THE MYTH OF A CONSERVATIVE SUPREME COURT: THE OCTOBER 2000 TERM

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It is an article of faith in legal academia and the liberal media that the "Rehnquist Court," the present Supreme Court, is extremely conservative. "[C]onservative judicial activism is the order of the day," NYU law professor Larry Kramer bitterly complains in the *New York Times*: "The Warren Court was retiring compared to the present one."[1] University of Chicago law professor Cass Sunstein concurs in another *New York Times* article, writing that "[w]e are now in the midst of a remarkable period of right-wing judicial activism. The

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1. Larry D. Kramer, *No Surprise. It's an Activist Court*, N.Y. TIMES, Dec. 12, 2000, at A33.

Supreme Court has moderates but no liberals."[2] These assertions tell us more about legal academia and the media than they do about the Court. The Court's liberal critics are correct that it continues to be activist, but its activism, contrary to their assertions, continues to be predominantly activism of the left. If Professor Sunstein does not find Justices Stevens, Souter, Ginsburg, and Breyer to be liberals, it is difficult to see what more they would have to do to meet his definition.

I. JUDICIAL ACTIVISM

The phrase "judicial activism" is subject to different usages, some confusing and inconsistent. Most generally, it means judges making rather than following the law. In the constitutional context, where it is most important because the decisions are hardest to change, it can most usefully be defined as judges disallowing as unconstitutional policy choices made in the ordinary political process that the Constitution does not clearly disallow—"clearly" because in a democracy the judgment of elected representatives should prevail in cases of doubt. Rulings upholding constitutionality demonstrate not activism, but restraint, a willingness to permit the policy choices made in the political process to prevail. Another reason such rulings—at least apart from the question of the scope of the federal government's enumerated powers—are rarely activist is that they are almost always legally correct because our short and simple Constitution wisely precludes very few policy choices, almost none of which American legislators would otherwise make.

Nor should it be considered activist—it is anti-activist—for a court to overrule a prior activist decision, returning the issue to the political process. Rulings of unconstitutionality give the prevailing party a positive victory, the adoption of a policy preference it failed to obtain in the ordinary political process, while the losing party has its political victory taken away. Rulings upholding constitutionality simply leave things as they were. For practical purposes, the extent and nature of a court's constitutional judicial activism is best determined by considering only its rulings denying, not its rulings upholding, constitutionality and comparing liberal and conservative victories.

2. Cass R. Sunstein, *Tilting the Scales Rightward*, N.Y. TIMES, Apr. 26, 2001, at A23.

II. THE NATURE AND SOURCE OF CONSTITUTIONAL LAW

Our constitutional law of the past half-century, beginning with the Warren Court, has had two defining characteristics. First, it has had very little to do with the Constitution: the bulk of rulings of unconstitutionality involved state, not federal, law and nearly all of those purported to turn on a single constitutional provision, the second sentence of the Fourteenth Amendment, and ultimately on no more than the words "due process" or "equal protection."[3] Scholarly debates on methods of constitutional interpretation are essentially irrelevant and at best misleading, because ordinarily there is little for a court to interpret. What was the Court interpreting in *Roe v. Wade*,[4] for example: the word "due" or the word "process"? As developed by the Court, the Due Process and Equal Protection clauses are not substantive provisions of law, but simply grants to the Court of unlimited lawmaking power.

The second characteristic of the Warren Court's decisions and later rulings of unconstitutionality is that they almost uniformly adopted the liberal position—the position favored by, say, the American Civil Liberties Union—on the policy issue involved. It is no coincidence that on virtually every issue of basic social policy—abortion, capital punishment, criminal procedure, prayer in the schools, government aid to religious schools, public display of religious symbols, compulsory busing to increase school racial integration, redistricting, pornography, libel law, street demonstrations, vagrancy control, discrimination on the basis of sex, legitimacy or alienage, and so on—the Court overturned the policy choice made in the ordinary political process, usually at the state level, only to impose on the nation a choice farther to the left-liberal side of the American political spectrum. The Court has fundamentally changed the nature of our society, remaking it in its own image, the image of liberal academia and particularly legal academia.[5]

The Warren Court not only worked a social revolution, but even

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3. U.S. CONST. amend. XIV, § 1.

4. 410 U.S. 113 (1973).

5. William F. Buckley, Jr., famously and sensibly said he would rather be ruled by the first 2000 names in the Boston phone book than by the Harvard faculty. *See* William F. Buckley, Jr., *Au Pair Case No Reason to Condemn Courts*, HOUS. CHRON., Nov. 8, 1997, at 36. As a result of the constitutional law of recent decades, we are to a large extent being indirectly ruled by the Harvard faculty, especially the law faculty, and their liberal counterparts in other elite institutions. (Justice Breyer was a member of the Harvard law faculty, Justice Ginsburg of the Columbia law faculty, and Justice Stevens taught at Northwestern.).

more important, fundamentally changed the understanding of the American people, and most important, of the judges themselves, of the role of courts in the American system of government. Its successor, the Burger Court—with four Nixon appointees—to the surprise of most observers proved to be, as the title of a well-known book on the subject suggests, "the counter-revolution that wasn't."[6] Not a single one of the Warren Court's revolutionary decisions was reversed, not *Miranda*,[7] not its decisions on prayer in schools,[8] on pornography,[9] and so on. Instead, the Burger Court not only accepted the Warren Court's innovations as if written into the Constitution, but embarked on a series of revolutionary innovations of its own. It was the Burger, not the Warren, Court that made abortion a constitutional right,[10] required busing for school racial balance,[11] and first disallowed almost all legal distinctions on the basis of sex[12] or alienage.[13]

Conservative activism comparable to the Warren and Burger Courts' liberal activism would require a Court to continue to make rulings of unconstitutionality freely, but now to move policy choices to the right. At the very least, a conservative court would overrule some of the results of its predecessors' liberal activism, returning the issues to the political process. That would be ideologically neutral anti-activism, though the result would be to rescind some prior liberal victories. Very little of the first and almost none of the second of these things has happened; constitutional law has proved to be a one-way ratchet, moving the nation consistently, though at varying speeds, in the liberal direction.

III. THE LIBERAL ACTIVISM OF THE REHNQUIST COURT

The actual performance of the Rehnquist Court[14]—which has continued unchanged for an exceptionally long time, since President

6. THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (Vincent Blasi ed., 1983).

7. Miranda v. Arizona, 384 U.S. 436 (1966).

8. *E.g.*, Engel v. Vitale, 370 U.S. 421 (1962); Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963).

9. *E.g.*, Roth v. United States, 354 U.S. 476 (1957); Memoirs v. Massachusetts, 383 U.S. 413 (1966).

10. Roe v. Wade, 410 U.S. 113 (1973).

11. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

12. Craig v. Boren, 429 U.S. 190 (1976).

13. Graham v. Richardson, 403 U.S. 365 (1971).

14. Justice Rehnquist was promoted to the chief justiceship in 1986.

Clinton's appointments of Justices Ginsburg and Breyer in 1992—has proven to be much the same as that of the Burger Court. With few exceptions, discussed below, it has not given conservatives positive victories by means of rulings of unconstitutionality comparable to the victories given liberals by the Warren and Burger Courts. Nor has it undertaken to rescind some of the liberal victories by overruling some of its predecessors' controversial decisions; on the contrary, it has accepted those decisions as legitimate additions to the Constitution, available as springboards for further liberal advances.

