IS THE REHNQUIST COURT AN "ACTIVIST" COURT?

THE COMMERCE CLAUSE CASES

RANDY E. BARNETT*

INTRODUCTION

In *United States v. Lopez*,[1] the Supreme Court, for the first time in sixty years, declared an act of Congress unconstitutional because Congress had exceeded its powers under the Commerce Clause. In 2000, the Court reaffirmed the stance it took in *Lopez* in the case of *United States v. Morrison*,[2] once again finding that Congress had exceeded its powers. Are these examples of something properly called "judicial activism"? To answer this question, we must clarify the meaning of the term "judicial activism." With this meaning in hand, I examine the Court's Commerce Clause cases. The answer I give to the question of whether the Rehnquist Court is an "activist" court is "no."[3]

I. THE MEANING OF "JUDICIAL ACTIVISM"

With one exception, I have consciously avoided, either in print or conversation, criticizing a judge or court for its "activism."[4] My hesitation stems from a belief that this term,

---

* Austin B. Fletcher Professor, Boston University School of Law, <rbarnett@bu.edu> This paper was prepared for *Conservative Judicial Activism*, a Conference sponsored by The Byron R. White Center for the Study of American Constitutional Law and the University of Colorado Law Review. (Oct. 19-20, 2001). I thank Frank Goodman for his very helpful suggestions on an earlier draft.

1. 514 U.S. 549 (1995).

2. 529 U.S. 598 (2000).

3. By "no" I mean "yes." While the Court is highly activist according to the definition I shall provide in Part I, I contend that it is *less* activist in precisely those cases for which it has been most criticized—in particular, its Commerce Clause cases.

4. The exception was Randy E. Barnett, *Left Tells Right: "Heads I Win, Tails You Lose,"* WALL ST. J., Dec. 12, 2000, at A26, *reprinted in* BUSH V. GORE: THE

while clearly pejorative, is generally empty. It is empty whether used by New Dealers to criticize the Progressive Era Supreme Court, modern conservatives to criticize the Warren Court, or more recently by those on the left to criticize the Rehnquist Court. When a decision is deemed to be "activist" this usually means only that a court has struck down a statute or reversed a criminal conviction—or in the case of *Bush v. Gore*[5] reversed a state supreme court decision—and the person using the term disagrees with the outcome. In other words, "activism" usually refers to an action taken by a court of which the speaker disapproves. By the same token, the term usually employed as the opposite of activism—"judicial restraint"—is similarly short on content.

Though some use this rhetoric to imply that a court is acting in an activist fashion *whenever* it strikes down an act of a legislature, almost no one really believes this is always improper. If pressed, I could think of only one academic (who shall remain nameless) who contends that courts should never, or almost never, strike down unconstitutional laws. Surely no one in this Symposium believes this. Though we may often disagree over whether a particular statute is constitutional, we all share the conviction that the Supreme Court and lower federal courts should strike down or nullify unconstitutional laws enacted by legislative majorities. Therefore, if something called "judicial activism" is a bad thing, this cannot be what the term means.

Rather than take the time to survey all the possible meanings of "judicial activism"—and assuming you do not wish to abandon the term entirely as I would favor—let me offer and then defend my own definition: When speaking of constitutional adjudication, it is activist for courts to adopt doctrines that contradict the text of the Constitution *either* to uphold or nullify a law.[6] In sum, it is activist for courts to substitute for the relevant constitutional provision another provision that they think, for whatever reason, is preferable. According to this definition, it is not judicial activism to strike

---

COURT CASES AND THE COMMENTARY 264 (E.J. Dionne Jr. & William Kristol, eds., 2001) (criticizing the Florida Supreme Court for its "activism" in *Bush v. Gore* using the same definition described below).

5. 531 U.S. 98 (2000).

