institute criticized majoritarianism as an “inheritance from the Progressive Era, not the Founding. At the Founding they got it right. They started with the individual.”

Look at sodomy laws. Root notes that when Georgia's sodomy laws were challenged in 1986 in *Bowers v. Hardwick*, “The fatal combination of majority rule and judicial deference spelled doom for the legal challenge.”

Yet in 2003, the Cato Institute attacked Texas' sodomy laws as illegitimate restraints on individual liberty. Cato then prevailed in *Lawrence v. Texas*. The same themes resulted in the court's finding an individual's right to bear arms under the Second Amendment in the *Heller* case in 2008.

This philosophical conflict helps explain the Rehnquist-Scalia difference. For Rehnquist, the democratic majority represented by the government almost always prevails under the Fourth Amendment. But for the more libertarian Scalia, an individual's interest in his home and personal autonomy will prevail when Scalia sees the government as overreaching.

The fact that two justices are called “conservative” does not necessarily mean they will agree. The conflict between libertarians and majoritarians continues.