A positive victory for conservatives on the abortion issue would be a decision not merely overruling *Roe v. Wade*, but one holding that the fetus is constitutionally protected. Even overruling *Roe v. Wade* and returning the issue to the political process has proved to be more, however, than opponents of abortion have been able to obtain from the Rehnquist Court. On the contrary, the decision has been not only reaffirmed,[15] but also extended to disallow state restrictions on even so-called partial-birth abortions.[16]

Similarly, a positive conservative victory on the issue of prayer in the schools would be a decision that the states not only may, but must make some provision for voluntary prayer in the schools. The Rehnquist Court not only has refused to overrule the anti-prayer decisions, but also has extended the prohibition to a student-composed nonsectarian reference to the deity at a high school graduation.[17] The most controversial current issue in the Court-led egalitarian crusade of the past half-century is the issue of discrimination on the basis of homosexuality. While the Burger Court refused, albeit only by a five to four vote, to grant homosexuals the status of a specially-protected class,[18] the Rehnquist Court has put that conclusion in doubt by holding that the people of Colorado could not amend the Colorado constitution by referendum to disallow special protection for homosexuals.[19]

Far from rejecting or even relaxing the Burger Court's prohibition of distinctions on the basis of sex, the Rehnquist Court ratified and strengthened the prohibition of single-sex schools by extending it to military schools.[20] Similarly, the citizens of several states who fought

15. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).
16. Stenberg v. Carhart, 530 U.S. 914 (2000).
17. Lee v. Weisman, 505 U.S. 577 (1992).
18. Bowers v. Hardwick, 478 U.S. 186 (1986).
19. Romer v. Evans, 517 U.S. 620 (1996).
20. United States v. Virginia, 518 U.S. 515 (1996).

and won political battles to impose term limits on federal representatives saw the victory taken away when their opponents had the issue decided by the Supreme Court.[21] The *Miranda* decision, virtually a synonym for liberal activism, decided by a five to four vote over a powerful dissent, was long considered a prime candidate for overruling by a conservative Court. The Rehnquist Court has not only refused to overrule it, but emphatically reaffirmed it, making clear that it is a constitutional decision, thus invalidating a federal statute that would have limited it.[22] The same fate awaited a federal statute that sought to restrict the availability of pornography to children.[23] The Court, it might appear to the proverbial Martian, performs in the American system of government a function similar to that formerly performed in some South American countries by the junta: political battles are fought and elections held, but the results are permitted to stand only so long as a majority of the justices does not disapprove. How is it possible for a Court that produces so many important liberal victories to be castigated as "conservative"? What more could a "liberal" Court do?

First, the Warren Court changed the meaning of a conservative Court or justice. So-called conservative justices today accept positions that are to the left of what liberal activists would have thought possible in the pre-Warren era. No justice challenges the fiction that the Fourteenth Amendment selectively "incorporates" nearly all of the provisions of the Bill of Rights, making them restrictions on the states as well as the federal government, even though the doctrine was essential to the Warren Court's creation and imposition on the states of a code of criminal procedure creating rights for the accused unknown to any other legal system. No justice suggests that we return to the pre-Warren court era when it was understood that judges simply had nothing to do with the administration of prisons, schools, hospitals, and the military. The role of judges has fundamentally changed: what was once rightly denounced as judicial imperialism is today accepted by "conservative" judges as standard operating procedure.

Second, the supposed dominance of the Rehnquist Court by conservative justices as a result of appointments by Presidents Reagan and Bush has turned out to be more illusory than real. A striking fact

21. United States Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).
22. Dickerson v. United States, 530 U.S. 428 (2000).
23. *See* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727 (1996).

about the Court's October 2000 term is the large number of decisions that were decided by a five-to-four vote. Of the 81 cases decided with opinion, only 31 were decided unanimously, and of the remaining 50, just over half, 26, were decided by a five-to-four vote. Why, over a wide variety of issues, should that precise pattern persistently obtain? The consistency of the voting patterns, especially by Justices Stevens, Souter, Ginsburg, and Breyer is even more striking. Regardless of the issue to be decided, these justices vote together so reliably and consistently as almost to constitute a single judicial unit—four persons in one judge. In addition to the 31 unanimous decisions, they voted together in 22 of the 26 five-to-four decisions, and in many other cases either joined one another's concurring opinions or wrote separate, but similar concurring opinions. It is notable and inexplicable in terms of the ordinary judicial function that these four justices were not only almost always on the same side of every issue, but also when voting together in a divided decision, they always supported a more liberal position. They constitute a highly reliable and predictable liberal bloc, which illustrates how little law and how much ideology affects Supreme Court decision-making.[24]

Chief Justice Rehnquist and Justices Scalia and Thomas regularly vote together, although not quite as consistently as the liberal four. When they vote together in a divided decision, they always support the more conservative position, thus forming a generally reliable conservative bloc. The outcome in any split decision depends on the votes of the two remaining justices, Justices O'Connor and Kennedy, who are much less predictable. Though they lean toward the conservative side on some issues, one or both of them is likely to move to the liberal side on many others. The conservative bloc can ordinarily prevail only if O'Connor and Kennedy both join it on any given issue. The liberal bloc has the advantage that it ordinarily needs only one of their votes, and one or both is often available. The Court can ordinarily be no more conservative on any issue than the most conservative position that *both* O'Connor and Kennedy will accept. This fact—along with the general acceptance of most prior liberal activism—largely explains why the Rehnquist Court's activism continues to be predominantly liberal, even though it has engaged in conservative activism on some issues.

24. The pattern was repeated in the Court's 2001 term. Of the 75 cases decided with opinion, 21 were decided by a five-to-four vote; the liberals voted as a bloc in 14, prevailing in four because joined by Justice O'Connor, and dissenting in the remaining ten.

IV. CONSERVATIVE ACTIVISM BY THE REHNQUIST COURT

A. Bush v. Gore

Apart from *Bush v. Gore*,[25] which may be put aside as *sui generis*, the Rehnquist Court has made rulings of unconstitutionality favoring conservative positions on primarily three issues: racial preferences, federalism, and "regulatory takings." *Bush v. Gore* may be quite enough by itself to cause liberals to have some second thoughts about the proper role of the Supreme Court in our system of government. That decision, though of great political importance, is much less so as a matter of constitutional law. It can best be seen as the majority's response to the unique situation of a presidential election being in the hands of a seemingly partisan state court, as activism countering activism. Seven justices (all but Stevens and Ginsburg) agreed that the recount ordered by the Florida Supreme Court violated the Equal Protection Clause because of the lack of a uniform standard, although two, Souter and Breyer, would have permitted the recount to continue once a proper standard was set.

Chief Justice Rehnquist argued in a concurring opinion joined by Justices Scalia and Thomas that the Florida Supreme Court's decision requiring a recount was not in compliance with Florida election law and therefore also violated the Constitution's Article II, section 1 requirement that a state's electors be chosen "in such manner as the legislature thereof may direct." A Florida statute required the correction of "error[s] in the vote tabulation"[26] and the counting of all "legal votes."[27] Contrary to the Florida Supreme Court, Rehnquist argued, there did not appear to be either error in the vote tabulation or a failure to count legal votes such as to require or justify still further recounting. The machines operated as they were supposed to, correctly tabulating all legal votes and correctly rejecting ballots that, because of voter error, did not constitute legal votes. As a purely prudential matter, the Court's intervention may have produced a result with a higher degree of perceived legitimacy than was otherwise available.[28] In any event, this extraordinary case has little relevance to the general operation of the Court.

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25. 531 U.S. 98 (2000).

26. FLA. STAT. ch. 102.168(3)(c) (2000).

27. FLA. STAT. ch. 102.166(5) (2000).

28. *See* RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION AND THE COURTS (2001).

B. Racial Preferences

The most important positive conservative victory in the Rehnquist Court has been on the issue of racial preferences. The Court's disallowance of some racial preferences has caused some liberal constitutional theorists to question whether constitutional judicial review is necessarily an improvement on representative self-government.[29] In 1995 the Court held, with the usual five-to-four split, that all racial preferences by government, state or federal and whether disadvantaging whites or blacks, are subject to "strict scrutiny," that is, presumptively unconstitutional and extremely difficult to justify.[30] That would seem to virtually put an end to racial preferences except that the issue may remain alive in the context of higher education because the 1978 *Bakke* case[31] has not been explicitly overruled. In *Bakke*, eight justices split evenly on the permissibility of preferences, leaving the decision to the ninth, Justice Powell. The resulting decision, a unique product of Powell's characteristic equivocation,[32] indicates that discrimination disadvantaging whites is every bit as bad as discrimination disadvantaging blacks, except that just a little is permissible—membership in a minority race may be used as a "plus" factor—in making college and university admission decisions when necessary to produce "diversity."[33]

If, as later cases indicate, the need to "remedy" past race discrimination—which should rarely be a factor in actual cases—is the only justification for race discrimination,[34] *Bakke* is no longer good law. The Court of Appeals for the Fifth Circuit held exactly this in disallowing further use of racial discrimination by the University of Texas Law School, and the Supreme Court permitted the decision to stand.[35] Justice O'Connor, the crucial fifth vote on this issue as on many others, can be confidently predicted to vote for a clear and unqualified prohibition of discrimination, however, only where it is on the basis of sex.