6. It might also be "activist" to go beyond nullifying unconstitutional laws to command that other branches of government perform their duties in certain ways and not in others, but I shall not pursue this possibility here.

down a statute that violates the text of the Constitution. To the contrary, it would be activist to do nothing in the face of legislation that runs afoul of the written Constitution.

I believe that most people, including most participants in this Symposium, would accept this definition of judicial activism upon reflection. Most everyone thinks courts should find a statute unconstitutional when it contradicts what the Constitution says. Where disagreements would, should, and do arise is over what the Constitution (or statute) actually requires; and part of this disagreement is over how the meaning of the Constitution should be determined.

I am of the view that the courts and Congress should respect the original meaning of the Constitution where that meaning can be determined.[7] I also think that, when the meaning is vague or where the text authorizes supplementation, as it does for example in the Ninth Amendment[8] and the Privileges or Immunities Clause of the Fourteenth Amendment,[9] there is room for discretionary choices and a need for judges to formulate constitutional doctrines to put these clauses into effect.

This method of interpretation is called "Original Meaning Originalism" and is to be distinguished from "Original Intent Originalism." Whereas Original Meaning Originalism looks to the public meaning that terms and phrases had at the time of the term's enactment, Original Intent Originalism seeks to understand the intentions of those who wrote or ratified the text to fill any gaps in the original public meaning at the time of enactment. While advocating an Original Intent Originalism is a perfectly respectable position, it is not the theory of interpretation espoused today by most thoughtful libertarians or conservatives. When pressed, most would say they seek original meaning, not original intent.[10] Here, I will confine my

---

7. I defend this approach in Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999). The next few paragraphs are based on the analysis presented at greater length there.

8. U.S. CONST. amend. IX ("The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.").

9. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .").

10. *Cf.* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (Amy Gutmann, ed., 1997) ("We look for a sort of 'objectified' intent - the intent that a reasonable person would gather from the text of the law, place alongside the remainder of the *corpus juris*.")

use of the term originalism to a method that seeks and relies upon the original public meaning of the text, not the original intent of its framers or ratifiers.

Even those who do not consider themselves originalists seem drawn to original meaning, as exemplified by the recent controversy over what constitutes an "impeachable offense." Liberals and conservatives, academics and public commentators alike, all began with, and placed great stock in, the original meaning of the term "high crimes and misdemeanors" and then attempted to apply that meaning to the conduct in question.[11] The same holds true of those who debate the meaning of the Second Amendment's "right of the people to keep and bear Arms."[12] And many academics who purport to reject originalism think that the original meaning of a constitutional term or passage should serve as a starting point or at least an important factor in establishing the meaning of the Constitution's text.[13]

The inherent attraction of original meaning flows, I believe, from the insight that where the Constitution speaks, judges are not empowered to change its meaning. As was contended by Isaac Penington, Jr. in 1651: "They who are to govern by *Laws* should have little or no hand in making the *Laws* they are to govern by."[14] The whole reason to have a written constitution, like a written contract, is to "lock in" some meaning that can only be changed by proper procedures. Otherwise, why bother? The object of a written constitution is to bind Congress or judges. Were these agents empowered to change its meaning to something they like better, the point of having a written constitution would be lost.

That the meaning of a written constitution must remain the same until it is properly changed is the essence of originalism. We should follow the original meaning of the text, then, not because we are bound by the "dead hand" of the past,

---

11. For an extended discussion of the current popularity of Original Meaning Originalism, even among ostensibly nonoriginalists, see Barnett, *supra* note 7, at 611-20.

12. U.S. CONST. amend. II.

13. *See, e.g.*, PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 13 (1991) (referring to the "historical modality" of constitutional argument).

14. ISAAC PENINGTON, JR., THE FUNDAMENTAL RIGHT, SAFETY AND LIBERTY OF THE PEOPLE 3 (London, 1651), *as it appears in* EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RIGHTS OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 84 (1988).

or by our dead ancestors, or in my case by *other people's* dead ancestors. We should adhere to the original meaning because—right here, right now—we are committed to a written constitution, and the whole reason for putting a constitution in writing is to constrain the behavior of political and judicial actors. If those actors can change its meaning as they desire and in the absence of a written amendment, the written constitution will have failed in its principal purpose, and our commitment to it rings hollow.

