FOREWORD

In our first article, Professor Ernest A. Young presents a typology and defense of "activism." Young argues that while the Rehnquist Court is frequently accused of "conservative judicial activism," neither "conservative" nor "judicial activism" is easy to define. According to Young, activism may include such diverse judicial behaviors as invalidating statutes, departing from text, history, or precedent, or deciding cases broadly rather than narrowly. Depending on which definition we adopt, Young concludes that most decisions worth arguing about will be "activist" in some respects but "restrained" in others. This basic indeterminacy does not render the terms useless; "activism" and "restraint" speak to an institutional aspect of judicial decision making that is generally not captured by discussions of a case's legal merits. Activism's many faces do require, however, that we be more circumspect in how we use the term.

Young also contends that "conservatism" is more complicated than most people think. Some conservatism is a "situational" resistance to change per se; other varieties seek to advance particular political positions, such as laissez faire economics or a right to life; while still others press for institutional values such as majoritarian democracy or states' rights. These different definitions of conservatism may have sharply different implications for the judicial role. Young argues that the Rehnquist Court cannot be characterized as reliably conservative in a political sense. Rather, the Court's conservatism has manifested itself most consistently in a situational, Burkean acknowledgment that courts have particular institutional strengths vis-à-vis the political branches in some circumstances. In light of these definitions, "conservative judicial activism" is neither an oxymoron nor necessarily a bad thing.

In our second article, Professor William P. Marshall evaluates the jurisprudence of the current Court's conservative wing relative to a number of indices of judicial activism. These indices include: (1) counter-majoritarian activism: the reluctance of the courts to defer to the decisions of the democratically elected branches; (2) non-originalist activism: the failure of the courts to defer to some notion of originalism in deciding cases; (3) precedential activism: the failure of the courts to defer to

judicial precedent; (4) jurisdictional activism: the failure of the courts to adhere to jurisdictional limits on their own power; (5) judicial creativity: the creation of new theories and rights in constitutional doctrine; (6) remedial activism: the use of judicial power to impose ongoing affirmative obligations on the other branches of government or to take governmental institutions under ongoing judicial supervision as a part of a judicially imposed remedy; and (7) partisan activism: the use of judicial power to accomplish plainly partisan objectives.

Marshall discusses whether under the first six of these indices selected decisions may fairly be described as activist, and whether, even if they can be so described, they may nevertheless be defensible, even to those who generally oppose activist decisions. Marshall concludes that the conservatives have indeed been activist under almost all of his indices, but that in many instances, this activism is defensible and within the bounds of historical norms. He finds fault, however, with the disingenuousness of conservatives who claim that theirs is a jurisprudence more principled and more restrained than that of their liberal counterparts when in fact their record suggests that, no less than those they criticize, their guiding purpose has been to achieve specific results and not to offer a methodological high ground. Professor Marshall also separately considers the "seventh sin"—partisan activism, but concludes that the cases neither establish nor refute whether this has occurred.

In our third article, Professor Rebecca L. Brown argues that the focus of debate over judicial activism should move away from empty attacks. Reflecting on some of the more activist periods of past Supreme Courts, such as the Lochner and Warren Court eras, the essay argues that activism is not itself a bad thing, but needs to be justified by a vision of what the court is seeking to accomplish through its activist decisions. That vision is not yet apparent from the Rehnquist Court's jurisprudence.

In our fourth article, Professor Randy E. Barnett defends the Rehnquist Court against the charge that its Commerce Clause cases are "activist." Though he rarely uses the term himself, Professor Barnett defines judicial "activism" as a decision by a court that violates the text of the Constitution. When speaking of constitutional adjudication, it is activist for courts—whether they are upholding or nullifying legislation—to substitute for the relevant constitutional provision another

provision they believe, for whatever reason, is preferable. One cannot assess whether a decision is activist, therefore, without getting substantive about the case at hand, and this requires that a critic endorse a method of interpreting the meaning of the text. Professor Barnett proffers a brief defense of "original meaning originalism" and suggests that a judicial decision can be criticized because its outcome is inconsistent with original meaning. After summarizing evidence of the original meaning of the Commerce Clause, Professor Barnett concludes that, in its Commerce Clause cases, the Rehnquist Court has reached conclusions that are more compatible with the original meaning of the Clause than any other cases decided in recent memory.

In our fifth article, Professor James R. Stoner argues that the question of conservative judicial activism is misunderstood, first because of a failure to conceive what a truly activist conservative decision would be, and second, because the full extent of liberal activism and its entrenchment in contemporary assumptions about the law go unnoticed. As an example of true conservative activism, Stoner posits judicial establishment of a right-to-birth that would not only reverse Roe v. Wade but also forbid statutory protection of abortion. An example of liberal activism, according to Stoner, is the steady undermining, in the name of Due Process and Equal Protection, of the common law of the family, where the courts have gone much further than legislatures in changing the legal regime that once reinforced the traditional family. In several recent cases, the Supreme Court has hinted at constitutional protection for, or at least protection from constitutional assault on, certain traditional assumptions about the family, but because of the continuing influence of liberal assumptions about the role of the law, the overall tendency of modern constitutional law to reject the traditional family in the name of individual rights has not been reversed or even stanched.