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29. *See* MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

30. Adarand Constructors, Inc. v. Pena, 515 U.S. 2 (1995).

31. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

32. *See, e.g.*, Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 217 (1973) (Powell, J., concurring in part and dissenting in part).

33. *Bakke*, 438 U.S. at 317.

34. *See Adarand*, 515 U.S. 2 (1995).

35. *See* Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).

The closest the Court came in the 2000 term to addressing a race discrimination issue was in *Easley v. Cromartie*,[36] the fourth time the Supreme Court had before it the question of alleged racial redistricting in North Carolina's 12th Congressional District. The mobile Justice O'Connor joined the liberals to make a majority for reversal of the district court's finding that the latest redistricting plan was unconstitutional because predominantly based on race. Under the Federal Rules of Civil Procedure, the Supreme Court is not authorized to reverse a district court finding of fact unless it is "clearly erroneous."[37] The lower court's finding, according to the dissenters, was not "clearly erroneous." Redistricting may not be based on race, the Court held, but it may be based on politics. Because race may be a reliable proxy for a voter's political inclination, race may be used after all. The result illustrates that reasons satisfactory to O'Connor for getting around the supposed virtual prohibition of all race discrimination can be found. Given the ardor and near unanimity with which the education establishment supports racial preferences, a clear and total prohibition by the Court may be too much to expect.[38]

The most important victory given conservatives by the Rehnquist Court may prove to be short-lived, although it has a good claim to be considered non-activist. It is unlikely that the Fourteenth Amendment was meant to disallow racial preferences, but the same may be said of school racial segregation. If the great *Brown* decision,[39] prohibiting segregation, is taken, as it was by Congress in enacting the crucial 1964 Civil Rights Act,[40] as prohibiting all official racial discrimination, the Court's decisions disallowing racial preferences by government can be seen as rare examples of valid rulings of unconstitutionality. The constitutional question should have never arisen in the first place, however, because all racial discrimination by institutions or activities that receive federal funds, as nearly all schools do, is prohibited by Title VI of the 1964 Civil Rights Act.[41]

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36. 532 U.S. 234 (2001).

37. FED. R. CIV. P. 52(a).

38. In the 2001 term the Court dismissed as improvidently granted a writ of certiorari in a case challenging racial preferences in government contracting, *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001). It granted certiorari, however, in two cases challenging racial preferences in higher education, *Grutter v. Bollinger*, 123 S. Ct. 617 (2002) and *Gratz v. Bollinger*, 123 S. Ct. 602 (2002) which may finally produce a definitive ruling on the issue.

39. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

40. *See* 42 U.S.C. § 1981, 2000a-h (2003).

41. 42 U.S.C. § 2000(d) (2003).

Except for Powell's unwillingness in *Bakke* to read the act, as four of his colleagues did,[42] to mean what it plainly says, the invalidity of racially preferential "affirmative action" would have been decided in 1978. By holding all racial discrimination by government unconstitutional, the Court is indirectly correcting the result of its own earlier misbehavior. Even better, and more clearly legally correct, would be for the Court to disallow racial preferences by all institutions, public or private, that receive federal funds by overruling *Bakke*'s clearly mistaken holding that they are not prohibited by Title VI.

C. Federalism

The second area in which rulings of unconstitutionality have favored the conservative position is federalism. The Court has clearly, albeit always by the same five-to-four split, undertaken a movement to protect the states from the national government—a protection they often do not seek—in three different respects. First, several recent cases have limited the ability of Congress to authorize private damage suits against a state, finding a violation of the states' sovereign immunity under the Eleventh Amendment.[43] Continuing this trend, the Court in the 2000 term in *University of Alabama v. Garrett*,[44] by the usual five-to-four split, held unconstitutional Congress' authorization of private damage suits against a state under the Americans with Disabilities Act.[45] Second, the Court has twice undertaken to protect a measure of state sovereignty by holding that Congress may not impose certain obligations on the states, such as an obligation to check the criminal record of an applicant for a gun permit.[46] No case involving this issue was decided last term.[47]

Finally and most important, the Court has twice in recent years decided that there are some things Congress cannot regulate under its

42. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 408 (1978) (Sevens, J., joined by Burger, C.J., Rehnquist, J., and Stewart, J.).

43. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); Alden v. Maine, 527 U.S. 706 (1999); Seminole Tribe v. Florida, 517 U.S. 44 (1996).

44. 531 U.S. 356 (2001).

45. The 2001 term produced another such decision, *Federal Maritime Comm'n v. South Carolina Port Auth.*, 535 U.S. 743 (2002).

46. *See* Printz v. United States, 521 U.S. 898 (1997); *see also* New York v. United States, 505 U.S. 144 (1992) (holding that Congress may not compel states to dispose of radioactive waste).

47. Nor in the 2001 term.

commerce power, namely things, such as guns around schools and gender-motivated violence against women, that are unrelated to commerce.[48] The Court did not make any further such ruling in the 2000 term, but the issue was involved at least peripherally in one hotly disputed decision. In *Solid Waste Agency of Northern Cook County v. U.S. Corps of Engineers*,[49] the Court held that the Clean Water Act did not give the Army Corps of Engineers jurisdiction to regulate the use of lakes and ponds that are not part of or adjacent to navigable waters in order to protect migratory birds. A different interpretation of the statute, the Court said, would raise "significant constitutional questions"[50] as to Congress' power under the Commerce Clause. The four liberals dissented, arguing that Congress had granted the disputed jurisdiction and that the Commerce Clause gave it the power to regulate because use of the ponds—by filling them, for example—affects the migratory birds that use them, and migratory birds are the subject of a widespread interest in bird-watching, which affects interstate commerce.[51]

Although the Rehnquist Court's federalism decisions are considered its most remarkable conservative achievements, it is doubtful that they will have a significant long-term effect. The sovereign immunity decisions that limit private damage suits against the state imply that if Congress wishes to impose such a liability on the states, it will have to purchase their consent by placing conditions on grants of federal funds. Some states have already enacted, or are considering, legislation waiving the immunity. The two decisions limiting the power of Congress to impose obligations on the states are more symbolic than substantive.

Decisions limiting the reach of Congress's commerce power are another matter. For the past 60 years, Congress has exercised *de facto* general legislative power (the "police power") in the name of regulating interstate commerce. The Court's imposition of real limits on this power would be not only important but also revolutionary, and for that reason, among others, it will not happen. There is force in the argument that, since everyone agrees that the Constitution created a federal government of limited powers, it is the duty of the Court to find and enforce some limits. The difficulty is that Congress's broadly

48. *See* United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000).

49. 581 U.S. 159 (2001).

50. *Id.* at 173.

51. *Id.* at 174 (Stevens, J., dissenting).

stated powers to tax for the general welfare, regulate commerce among the states, and make war seem inevitably to amount in practice to all power. It is impossible for the Court to limit these powers on the basis of a workable constitutional principle rather than by a series of essentially *ad hoc* policy judgments on the basis of distinctions that will be difficult to apply consistently.

The Rehnquist Court's two decisions, *United States v. Lopez* and *Morrison v. United States*, both by the usual five-to-four vote, that invalidated purported exercises of Congress's commerce power, are based on the premise that the commerce power must not be permitted to become a grant of the police power, the power to legislate for the public health, safety, morality, and welfare.[52] The Court, however, a long time ago, permitted Congress to use the commerce power for police power ends, and it is unlikely that such permission will be constitutionally revoked. The Court permits Congress to legislate against any social ills—gambling, sexual immorality, car theft, firearms, kidnapping, food and drugs, unsafe products, pollution, and so on—by the simple technique of placing conditions on the interstate movement of people, goods, and other things. For example, the Mann Act—upheld by the Court as a regulation of interstate commerce[53]—makes it a federal crime to transport a female across a state line for immoral purposes. The defendants convicted under this act[54] would be surprised if they were informed that the Court is concerned to keep the commerce power from becoming the police power. In *Lopez*, the Court carefully pointed out that there was no evidence that either Lopez or his gun had recently crossed a state line,[55] as if evidence of such a crossing would make the statute less of a police power measure. Only the lawyer's professional immunity from embarrassment by obvious fictions makes such reasoning possible.