Also hollow would be the claim that persons should obey Congress or the courts because their actions were authorized or mandated by the Constitution. Judges claim that their rulings are not just *their* opinions, but come from an independent source called "the Constitution." If, however, the Constitution means whatever Congress or the courts want it to mean, then this is a lie. A more accurate statement would be "Obey because WE tell you to," and such a statement is unlikely to be well-received by the public.

On the other hand, where the text is either vague or deliberately incomplete, there is room for judicial construction that does not contradict the original meaning. Even where the original meaning of a term or passage can be discovered it must still be *applied* to a particular case or controversy and the process of application will require choice and judgment. Though this makes originalism considerably less confining than its critics assume, the existence of vagueness and the need for judgment does not eliminate the duty to adhere to and apply original meaning in good faith to the extent it can be determined.

When considering whether you agree or disagree with Original Meaning Originalism, I suggest you think not of the clause of the Constitution you dislike and would like to see changed but of the one you most cherish and do not want to see *others* change. Do not think of the clause that impedes your ability to accomplish what you think is in the public good; think of the clause that stops others from doing bad things that *they* think are in the public interest. In the absence of a constitutional amendment, do you really want judges with whom you disagree to be able to change the meaning of your favorite clause to something they like better? How do you argue when your favorite clause is threatened or violated by those who do not like it?

In sum, for an Original Meaning—or "moderate"[15]—originalist, it is not activist (if one insists on using that term) for a court to strike down legislation that violates the original meaning of the text. To the contrary, it would be activist to disregard that meaning and uphold a statute where it conflicts with the text of the Constitution because a judge, for some reason, prefers the statute to the original meaning of the Constitution. By the same token, it would not be activist for a court to adopt doctrines to identify what constitutes "cruel and unusual punishment" or an "excessive fine."[16] Nor would it be "activist" for a court to protect from legislative infringement an unenumerated right that, as the Ninth Amendment affirms, is "retained by the people." On the contrary, it would be activist for the Court to ignore the Eighth Amendment's prohibition on cruel and unusual punishment simply because it is vague, or to contradict the original meaning of the Ninth Amendment and "deny or disparage" a right simply because a particular right was not included in the enumeration.

According to this view of "judicial activism," whether or not a court is being activist depends not at all on whether it is upholding or striking down legislation. Instead, it depends on whether the court is enforcing or refusing to enforce the text of the Constitution as properly interpreted. And proper constitutional interpretation, I further maintain, means finding and applying in good faith its original meaning.

This suggests two distinct factors that determine whether a particular decision should be deemed activist: (1) Does the result of a given case contradict the text of the Constitution as properly interpreted (regardless of how the court reached that result)? (2) Did the court try to identify and stay within the original meaning of the text (regardless of the result that was reached)? A decision whose result is consistent with original meaning is less activist than one that contradicts it. And a decision in which a court in good faith seeks the original meaning is less activist than one that deliberately ignores that meaning. With respect to the first of these considerations, we cannot conclude that a court is being activist until we

15. *Cf.* Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204, 231 (1980) ("Moderate originalism is a perfectly sensible strategy of constitutional decision making.").

16. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

determine the original meaning of the text that a particular statute either has or has not violated. We cannot assess the first type of activism, therefore, without evaluating the substance of the relevant constitutional text.

Many who use the term "activist" do so, it seems, in order to criticize a court without having to advance their own view of the correct interpretation of the constitutional text at issue, but this is a cheat. Unless one abandons judicial review entirely, one simply cannot know whether a court is being activist unless one also knows what that text means. The epithet of "activism" provides no escape from the need to take a stance on how the critic thinks the Constitution should be interpreted. By what method should its meaning be found and what meaning does the critic attach to whatever particular passage is at issue?