In our sixth article, Professor Neal Devins, argues that the fight over "conservative judicial activism" has little to do with Democratic disappointment with recent Rehnquist Court decisions striking down high profile federal statutes. He first examines the bills that the Court invalidated and concludes that these bills cannot be characterized as Democratic measures. He then emphasizes that these decisions do not foreclose legislation on the same subject by Congress and/or the states. Therefore, he reasons, it is not surprising that Congress has

invested little energy in countermanding the Rehnquist Court for its "conservative," "activist" decision making. Professor Devins then argues that, in contrast, Democrats on the Senate Judiciary Committee have strong incentives to use the confirmation power as a way of limiting presidential power. He illustrates that these incentives are tied to the increasing polarization within Congress, the related desire of Senate Democrats both to exercise power and pay the Republicans back for their treatment of Clinton-era nominees, and the saliency of the courts. Professor Devins concludes that for these reasons, Senate Democrats are now leading the charge against "conservative judicial activism" when considering Bush appointees to the judiciary.

In our seventh article, Professor Stephen F. Smith discusses conservative judicial activism within the context of criminal procedure. Although discussions of activism by conservative judges usually focus on the Rehnquist Court's federalism decisions, Professor Smith argues that criminal procedure is the more fruitful area for studying activism. Criminal procedure, after all, is what created the political conditions that gave rise to the conservative majority on the Court. Moreover, recent changes in criminal procedure have been modest in comparison to the fundamental changes that have taken place in criminal procedure over the last three decades. Looking to criminal procedure as the framework for analysis, Smith argues that the Court's critics are both right and wrong. The rollback in criminal procedure has, at times, occurred through assaults on precedent that amount to judicial activism. In that sense, Smith claims, the Court's critics are on solid ground. In his view, however, the critics overlook an important normative consideration—namely, that activism in mitigation of earlier activism is not equivalent to first-instance activism. To the extent the rollback in criminal procedure has been an effort to limit the damage done by prior activist decisions, the Court's activism promotes judicial restraint and should not be condemned as "activist."

In our eighth article, Professor Saikrishna B. Prakash argues that the Constitution's text and history amply support the notion that the judiciary, both federal and state, may decide whether federal statutes are constitutional. Many scholars have criticized the Supreme Court's enforcement of subject matter restrictions on federal power. Some have suggested that the entire enterprise is misguided because the founders

never contemplated or desired the judiciary to second-guess the constitutionality of federal statutes. Such criticisms raise the issue whether the recent attempts to enforce limits on federal power is the ultimate form of judicial activism because, whatever the merits of particular decisions, the courts actually ought not play any role in enforcing limits on Congress. Professor Prakash points out, however, that numerous Federalists and Anti-federalists understood that the Constitution authorized/permitted such review. Hence while one should feel free to criticize the substance of individual decisions, one ought not subscribe to the notion that the founders did not sanction judicial review of the scope of federal power.

In our ninth article, The Honorable J. Harvie Wilkinson III Many respected figures in the legal profession question whether there is any longer a distinctive conservative judicial philosophy. They contend that conservatives have now become activists and have forsaken their traditional high ground of judicial self-restraint. In this article, Chief Judge Wilkinson examines these criticisms and asks whether there is any longer a distinctive conservative jurisprudence. He approaches his inquiry from several perspectives. In Section I, he asks whether the interventionism of the Rehnquist Court is really any different from earlier activist eras. In Section II, he examines the often-made criticism that the present Supreme Court's commitment to federalism is little more than a doctrine of convenience. In Section III, he focuses less on criticisms of the present Court than on its positive constitutional vision of a role for mediative institutions in America. Finally, in Section IV, Chief Judge Wilkinson summarizes what he believes to be the major contributions of contemporary conservative jurisprudence.

In our final article, The Honorable Frank H. Easterbrook argues that an activist decision is one that interferes with the democratic function of the national government. According to Judge Easterbrook, the judiciary should, to the greatest extent possible, implement acts of Congress and the Executive branch. When it fails to do this, the result is activist decisions. Activist decisions take three forms: declaring a law unconstitutional, construing a law in a way that avoids constitutional difficulties, and construing a law to do something other than what it was meant to do—something more congenial to a particular judge's idea of wise policy. The second of these strategies is most troubling to Easterbrook because to create law in this way is an abuse of judicial power, but he concludes that all nine jus-

tices of the current Supreme Court engage in this form of activism. With this framework in place, Judge Easterbrook examines every decision from the 1999 and 2000 terms and concludes that there is no appreciable difference in the number of "activist" decisions between liberal and conservative justices.

THE EDITORS