The Court has upheld Congress's prohibition of racial discrimination in public accommodations[56] and Congress's requirement that mining companies restore land to its natural beauty[57] as valid regulations of interstate commerce. It is neither likely, nor is

52. To uphold the Gun-Free School Zones Act would, the Court said, "bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567.

53. *See* Hoke v. United States, 227 U.S. 308 (1913).

54. *See, e.g.*, Caminetti v. United States, 242 U.S. 470 (1917).

55. *Lopez*, 514 U.S. at 567.

56. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

57. *See* Hodel v. Via. Surface Mining and Reclamation Ass'n., 452 U.S. 264 (1981).

there any apparent popular demand, that the Court will question the pretextual uses of the Commerce Clause on which some of our most basic federal laws are based. The Court's newfound concern to confine the Commerce Clause to commerce ends is therefore an exercise in futility, the principal effect of which will be to make Congress pursue its police power ends in less candid and more circuitous ways, relying more, for example, on the technique of prohibiting interstate movements.[58]

Even more difficult to contain than the commerce power is the power of Congress to tax and spend for the "general welfare."[59] It is valid, the Court has held, for Congress to use its power to tax, not to raise revenue, but to suppress the sale of disfavored goods, such as drugs, machine guns, and oleomargarine.[60] It is also valid for Congress to achieve by placing conditions on its spending results that it could not achieve by direct regulation. For example, the Court has held that Congress can effectively impose a national minimum drinking age of 21 by the simple technique of giving the states the option of either making this the minimum age or suffering the loss of some federal highway funds.[61] President Reagan, an ardent defender of state autonomy, signed the bill into law; as always, the particular interest involved was found to outweigh the interest in state autonomy.

The preservation of some degree of policy-making autonomy in sub-national units, has many important advantages—it facilitates democracy, experimentation, and competition—but it need not be done, and it may not be possible to do it, as a matter of law rather than policy.[62] There is no reason to think that the policy choice between local autonomy and national uniformity and efficiency that is involved in each case can be better made by judges, with no guidance from the Constitution, than by Congress and the president. Judicial review has historically served to facilitate and validate rather than limit the expansion of federal power.[63] Not only will the Court not be

58. *See generally* Lino A. Graglia, United States v. Lopez*: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719 (1996).

59. *See* U.S. CONST. art. I, § 8.

60. *See, e.g.*, Sonzinsky v. United States, 3 U.S. 506 (1937) (guns); United States v. Doremus, 249 U.S. 86 (1919) (drugs); McCray v. United States, 195 U.S. 27 (1904) (oleomargarine).

61. *See* South Dakota v. Dole, 483 U.S. 203 (1987).

62. *See* Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

63. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Gibbons v.

able to significantly limit Congress's legislative authority, but it is also not in the interest of conservatives that it have the power to do so. The Court, not Congress, has for the past 50 years taken from the states and arrogated to itself decision-making power on almost every issue of domestic social policy, almost always to push policy choices to the left. The people have no influence at the polls over the Supreme Court and its policy. Conservatives cannot credibly protest the usurpation of policy-making power by judges and simultaneously beseech them to protect us from our elected representatives. The need is for Congress to protect us from the Court, not vice versa.

Abandoning the pretense of limiting the legislative authority of Congress is the best thing the Court can do for federalism. Such action would make clear that Congress alone is responsible for the expansion of federal power. It would introduce a much-needed element of honesty into constitutional law by relieving Congress of the need to pretend, and the Court of the need to affirm, that Congress's police power related measures are regulations of commerce. It should be embarrassing that to protect migratory birds, for example, our national government must pretend to be regulating interstate commerce.

D. Regulatory Takings

The Fifth Amendment provides in part that private property may not be taken for public use without just compensation.[64] There is no question that the government must pay when it takes property by occupation, possession, or assertion of title. What if government merely reduces the value of property, perhaps to nothing, by regulating its use while leaving title and possession in the hands of the nominal owner? In his 1922 opinion for the Court in *Pennsylvania Coal, Co. v. Mahon*, Justice Holmes said that a regulation that restricts the use of property can be a taking if, as he unhelpfully explained, it "goes too far."[65] The Court thereafter skillfully avoided the problems this cryptic pronouncement presented by rarely again applying it. Until the Rehnquist Court it was unclear that there was a "regulatory takings" doctrine. Beginning in 1987 the Court upheld regulatory taking claims in no fewer than four cases,[66] and another

Ogden, 22 U.S. (9 Wheat.) 1 (1824); Wickard v. Filburn, 317 U.S. 111 (1942); Katzenbach v. McClung, 379 U.S. 294 (1964).

64. U.S. CONST. amend. V.

65. 260 U.S. 393, 415 (1922).

66. *See* Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. S.C. Coastal Council, 505 U.S. 1 3 (1992); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); First English

regulatory takings claimant won in the 2000 term in *Palazzolo v. Rhode Island*.[67] What exactly he won is not easy to say.

In *Palazzolo*, a Rhode Island wetlands regulation prohibited the plaintiff from building on most of his property, making it virtually worthless. The Rhode Island Supreme Court held that he was not entitled to compensation for two reasons. First, his claim was not ripe, that is, the amount of his loss was not clear because he might have been allowed to build on some of his land if he had filed a more limited application with the regulatory authorities. Second, he had no claim because he acquired title to the property after the restrictive wetlands regulation had been adopted, and he should have known that its value was reduced. The United States Supreme Court, by the usual five-to-four split, rejected both of these grounds. Rejection of the first ground is important because alleged lack of ripeness is a standard move for courts seeking to escape a decision of a regulatory takings claim.[68] Rejection of the second ground—that purchase with notice of the regulation precludes recovery—is more important, but Justice O'Connor's concurring opinion weakens the Court's holding, over Scalia's protest, by stating that such notice may preclude recovery.

As with its previous taking decisions, the Rehnquist Court wants to notify government agencies that it will give property owners some constitutional protection from regulatory takings, but is unable to define the scope of that protection. Zoning laws, for example, restrict the use and therefore reduce the value of property without requiring compensation.[69] "Government hardly could go on," if compensation were required in all such cases, Holmes pointed out in *Mahon*.[70] On the other hand, if compensation is never required for losses caused by regulation, regulators could destroy property values at will. The problem facing the court is formulating a general rule suitable for judicial enforcement to determine when payment should be required in the absence of physical occupation, and it is not clear that a solution is possible.[71]

The Rehnquist Court has formulated two special protective rules of

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Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

67. 533 U.S. 606 (2001).

68. *See, e.g.*, MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986).

69. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

70. 260 U.S. at 413.

71. For good discussions of the problem, see, for example, William K. Jones, *Confiscation: A Rationale of the Law of Takings*, 24 HOFSTRA L. REV. 1 (1995); Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

uncertain scope in its takings jurisprudence. If regulators require a permit for certain uses of property, as they may without paying compensation for losses in value, and place restrictive conditions on the grant of the permit, the conditions imposed must bear a certain relationship to the reason for requiring a permit.[72] The significance of this rule, given the many ways in which it can be evaded—for example, by manipulating the reasons for the permit—is unclear. The Court has also created a "bright line" rule that a regulation that renders a property valueless necessarily constitutes a taking.[73] Regulations rarely render property valueless and the scope of the rule depends on how the property is defined, a question the Court has not answered. In *Palazzolo* the wetlands portion of the property might have been made worthless while the property as a whole, including the usable land above water, was not.

The Rehnquist Court's taking decisions probably provide the clearest support for the claim that the Court engages in conservative activism.[74] Even accepting the fiction of the Fifth Amendment's just compensation clause applying to the states by its incorporation in the Fourteenth Amendment, it is doubtful that the clause was intended to require compensation for loss of property values resulting from government regulation.[75] The Court's only justification for this activism is that the just compensation clause is a part of the Bill of Rights, and there is no reason why it should be treated as a black sheep. Why should it not be "interpreted," Chief Justice Rehnquist has argued, as imaginatively and expansively as the First Amendment?[76] Why should the Court's excessive enthusiasm for constitutional rights not include property rights rather than being

72. *See* Dolan v. City of Tigard, 512 U.S. 374, 386-89 (1994).

73. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1 3, 1015-16 (1992).