Upon examination, I conclude that, while the Rehnquist court may indeed be an activist court in its *method*, the *results* it has reached are less activist than those of previous courts in precisely those cases where its activism is now being criticized—most especially in its Commerce Clause decisions. Any such assessment, however, requires an inquiry into the original meaning of the Commerce Clause.

II. ARE THE COMMERCE CLAUSE CASES "ACTIVIST"?

This brings us back to the *Lopez* and *Morrison* cases. Whether the Court was being activist in striking down the Gun Free School Zones Act or a portion of the Violence Against Women Act depends entirely on whether those acts exceeded the powers of Congress under the Commerce Clause as properly interpreted. Because I think they did, I do not believe the Court was acting in an activist fashion in those two cases.

As the courts have always recognized, the text of the Constitution does not grant Congress a general "police power" to pass any legislation it may deem to be in the public interest. Instead, the Constitution confines Congress to its enumerated powers and allows it to execute those powers by means of laws that are "necessary and proper."[17] In the landmark case of

17. *See* Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745 (1997) (distinguishing between Madisonian and Marshallian conceptions of "necessity"). In a new book, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (Princeton Univ. Press, forthcoming 2003) (on file with

Marbury v. Madison,[18] Chief Justice Marshall stated this proposition as well as it can be stated:

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed .[19]

Later, in *McCulloch v. Maryland,*[20] Marshall reaffirmed the proposition that: "This government is acknowledged by all to be one of enumerated powers."[21] In that same opinion, he also wrote: "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended."[22] To the extent that readers accept Marshall's proposition, they cannot claim it is activist for courts to restrict Congress to its enumerated powers and to nullify any law that exceeds those powers.

The next question to be addressed, then, is the meaning of the Commerce Clause, which Congress claimed as its source of power in both *Lopez* and *Morrison.* Notice that the Constitution does not grant Congress the power over *all*

---

the author) (hereinafter RESTORING THE LOST CONSTITUTION), I will be qualifying somewhat the historical claim I made there by showing how Madison's (and others') conception of "necessity" was closer—though by no means identical—to that of Hamilton (and Marshall) than is commonly believed. For now, see David P. Currie, *The Constitution in the Supreme Court: State and Congressional Powers, 1801-1835*, 49 U. CHI. L. REV. 887, 932 (1982) (discussing John Marshall's opinion in *McCulloch v. Maryland* and concluding that, "[i]n light of earlier statements in his opinion, the implication seems unmistakable; incidental authority must not be so broadly construed as to subvert the basic principle that Congress has limited powers.").

18. 5 U.S. 137 (1803).

19. *Id.* at 176. By quoting from Chief Justice Marshall here and elsewhere, I do not mean to endorse all of what he says about either the Commerce Clause or the Necessary and Proper Clause. Nor do I consider his opinions reliable sources of original meaning. I cite them as evidence that even in the most expansionist cases from this era—cases still alleged to support expansive federal powers—Marshall adamantly insists that the powers granted Congress under these clauses are necessarily limited.

20. 17 U.S. 316 (1819).

21. *Id.* at 405.

22. *Id.* at 421.

commerce. Instead, it granted Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[23] The only reason to list these three specific powers over commerce was to exclude some commerce from the purview of Congress—and it turns out that the only commerce that is excluded is commerce that occurs wholly within a particular state. As Chief Justice Marshall wrote in *Gibbons v. Ogden*,[24] the most famous of all Commerce Clause cases:

> The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. . .The completely internal commerce of a State, then, may be considered as reserved for the State itself.[25]

Protecting wholly intrastate commerce from the reach of Congress is a constitutional imperative in our federal system. Indeed, if Article I had included the power to regulate wholly intrastate commerce, it would simply have read "Congress shall have power to regulate commerce." The only reason for the tripartite breakdown specified was to exclude the power to regulate wholly intrastate commerce. To the extent that the activities sought to be regulated by Congress in these two statutes—possessing guns within 1000 feet of a school or committing the crime of rape—are wholly intrastate activities, they are outside the reach of Congress whether or not they are commerce. But were these acts "commerce"?