74. Or at least they did until the Court's 2001 term decision in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465 (2002), finding no compensable taking in the fact that development of the plaintiffs' lands was precluded for almost six years. The result was to substantially qualify, if not practically overrule, two of the Court's most pro-compensation decisions, *First English Evangelical Lutheran Church*, *supra* note 66, holding that even temporary takings require compensation, and *Lucas*, *supra* note 73, creating the "bright-line" rule that compensation is required for regulations that deprive property of all value. The defection of both Justices O'Connor and Kennedy to the liberal side in *Tahoe-Sierra* indicates that the era of "conservative activism" on the takings issue is likely over.

75. *See, e.g.*, FRED BOSSELMAN ET AL., U.S. COUNCIL ON ENVIRONMENTAL QUALITY, THE TAKING ISSUE (1973).

76. *See Dolan*, 512 U.S. at 392 ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation . . . .").

confined to serving only liberal causes?

This argument is the obverse of one successfully made by Justices Holmes and Brandeis in the early twentieth century. Holmes and Brandeis correctly objected that the (truly conservative) Court at the time had no basis for disallowing many economic and business regulations by creating the oxymoronic doctrine of "substantive due process," thereby converting a requirement of procedural regularity into a guarantee of whatever substantive rights the justices chose to create. If property interests were to be protected in this way, Holmes and Brandeis argued, there was no reason why speech interests, for example, should not be as well.[77] This argument proved to be successful.[78] The Court as recreated by President Franklin Roosevelt was much less enthusiastic, if not antipathetic, to property rights, which were permitted to drop out of the constitutional picture while the protection of speech and other rights remained.[79] Under the Warren and Burger Courts these non-property rights were greatly expanded. The Rehnquist Court has brought the Holmes and Brandeis argument full circle by relying on speech rights, for example, to bring property rights back into the constitutional picture.

This "what's good for the goose" argument is irresistible to conservatives, who, like Locke and Madison, believe that property rights are at least as important as other rights. The Court's judicial activism in the service of egalitarian causes will not abate— speech rights,[80] and criminal procedure rights will continue inexorably to expand. What alternative do the conservative justices have except to rule that some protection of property be included? The alternative, which may seem utopian, is for conservatives to demonstrate the sincerity of their objection to judicial activism by protesting its use even when such activism serves their interests.

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77. *See* Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting) ("The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used . . . .").

78. *Id.* at 666 ("For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").

79. *See, e.g.*, Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955); Ferguson v. Skrupa, 372 U.S. 726 (1963).

80. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (concluding that conviction of a person for burning the American flag at the end of a demonstration violates the First Amendment); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (holding that a bias-motivated crime ordinance under which defendants were convicted of burning a cross on a black family's lawn was an unconstitutional constraint on free speech and expression).

Tocqueville's warning that the Supreme Court is more dangerous than Congress or the President, capable in the hands of "imprudent men," of giving the nation cause to fear "anarchy or civil war" has proven to be correct.[81] From *Dred Scott*,[82] which helped the onset of the Civil War, to the 1883 *Civil Rights Cases*,[83] which preserved racial segregation in public accommodations for an additional 81 years, to forced busing,[84] which has devastated public school systems and cities,[85] to a dysfunctional system of criminal justice, judicial activism has been seriously injurious to our political and social health. If we continue to believe in the basic constitutional principles of federalism, democracy, and separation of powers, which have served us well when they have been allowed to operate, principled protest against government by judges in all its forms should be seen as a civic duty.

V. THE PREDOMINANTLY LIBERAL ACTIVISM OF THE OCTOBER 2000 TERM

The Rehnquist Court's conservative activism in takings cases and arguably some other areas does not change the fact that its rulings of unconstitutionality continue predominantly to favor the political preferences of the left. Most such rulings involve criminal procedure, and here the one-way ratchet effect of constitutional law is clearest, operating continuously to find new reasons for overturning criminal convictions. Although the Burger Court was more liberal-activist than the Warren Court in some respects, it was less so on criminal procedure issues. The rights of the criminally accused expanded less rapidly and steadily, but nonetheless continued to expand and were rarely cut back. The same is true of the Rehnquist Court, as its recent reaffirmation and strengthening of *Miranda* illustrates.[86]

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81. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 142 (Harvey C. Mansfield & Delba Winthrop eds., 2000). Tocqueville states:

> The President can fail without the state's suffering because the president has only a limited duty. Congress can err without the Union's perishing, because above Congress reside the electoral body that can change its mind by changing its members. But if the Supreme Court ever came to be composed of imprudent or corrupt men, the confederation would have to fear anarchy or civil war.

Id.

82. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

83. 109 U.S. 3 (1883).

84. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

85. *See* LINO A. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS (1976).

86. *See* Dickerson v. United States, 530 U.S. 428 (2000) (holding that an Act of

A. Search and Seizure

The 2000 term was not an exception in this respect. It was a banner year for search and seizure doctrine and the exclusionary rule that is supposedly derived from the Fourth Amendment. The result was the creation of additional impediments to effective criminal law enforcement. The Court's ruling, in its previous term, that a drug smuggler's Fourth Amendment rights were violated when a government agent discovered a package of cocaine by squeezing an item of his luggage on a bus rack typifies this trend.[87] If narcotics law violators found that decision encouraging, they had even more reason to cheer the 2000 term's decisions.

The use of crack-cocaine by pregnant women is known to have serious adverse effects on their unborn children. To deal with the problem, a maternity hospital tested urine samples of pregnant women for drugs. When evidence of drugs was found, authorities were notified so that the possibility of prosecution for child abuse could be used to induce the drug user to undergo treatment. The Court had previously approved of drug tests without a warrant for railway conductors, customs agents, and high school student athletes,[88] but a hospital testing the urine of pregnant women, the Court held in *Ferguson v. Charleston*, in an opinion by Justice Stevens joined by Justice O'Connor and the remaining three liberals, with Kennedy writing a concurring opinion, constituted an unreasonable "search" prohibited by the Fourth Amendment.[89] Cases where warrantless testing was upheld involved some "special need," Stevens explained.[90] Protection of the health not only of the mother but also of the unborn child is a "special need," Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, insisted in dissent, but that was not so, Stevens said, because the "relevant primary purpose" of the test, in his view, was law enforcement.[91]

A search was held unconstitutional by the same six-to-three vote in *City of Indianapolis v. Edmond,*[92] again rejecting application of the

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Congress may not overrule the Supreme Court's constitutionally based decision in *Miranda*).

87. *See* Bond v. United States, 529 U.S. 334 (2000).

88. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (student athletes); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (customs agents); Skinner v. Ry. Labor Executive Ass'n, 489 U.S. 602 (1989) (conductors).

89. 532 U.S. 67 (2001).

90. *Id.* at 78-79.

91. *Id.* at 79-83.

92. 531 U.S. 32 (2000).

"special need" doctrine. The Court disallowed a police practice of stopping automobiles to check them with the aid of dogs trained to detect drugs. The stops were non-discretionary—made in sequence, not at random—and typically took two to three minutes. While a policeman checked the driver's license and registration, a dog would be led around the car sniffing for drugs. The Court held that although automobile stops to check for illegal aliens or drunken drivers are constitutional,[93] the Constitution draws the line at stops to check for drugs. What if the cars were stopped for *both* a driver sobriety check or an illegal alien check *and* a drug check? O'Connor stated that the answer would depend on the *primary* purpose of the stop, and the use of the drug sniffing dogs made clear that the purpose, as in *Ferguson*, was not some "special need," but law enforcement.[94]

The growing of marijuana indoors away from prying eyes requires the application of intense light, which produces intense heat. A narcotics agent confirmed his suspicion that defendant was growing marijuana indoors by pointing a thermal imaging device at the building from across the street and thereby detecting the emission of an unusual amount of heat from an exterior wall. In *Kyllo v. United States*,[95] the Court held that such police actions constituted an unconstitutional "search." The decision was by a five-to-four split, but with an unusual switching of sides by the justices. Justice Stevens joined Chief Justice Rehnquist and Justices O'Connor and Kennedy in voting to uphold the conviction, but Justices Scalia and Thomas joined the remaining three liberals to make a majority for reversal.

What is the point in Justices Scalia and Thomas dissenting in case after case against the liberal position of finding reasons to overturn convictions only to join that position and its supporters in a case where it would not otherwise prevail? Every case must be decided on its own merits, but did the merits of this case inescapably require reversing another conviction and disallowing another law enforcement technique over the objection of four other justices? The decision would not only reverse the conviction of a guilty defendant, but like all rulings of unconstitutionality, also provide the basis for further such rulings—against which Scalia and Thomas will no doubt then vigorously and futilely dissent. One reason the march of liberal

93. *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (drunk drivers); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (illegal aliens).

94. *See Edmond*, 531 U.S. at 40-45.

95. 533 U.S. 27 (2001).

activism is inexorable is that even the most conservative judges for one reason or another sometimes find its call irresistible, while such deviations are much less common on the liberal side.[96] It is not likely that Justice Ginsburg, for example, will ever be found to provide the deciding vote for a decision upholding a criminal conviction.

Justice Scalia's opinion for the Court pointed out that the Court had long ago "decoupled" the Fourth Amendment from the common law by holding that there could be an unconstitutional "search" in the absence of any trespass or physical intrusion.[97] If placing a listening device on the exterior of a telephone booth constituted a Fourth Amendment search, as the Court had held,[98] it followed as a matter of logic that detecting heat waves by a device exterior to a building was also a search. Justice Stevens, writing for the dissenters, saw a basic constitutional difference between "through the wall" and "off the wall" surveillance.[99] Through the wall surveillance, by devices that detect what is happening inside a building or other space, properly constitutes a search, he agreed, but off the wall surveillance, by a device that merely detects external emissions from a building, does not. The life of the law is fine distinctions.

Scalia dismissed Stevens' distinction as invalid by pointing out that even so-called through the wall surveillance, as in the telephone booth case, although detecting what occurs inside a structure, does so only by capturing sound waves from its exterior. Similarly, a satellite visual scan detects doings in private areas only by detecting externally emitted light waves.[100] All surveillance devices operate by detecting exterior emissions, and heat waves, as much as sound or light waves, can give information as to what is happening inside a building. Logic requires that detecting heat waves without a warrant be as much an unconstitutional search as detecting sound or light waves without a

96. The second Justice Harlan, for example, after a lifetime of protesting judicial activism, led the way to perhaps the most activist decision of all. His impassioned lone dissent in *Poe v. Ullman*, 367 U.S. 497, 523 (1961), was effectively adopted in *Griswold v. Connecticut*, 381 U.S. 479 (1965), which held Connecticut's anti-contraception law to be unconstitutional, which in turn became the basis for *Roe v. Wade*, 410 U.S. 113 (1973). Similarly, Justice Powell's protests against activism did not keep him from rewriting Title VI of the 1964 Civil Rights Act in *Bakke*, the most important decision of his career. *See* Regents of Univ. of Calif. v. Bakke, 438 U.S. 265 (1978). Justice Scalia's vote was necessary to make flag burning a constitutional right in *Texas v. Johnson*, 491 U.S. 397 (1989).

97. *Kyllo*, 533 U.S. at 32-33.

98. *See* Katz v. United States, 389 U.S. 347, 358-59 (1967).

99. *Kyllo*, 533 U.S. at 41.

100. *Id.* at 35.

warrant.

The difficulty with Scalia's reasoning is not necessarily its logic, but its premise, which results from the Court's earlier "decoupling" of the Fourth Amendment, along with nearly all other Bill of Rights restrictions, from its common law roots, which are the only source of its meaning. The Court's unwarranted application of the Bill of Rights restrictions to the states is not nearly as important—state law rarely conflicts with the intended meaning of Bill of Rights provisions—as the Court's imaginative expansion of the restrictions beyond their intended (common law) meaning. If a Fourth Amendment "search" is not limited by the common law requirement of physical intrusion, by what is it limited, if all police investigation is not to be unconstitutional? After removing this essential limit, the Court redefined "search," with perfect circularity, as any police action that interferes with a defendant's "expectation of privacy that society is prepared to recognize as legitimate."[101] A "legitimate expectation" is whatever expectation the Court says is legitimate. The Fourth Amendment was thus converted, like the other provisions of the Bill of Rights, from a meaningful rule of law into a transfer of lawmaking authority to the Court, enabling it to impose on each state and the federal government a unique law of search and seizure and exclusionary rule.

Justice Stevens' dissent illustrates a typical response to a problem caused by the Court's freehand constitutional lawmaking: the making of an untenable distinction in an attempt to escape from an absurd result caused by an unjustifiable constitutional rule, without challenging the rule itself. Modern technology can present a problem of unwanted police surveillance, but it is not the same as the problem of physical intrusion addressed by the Fourth Amendment. Whether Fourth Amendment protection should be extended to the use of heat-detecting devices is a policy question that in a system of representative self-government should be made by elected legislators through legislation rather than by judges in the form of constitutional law. Legislators are likely to be more knowledgeable as to the tradeoffs involved, able to be more explicit in stating them, and less subject to the utopian notion that more rights is always a good thing.

Judges may, apparently trapped by the logic of earlier expansive rulings, produce decisions that are difficult to explain except on the basis of an "anti-cop" bias, or a presumption against effective

101. *Id.* at 34.

enforcement of the criminal law, especially narcotics law. Our constitutional rights have, under the Court's constant fertilization, grown so luxuriantly that a provision intended to protect us against the unwarranted intrusion of police into our homes now protects us against such indignities as a dog smelling our car, a hospital testing our urine, or the police detecting heat emissions from a building. That the Court does these things is not surprising, given that it has been doing them for 50 years. It is surprising that it should nonetheless be castigated by liberal academics as "conservative."

The Supreme Court does sometimes uphold convictions in cases it agrees to review, even convictions of Fourth Amendment claimants in a very good year for such claimants. In *Illinois v. McArthur*[102] a man suspected of having illegal drugs in his trailer home was kept from entering it unaccompanied by a policeman for about two hours while the police obtained a search warrant. There was little doubt that had the respondent been allowed to enter the home, the drugs would have been flushed away. Reversing the decision of an Illinois court—illustrating that there are state judges even more committed than the Supreme Court to the protection of our constitutional rights—the Supreme Court found no violation of the Fourth Amendment. Only Justice Souter found it necessary to qualify his agreement in a concurring opinion, and only Justice Stevens dissented.

In *Atwater v. City of Lago Vista*,[103] the Court also found no constitutional ("due process") violation in permitting an arrest for a nonviolent misdemeanor—the failure of a woman and her two small children to wear seat belts—punishable only by a fine. Justice Souter surprisingly joined the three conservatives and Justice Kennedy to make a majority for upholding the arrest, while Justice O'Connor joined the remaining three liberals in dissent. Assigned to write the majority opinion, which is often the case with the "swing" vote, Souter did not simply point out, as would have been accurate and sufficient, that the Constitution did not preclude such arrests. Neatly illustrating the justices' confident assumption that they are authorized to deal with all *serious* problems, Souter argued that such arrests seemed too infrequent to present a national problem that, Constitution or no Constitution, might require the Court's intervention. For O'Connor writing for the dissenters, even one arrest that she considers unreasonable is enough to create a new basis for

102. 531 U.S. 326 (2001).
103. 532 U.S. 318 (2001).

overturning convictions and allowing new causes of action against the police.

That the Court upholds a large majority—sixteen of twenty-two last term—of the criminal convictions it reviews in constitutional cases is beneficial for law enforcement only because new reasons for overturning convictions are not created as rapidly as possible. Because no prior decision expanding the rights of the criminally accused was overruled, the net result of the term was, as always, that those rights continued to expand.[104] The Rehnquist Court retains the complete control of the criminal justice systems of the states that the Warren Court seized in the 1960s. The result has been the creation and continuing imposition on the nation of a criminal justice system in which the guilt of the accused is often the least relevant consideration.

B. Freedom of Speech

Liberal egalitarianism's skepticism as to criminal liability is matched by its enthusiasm for civil liability. When the expansion of civil liability was at issue in the 2000 term, the reliability and cohesion of the liberals was at its greatest. Joined by Justice Kennedy, they won an important positive victory in *Legal Services Corp. v. Velazquez*,[105] holding that Congress could not constitutionally restrict funding of the Legal Services Corporation so as to preclude its litigation of welfare claims. Congress had yet again failed to understand or abide by the First Amendment, although how a refusal to subsidize litigation can be seen as abridging the freedom of speech might not be obvious to everyone, as it was not to the conservatives, joined by Justice O'Connor, in dissent.