The Commerce Clause empowers Congress to regulate "commerce," not to regulate other activities—but what does "commerce" mean? The historical evidence is overwhelming that, at the time it was enacted, "commerce" referred to the buying, selling, bartering or transporting of goods. I recently surveyed every use of the term "commerce" in the records of the Constitutional Convention, the state ratification conventions, and *The Federalist Papers*.[26] While I found many examples of the term "commerce" being used to refer to the exchange or

---

23. U.S. CONST. art. I, § 8.

24. 22 U.S. 1 (1824).

25. *Id.* at 195. Once again, this is not meant neither to endorse the rest of Marshall's analysis of the clause in *Gibbons* nor as evidence of original meaning.

26. Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001).

transportation of goods, I did not find a single example of the word being used unambiguously in any broader sense. Instead, "commerce" or trade was routinely distinguished from such productive activities as agriculture and manufacturing.[27]

These findings were strongly confirmed by a new survey of every use of the term "commerce" in the *Pennsylvania Gazette* from 1728 until 1800.[28] Like the evidence I reported from the drafting and ratification process, commerce was consistently distinguished from productive economic activities such as agriculture and manufacturing. For example, a passage from the January 13, 1790 issue is particularly revealing:

> Agriculture, Manufactures and Commerce, [a]re acknowledged to be the three great sources of wealth in any state. By the first [agriculture] we are to understand not only tillage, but whatever regards the improvement of the earth; as the breeding of cattle, the raising of trees, plants, and all vegetables that may contribute to the real use of man; the opening and working of mines, whether of metals, stones, or mineral drugs; by the second [manufacturers], all the arts, manual or mechanic; by the third [commerce], the whole extent of navigation with foreign countries. As these are more or less cultivated or encouraged, the figure or influence of a nation will rise or fall among her neighbours; for as riches, in the present state of things, constitute more than half the character or power, the acquisition of these to the community must bring with it every other public advantage.[29]

In short, at the time of the enactment of the Commerce Clause, the public meaning of "commerce" was the trade and transportation of what is produced by agriculture and manufacturing.[30] Moreover, nowhere was it ever used to refer

---

27. *See id.* at 112-25.

28. *See* Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. (forthcoming Oct. 2002). Because no single quote can establish whether a usage is normal or aberrational, in my *Chicago* and *Arkansas* articles I have provided a comprehensive assessment of *every* use of the term in the Constitutional Convention, ratification conventions, the *Federalist Papers* and *The Pennsylvania Gazette*. This new survey of *The Pennsylvania Gazette* was made possible by the database provided by Accessible Archives, Inc. on its website, http://www.accessible.com.

29. THE PA. GAZ., January 13, 1790. This quote appears in entry #76406 on Accessible Archives, *supra* note 28.

30. Therefore, to the extent the Court expands the meaning of commerce to include all "economic" activity, it is acting in an "activist" fashion, but that

to a noneconomic activity. Given that Congress sought in these statutes to reach activities—possessing a gun within 1000 feet of a school or committing the crime of rape—that were not "commerce" under this definition, it exceeded its power under the Commerce Clause, and it was not "activist" for the Rehnquist Court to so find.[31]

Though Congress exceeded its commerce power by attempting to regulate activities that are not commerce and take place wholly within a state, a further issue must be addressed to determine whether the Court properly found the statute to be unconstitutional. Can Congress reach these actions under the Necessary and Proper Clause that gives it the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its power to regulate commerce between one state and another?[32] Since the founding, it has long been recognized that this provision could not have been intended to render the enumeration of powers redundant or superfluous.