First Amendment violations were found in four other cases in the 2000 term. In *Bartnicki v. Vopper*[106] the Court held that federal and state statutes prohibiting the publication of illegally intercepted

104. This was also true of the 2001 term in that the Court reversed criminal convictions on constitutional grounds in seven cases: *Kelly v. South Carolina*, 534 U.S. 246 (2002); *Kansas v. Crane*, 534 U.S. 407 (2002); *Lee v. Kemna*, 534 U.S. 362 (2002); *Alabama v. Shelton*, 535 U.S. 654 (2002); *Atkins v. Virginia*, 536 U.S. 304 (2002); *U.S. v. Ruiz*, 536 U.S. 622 (2002); *Kirk v. Louisiana*, 536 U.S. 635 (2002). In *Atkins* it continued its program of abolishing capital punishment by precluding execution of the mentally retarded. In addition, in *Hope v. Pelzer*, 536 U.S. 730 (2002), the Court held that an inmate may sue prison guards for inflicting "cruel and unusual" punishment by handcuffing him to a restraining bar ("hitching post").

105. 531 U.S. 533 (2001).

106. 532 U.S. 514 (2001).

communications could not constitutionally be applied to prevent a broadcaster from broadcasting a cellular telephone conversation that was illegally recorded by a third party. Writing for the majority, Justice Stevens found that although Congress's prohibition against intercepting electronic communications was consistent with the First Amendment, Congress could not constitutionally prohibit publication of illegally obtained material. Stevens could not see how prohibiting publication would remove an incentive to illegal interception.[107] Only the conservatives dissented.[108]

In *Lorillard Tobacco Co. v. Reilly*,[109] however, Justices O'Connor and Kennedy joined the conservatives to invalidate a Massachusetts law that severely restricted the advertising and displaying of tobacco products. The Court held that part of the statute prohibiting outdoor advertising within one thousand feet of a school or playground was invalid because the Federal Cigarette Labeling and Advertising Act preempted the prohibition. Another part of the statute involving point of sale advertising, not preempted by federal law, was found to be inconsistent with the First Amendment. The liberals dissented primarily on the statutory preemption issue rather than constitutional grounds. They made clear, however, that they favored less constitutional protection of "commercial speech" than did the Court, while justices Kennedy, Scalia, and especially Thomas made it clear in concurring opinions that they would be even more protective of commercial speech.[110]

Congress also failed to abide by the First Amendment, the Court found in *United States v. United Foods, Inc.*,[111] by enacting the

107. "[T]here is no basis for assuming that imposing sanctions [on publishers] will deter the unidentified [interceptors] from continuing to engage in surreptitious interceptions." *Id.* at 531.

108. In the 2001 term, in Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002), the Court invalidated as "overbroad" a federal ban on "virtual" pornography (no actual children are used), Rehnquist and Scalia dissenting and O'Connor dissenting in part, and in Watchtower Bible and Tract Society v. Village of Stratton, 536 U.S. 550 (2002), invalidated a requirement that door-to-door solicitors obtain a permit and display it on demand, only Rehnquist dissenting and Scalia and Thomas concurring separately. In Republican Party of Minnesota v. White, 536 U.S. 765 (2002), the Court invalidated a provision of a "code of judicial conduct" that placed restrictions on the speech of candidates for judicial office, the liberals dissenting. In Thompson v. Western States Medical Center, 535 U.S. 357 (2002), the Court invalidated a Food and Drug Administration regulation prohibiting the advertising of certain drugs. The vote was five-to-four, but surprisingly with Souter in the majority and Rehnquist joining Stevens, Ginsburg, and Breyer in dissent.

109. 533 U.S. 525 (2001).

110. For the 2001 term see *Thompson* 535 U.S. 357.

111. 533 U.S. 405 (2001).

Mushroom Promotion, Research, and Consumer Information Act. The Act authorized the Secretary of Agriculture to establish a Mushroom Council to promote the interests of the industry and to cover its cost by levying mandatory assessments on mushroom producers. Although the Court had four years earlier upheld a mandatory assessment on producers of certain California fruits as part of an overall regulatory scheme,[112] it distinguished that case on the ground that here the funds were used almost entirely for advertising. The Court held that producers were therefore forced to subsidize speech with which they might not agree. Justices O'Connor, Ginsburg, and Breyer dissented.

United Foods is not only an activist decision, but also an example of judicial policymaking at its least justifiable. Purporting to enforce a vague and abstract principle, judges who are likely to have little understanding of the problem supplant the policy choice made by better informed individuals. Transferring the issue of paying for mushroom advertising from the Secretary of Agriculture and the mushroom industry to judges is unlikely to produce a better result, if only because only judges could purport to believe that the problem is primarily one of freedom of speech.

While *United Foods* is undoubtedly activist, it is less clear, as is also true of *Lorillard*, that it is conservative. The usual "how the liberals voted" test does not work, because the liberal judges split evenly and O'Connor voted with the dissenting two. On the other hand, Thomas, one of the two most conservative justices, is the judge who is most committed to protecting commercial speech. The commercial speech cases can be seen as an aspect of a liberal Court's generally excessive enthusiasm, endemic to lawyers and law professors, for whatever it sees as a speech interest. Protection of commercial speech can also be seen, however, as a return under a different banner to the old economic substantive due process antipathy towards economic regulation, which would make them conservative.[113]

In *Good News Club v. Milford Central School*,[114] a clear conservative victory, a violation of the First Amendment guarantee of freedom of speech was found when a public school refused to grant a religious club the same rights granted other groups to hold meetings

112. *See* Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997).

113. *See* Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979).

114. 533 U.S. 98 (2001).

at the school after school hours. The liberals dissented, although Breyer concurred in part. On the unwarranted assumption that the religion clauses of the First Amendment apply to the states—in fact, they were meant to guarantee, not restrict, state autonomy in matters of religion[115]—the Free Exercise Clause might be understood to disallow explicit discrimination against religion. Perhaps the majority relied on the Freedom of Speech rather than the Free Exercise Clause because one of the Rehnquist Court's few successes in reducing judicial policymaking has been to relax, usually over the liberals' dissent, religion clause restrictions on the states, holding that many state accommodations of religion are neither required by the Free Exercise Clause[116] nor prohibited by the Establishment Clause.[117] A First Amendment free-speech claim was rejected, however, in *Federal Election Commission v. Colorado Republican Federal Campaign Committee*.[118] Justice O'Connor joined the liberals to reaffirm the Court's seminal *Buckley v. Valeo*[119] decision that upheld various restrictions on political contributions as consistent with the First Amendment. Justices Kennedy joined the conservatives in dissent.

While liberals usually take a more expansive view than conservatives of the First Amendment, they do not on the issues of campaign finance and commercial speech. On these issues, the conservatives plus Kennedy and sometimes O'Connor are more likely to find unconstitutionality. These issues provide additional examples of judicial activism, or at least would-be judicial activism, of the right. Whether disallowing restraints on campaign finance, which are also opposed by many liberals, should be seen as a conservative position may not be entirely clear. As to commercial speech, it takes a trained legal mind to appreciate why a state that may ban a product entirely may not instead merely ban or restrict advertising. Probably unique to the United States, such a result is likely to be produced only when policy choices are made by judges, supposedly acting on the basis of a principle, rather than by legislators unembarrassed to address each case on its own merits. Since the Court is unanimous that the First Amendment protects commercial speech, the issue

115. ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982).

116. Employment Div. Dept. of Human Res. v. Smith, 494 U.S. 872 (1990).

117. *See, e.g.*, Agostini v. Felton, 521 U.S. 203 (1997).

118. 533 U.S. 431 (2001).

119. 424 U.S. 1 (1976).

usually does not present a liberal-conservative split, although the conservatives are generally more protective of commercial speech than the liberals.

C. Immigration

Clearly on the liberal side of the activism ledger last term were several decisions on the subject of immigration—rulings of unconstitutionality in all but name. A federal statute provides that resident aliens who are to be deported, usually because of criminal activity, are to be detained in custody until a country can be found that will accept them. In *Zadvydas v. Davis*,[120] the liberals joined by Justice O'Connor, instead of invalidating the statute by holding it unconstitutional, invalidated it by deconstruction, rewriting it to disallow detention for more than six months. Justice Kennedy joined the conservatives in dissent.