As then-Representative James Madison explained to the first Congress: "Whatever meaning this clause may have, none can be admitted, that would give an unlimited discretion to Congress. Its meaning must, according to the natural and obvious force of the terms and the context, be limited to means necessary to the end, and incident to the nature of the specified powers."[33] Madison then observed: "The essential characteristic

---

criticism does not apply to the actual outcome of either *Lopez* or *Morrison*.

31. As for the argument that possession of guns near schools "substantially affects" commerce, Congress was delegated a power over commerce among the states, not a power over any activity that substantially affects commerce. The "substantial affects" doctrine is a constitutional construction that, whatever else it might entail, cannot be used to undermine the enumerated powers scheme which it would if it extends to the activities at issue in *Lopez* and *Morrison*. As I briefly discuss below, it was precisely this untenable conception of substantial effects that the Court was trying to avoid in both cases.

32. U.S. CONST. art. I, §8.

33. 2 ANNALS OF CONG. 1898 (1791). Although there came to be disagreement between Madison, Jefferson, and Randolph on the one hand, and Hamilton and Marshall on the other, about the degree of necessity that must be shown, all agreed that, for a measure to be "necessary," there must be a sufficient fit between the means chosen and the enumerated end. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) at 421 (stating that means chosen must be "plainly adapted" to an enumerated end); Alexander Hamilton, Opinion on the Constitutionality of an Act to Establish a Bank, *in* 8 PAPERS OF ALEXANDER HAMILTON 97, 104 (Harry C. Syrett & Jacob Cooke eds., 1965) ("The relation between the *measure* and the *end*, between the *nature of the mean* employed towards the execution of a power and the object of that power, must be the

of the Government, as composed of limited and enumerated powers, would be destroyed, if, instead of direct and incidental means, any means could be used . . . ."[34]

In *Lopez* and *Morrison,* the Supreme Court adopted two doctrines to avoid construing the Necessary and Proper Clause as a grant of unlimited power to Congress. First, it held that when Congress attempts to reach wholly intrastate activities, these activities must be *economic* in nature to be incident to its power over commerce.[35] Second, Congress may reach wholly intrastate economic activity only if that activity was shown to "substantially affect[] interstate commerce."[36]

Of course the text of the Constitution includes neither doctrine and both can be criticized as much for giving too much power to Congress as for giving too little.[37] Still, the expressed purpose of adopting these two doctrines was to apply the Necessary and Proper Clause in such a way as to maintain the scheme of limited and enumerated powers that John Marshall correctly attributed to the text while, at the same time, staying within the "aggregate effects" test first enunciated in *Wickard v. Filburn.*[38]

In *Wickard*, the Court said that Congress may regulate wholly intrastate activities that, *taken in the aggregate*, adversely affect interstate commerce.[39] In a world in which virtually any type of action, when aggregated, could be said to "affect" interstate commerce, some limiting doctrine like a "substantial effects test" must be established or the enumerated powers scheme would be completely eliminated and Congress would have unlimited power over all activities whether economic or not. Indeed the Court in *Wickard* itself repeatedly used the term "substantial" to describe the type of effect that an act must have to be reached by Congress: "[T]he reach of that power [granted by the Commerce Clause to Congress] extends to those intrastate activities which *in a*

---

criterion of constitutionality . . . .").

34. 2 ANNALS OF CONG. 1898 (1791).

35. United States v. Lopez, 514 U.S. 549, 559-60 (1995).

36. *Id.* at 560.

37. Once again, the original meaning of "commerce" patently did not extend to all economic activity.

38. 317 U.S. 111 (1942).

39. *Id.* at 127-28 (stating "[t]hat appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.")

substantial way interfere with or obstruct the exercise of the granted power."[40]

The need for a doctrine to limit the reach of the Commerce Clause, and thereby preserve the enumeration of powers, in an interconnected economy is nothing new. For example, while President, Madison wrote: "In the great system of political economy, having for its general object the national welfare, everything is related immediately or remotely to every other thing; and consequently, a power over any one thing, if not limited by some obvious and precise affinity, may amount to a power over every other thing."[41] Despite the fact that, even at the time of the founding, everything was "related immediately or remotely to every other thing,"[42] the Constitution granted Congress the power to regulate only "commerce" and only commerce "among the several states."

In sum, adopting any construction of the Commerce and Necessary and Proper Clauses that gives Congress unlimited power over anything it chooses to regulate would be the height of judicial activism (if we must use this term) for such a construction would render the list of enumerated powers purposeless. It would also violate the very first sentence of Article I, which begins, "All legislative Powers *herein granted* shall be vested in a Congress of the United States. . . ."[43] And it would run afoul of the Tenth Amendment which affirms that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[44]

---

40. *Id.* at 124 (quoting United States v. Wrightwood Dairy Co., 315 U.S. 110, 119) (emphasis added). *See also id.* at 125 (Appellee's activity may "be reached by Congress if it exerts a *substantial economic effect* on interstate commerce . . . .") (emphasis added); *Id.* at 128-29 ("Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a *substantial effect* in defeating and obstructing its purpose to stimulate trade therein at increased prices.") (emphasis added). On the reluctance of the Court deciding *Wickard* to completely abandon all limits on its judicial review of congressional power and its refusal to take such a step explicitly, see BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 212-24 (1998).

41. Letter From James Madison to Judge Roane (Sept. 2, 1819), *in* 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON, 1816-1828, at 143-44.

42. *Id.*

43. U.S. CONST. art. I, § 1 (emphasis added).

44. U.S. CONST. amend. X. This is not to assert a doctrine of "states' rights," but merely to affirm the limits of federal power. According to the Tenth Amendment, powers that are not in the hands of the national government are

The following test for any Commerce Clause and Necessary and Proper Clause doctrine would smoke out any activism flying under the cover of legitimate constitutional construction: If you cannot think of an example of an activity that Congress may not reach under the proposed doctrine, then it must be wrong.[45] The Court sought to avoid just such an unlimited doctrine in *Lopez* and *Morrison*.[46] By limiting Congress to regulating only that wholly intrastate activity that was (1) economic and (2) had a substantial effect on interstate commerce, the Court likely ceded too much power to Congress. In attempting to draw some such line, however, the Court was certainly not acting in an activist fashion.

CONCLUSION: CONSERVATIVE VERSUS LIBERAL ACTIVISM

In this article, I have confined myself to the charge that the Court has engaged in "conservative judicial activism" in its Commerce Clause decisions wherein it held Congress within its enumerated powers. In contrast, the sort of "liberal judicial activism" typically complained of by conservatives involves striking down legislation because it violates the unenumerated rights, privileges or immunities retained by the people. Rehnquist Court cases such as *Planned Parenthood v. Casey*[47] and *Troxel v. Granville*[48] come immediately to mind. I am as unsympathetic to the latter charge of activism as I am to the former.

---

either in the hands of the states *or* in the hands of the people. It does not specify which.

45. Of course, this test does not imply the converse: that any construction of these clauses that has *some* limit is therefore necessarily acceptable.

46. Indeed, the test is inspired by Justice Scalia's questioning in oral argument of Solicitor General Drew Days seeking an example of a law that would exceed the commerce power of Congress under the Government's construction:

> But with reference to the commerce point, realistically, that's where we are. None of us at least can think of anything under our present case law, or at least under your argument, that Congress can't do if it chooses under the Commerce Clause, so if the Federal system must be preserved by someone, and the Commerce Clause is a means by which the Federal structure can be obliterated, and if we have no tools or analytic techniques to make these distinctions, then it follows that the Federal balance is remitted to the political judgment of the Congress.

Oral Argument Transcript at 18-19, United States v. Lopez, 514 U.S. 549 (1995) (No. 93-1260).

47. 505 U.S. 833 (1992).

48. 530 U.S. 57 (2000).