Calcano-Martinez v. INS[121] and *INS v. St. Cyr*,[122] involved a federal statute that sought to lessen delays in deportation proceedings by precluding judicial review of INS deportation orders. As in *Zadvydas*, the Court, as an alternative to holding the statute unconstitutional, effectively invalidated it by finding that it does not preclude judicial review. This time it was Justice Kennedy who joined the liberals to produce another important activist liberal victory, while Justice O'Connor joined the conservatives in dissent.

D. State Action

Because the Fourteenth Amendment, the basis of nearly all constitutional claims against the states, applies only to "state action," not private actions, to expand the meaning of "state action" is to expand the scope of constitutional law. In *Brentwood Academy v. Tennessee Secondary School Athletic Association*,[123] the liberals joined by Justice O'Connor expanded the meaning of "state action" by holding that the act of an association privately formed to organize and regulate interscholastic athletic competitions, involving both private and public schools, constituted "state action" because of the "pervasive entwinement" of public school officials in the

120. 533 U.S. 678 (2001).
121. 533 U.S. 348 (2001).
122. 533 U.S. 289 (2001).
123. 531 U.S. 288 (2001).

association's regulatory activities.[124] The association, therefore, was subject to a suit claiming that its restrictions on a private high school's recruiting practices violated the First Amendment—a claim that the district court had upheld. Justice Kennedy joined the conservatives in dissent.

E. Statutory Interpretation

Although rulings of unconstitutionality are the clearest and most important kind of judicial activism, they are not the only kind. Judges can and do ignore or rewrite statutes as well as the Constitution to further their ends. The October 2000 term provides several examples in addition to the immigration cases noted above. *PGA Tour v. Martin*,[125] the much-discussed disabled golfer case, illustrates the inexorable tendency of many judges to treat every legislative creation of new rights and liabilities as an invitation to expand them still further. Why should only legislators get to do such satisfying things as expanding rights? Judges being, like many legislators, lawyers professionally fond of law, do not see the expansion of liability and litigation as necessarily bad things. The inherent contradiction in our political system may not be, as Marx thought, that the capitalists will exploit the workers until they revolt, but that we permit our law largely to be made by lawyers, and the more and the worse the law, the better it is for lawyers.

The Americans with Disabilities Act requires "places of public accommodation" to make "reasonable accommodations" to disabled persons seeking to use their facilities or services. In *Martin*, the Court held that a golf tournament must make accommodations not only for disabled spectators, the tournament's customers, but also for disabled persons who wish to participate as competitors. The Court was of the opinion, contrary to that of professional golfers, that permitting competitors to ride rather than walk the course would not, in the words of the act, "fundamentally alter" the nature of the game. Chief Justice Rehnquist as well as Justices O'Connor and Kennedy joined the liberals, leaving only Justices Scalia and Thomas in dissent. The Court's stretching the coverage of the act was, Scalia argued, a triumph of "benevolent compassion" over law. Even the net benevolence of the decision might be questioned once the costs of litigation and of steps to avoid litigation that is likely to result are

124. *Id.* at 298.
125. 532 U.S. 661 (2001).

taken into account. Inherent in the egalitarianism of the majority is a presumption in favor of government regulation that is the antithesis of conservatism.

Justices O'Connor and Kennedy voted with the conservatives, however, with the liberals dissenting, in two other statutory interpretation cases, resulting in decisions against the expansion of liability. Title VI of the 1964 Civil Rights Act prohibits racial and other discrimination by institutions that receive federal funds.[126] Some federal agencies that enforce Title VI have ruled that practices that are racially neutral on their face—such as a literacy or education requirement—but have a "disparate" effect on a racial or other group are presumptively discriminatory even in the absence of "discriminatory intent," i.e., despite that they have a clear nonracial justification. In *Alexander v. Sandoval*[127] the Court held that although private parties may sue under Title VI to recover damages for intentional discrimination, they may not sue on the basis of disparate effect.

In *Buckhannon Board and Care Home Inc. v. West Virginia Department of Health and Human Resources*,[128] the Court held that civil rights attorneys may not collect fees under statutes that award attorney's fees to the "prevailing party" in litigation unless they obtain a favorable judgment or consent decree. It is not enough that a suit brought by an attorney served as a "catalyst" to bring about a change in the law favorable to his client. In both *Bukchannon* and *Alexander*, the majority's interpretation of the statute is the more reasonable one, at least on the assumption that an interpretation limiting liability should be favored in cases of doubt, and therefore should not be considered activist.

VI. IN SUM: STILL A PREDOMINANTLY LIBERAL ACTIVIST COURT

Measuring judicial activism by rulings of unconstitutionality, the Rehnquist Court's activism in the 2000 term, like that of its prior six terms and of the Warren and Burger Courts, predominantly advanced liberal causes. Including *Bush v. Gore*, the *INS* cases, and the state action case, the Court made nineteen rulings of unconstitutionality last term. Twelve of these can clearly be classified as liberal and one as probably liberal, while only four are clearly conservative, and two

126. 42 U.S.C. § 2000d (1998).
127. 532 U.S. 275 (2001).
128. 532 U.S. 598 (2001).

seem mostly conservative.

Five liberal decisions reversed criminal convictions, three more held unconstitutional a hospital's use of a urine test for drugs, the denial of funding for welfare rights litigation, and a prohibition on broadcasting illegally obtained matter, and a ninth increased the reach of constitutional law by expanding the state action doctrine. The three immigration cases invalidated federal statutes in order to expand the rights of aliens threatened with deportation. A thirteenth case, *Cook v. Gralike*,[129] invalidated a Missouri law that required the ballot to identify candidates who failed to support term limits, should also be classified as a minor liberal victory, because conservatives primarily support term limits.

Six rulings of unconstitutionality remain. Four are clearly conservative victories, as indicated by the liberals' unanimous dissent in each except that Breyer partially concurred in one: *Bush v. Gore*, stopping the Florida recount; *Garrett*, invalidating a federal statute that permitted private damage suits against states; *Good News Club*, disallowing the exclusion of a religious club from after-hour use of public school facilities (Breyer concurred in part); and *Palozzola*, making it easier to successfully assert a regulatory takings claim. The two commercial speech cases should also be considered conservative victories.

Far from being in "the midst of a period of remarkable right-wing activism," as Professor Sunstein would have it, we have a Supreme Court whose decisions continue, as in the past several decades, predominantly to advance liberal policy preferences. The Rehnquist Court's rulings of unconstitutionality favoring the conservative position are on the issues of race preferences, which arguably are not activist; federalism, which seem more symbolic and formalistic than substantive; and regulatory takings, which may be impeding various environmental and endangered species' protection measures but are still rather tentative and uncertain.[130] On most controversial issues of basic social policy—abortion, criminal procedure, prayer in the schools, pornography, sex discrimination, homosexuality, flag burning, vagrancy, and so on—the Rehnquist Court continues and sometimes extends the liberal positions taken by its predecessors. During the October 2000 term, its rulings of unconstitutionality

129. 531 U.S. 510 (2001).

130. And which have now been substantially limited, *supra* note 74.

favored liberal over conservative causes by more than two to one.[131]

The only reason liberal academics can denounce the Rehnquist Court as "right-wing" and see an urgent need for "balance" by appointing more liberals is that the Court's advancing of liberal causes is seen as the norm, really the point of constitutional law, while any deviation from that norm is seen as a virtual abdication of duty.

131. This continued to be true in the 2001 term. Of the Court's twelve rulings of unconstitutionality, the eight criminal law cases, expanding the rights of the accused, and two of the four First Amendment cases, *Watchtower Bible & Trust Soc'y of VT v. Village of Straton*, 536 U.S. 150 (2002) (invalidating a solicitation permit requirement), and *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (invalidating a ban on virtual child pornography), are liberal. The other two, *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) (invalidating a restriction on judicial campaign speech), and *Thompson v. Western States Med. Ctr.*, 535 U.S. 357 (2002) (invalidating a restriction on drug advertising), must be classified as conservative. A thirteenth case, *Federal Mar. Comm'n v. South Carolina State Ports Auth*, 535 U.S. 743 (2002) (disallowing private suits against a state agency on Eleventh Amendment grounds), may be considered a restrictive constitutional ruling and added to the conservative side. The result is that the Court's interventions in the political process favored liberal positions by a count of ten to three.