The Ninth Amendment and the Privileges and Immunities Clause of the Fourteenth Amendment are as much a part of the text of the Constitution as the Commerce Clause. No inkblot on the document prevents us from discovering their original meaning.[49] Protecting the unenumerated liberties to which they refer from violation is an essential component of a legitimate law-making system in which the majority is neither allowed to exceed its enumerated powers *nor* to violate the rights of the individual.[50]

A commitment to adhere to the original meaning of the entire text, not merely the parts one likes, is neither "conservative" nor "liberal" as these terms are used today. Regrettably, in my experience, many liberals and conservatives are quite willing to jettison those portions of the text that do not fit neatly within their philosophical approach, be it the restrictions of enumerated powers on the one hand or unenumerated rights on the other. Either form of "activism"—whether by Courts or by Congress—that conflicts with the original meaning of the Constitution, however, is forbidden by the commitment to preserve, protect, and defend a written constitution that constrains the power of lawmakers.

I am not claiming that the present Supreme Court has never acted in an activist fashion as I have defined the term. As was discussed in Part I, from an originalist perspective, there are actually two distinct types of activism that can apply to judicial decisions that deviate from the text of the Constitution: decisions with activist *results* and those opinions

---

49. *See* Randy E. Barnett, *James Madison's Ninth Amendment*, *in* 1 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 1, 1 (Randy E. Barnett, ed. 1989) (identifying the original meaning of the rights "retained by the people" in the Ninth Amendment as the natural liberty rights that people have before a government is formed); *"Implementing the Ninth Amendment," in* 2 THE RIGHTS RETAINED BY THE PEOPLE 1, 1 (Randy E. Barnett, ed. 1993). *See also* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986) (identifying the original meaning of "privileges or immunities" in the Fourteenth Amendment as both the natural liberty rights retained by the people and additional fundamental written guaranties in the Bill of Rights). I shall provide additional supporting evidence for both of these conclusions in RESTORING THE LOST CONSTITUTION, *supra* note 17.

50. I defend this conception of constitutional legitimacy in Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. (forthcoming Jan. 2003). as well as in RESTORING THE LOST CONSTITUTION, *supra* note 17. A preliminary defense can be found in Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMMENT. 93 (1995).

employing activist *methods*. The first is when the result of a given case contradicts the original meaning of the text. The second is when judges do not even try to discern the original meaning of the text.

Given that the Rehnquist Court largely continues to adhere to the doctrines of the past sixty years, I have no doubt that it does engage in the first sort of activism all the time. Moreover, the Rehnquist Court rarely employs an originalist method. Even in *Lopez* itself, Justice Rehnquist (unlike Justice Thomas) did not base his decision on the original meaning of the Commerce Clause, choosing instead to rely on "first principles"[51] while trying to remain consistent with New Deal decisions. Nevertheless, the result reached by the Court in *Lopez* and *Morrison* were much closer to the original meaning of the Commerce Clause than any case in the previous sixty years. The irony is that the Court is being criticized as activist in the few areas where its results have come closer to the original meaning of the text than any Supreme Court in recent memory—that is, where it has acted in a *less* activist manner.

Of course, you are free to reject the conception of "judicial activism" I am proposing and to advocate a power in Congress or the courts (or both) that allows them to change the meaning of the Constitution with the times and reach results you think are better. If you do, however, you have no basis to criticize the Supreme Court's Commerce Clause cases as "activist"—unless you also adopt a conception of "judicial activism" that applies *whenever* a court strikes down any law enacted by a legislature. But this would be a conception of "judicial activism" that would call into question the entire practice of judicial review. Few would embrace this conception of judicial activism except hypocritically to criticize a Court for those decisions with which they disagree.

---

51. 514 U.S. at 552 ("We start with first principles. The Constitution creates a Federal Government of enumerated powers. *See* art. I, § 8. As James Madison wrote: 'The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.'"). On the other hand, if you apply the same "first principles" as held by the framers your results are highly likely to be consistent with the original meaning of the text they wrote.