CONSERVATIVES AND THE SEVEN SINS OF JUDICIAL ACTIVISM

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INTRODUCTION

Any discussion of conservative judicial activism is immediately beset by two threshold definitional problems: the meanings of "conservative" and "judicial activism." Neither term is free from ambiguity.

The use of the term "judicial activism" in political rhetoric has, as Michael Gerhardt recently documented, varied widely throughout American history.[1] While the charge of judicial activism has resided "in the lexicon of judicial critique throughout the past one hundred years,"[2] the subjects (and the originators) of the activism charge have continually shifted with changes in political and judicial power. Judge Goodwin states this point more succinctly: Judicial activism means a decision one does not like.[3]

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1. *See generally* Michael J. Gerhardt, *The Rhetoric of Judicial Critique: From Judicial Restraint to the Virtual Bill of Rights*, 10 WM. & MARY BILL RTS. J. 585 (2002).

2. *Id.* at 587.

3. *Cited in* Stephan O. Kline, *Judicial Independence: Rebuffing Congressional Attacks on the Third Branch*, 87 KY. L.J. 679, 688 n.26 (1998) (citations omitted). Because the claim of activism is often subjective, some have argued that asking whether a decision is activist is time wasted. *See, e.g.*, Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207 (1984). I disagree. As the next section demonstrates, there are indices of activism that can be applied to judicial decisions, which are sufficiently independent of result to support assertions that certain decisions are, or are not, activist. After all, if the Court had used the facts in *United States v. Lopez* to hold that all federal criminal law was beyond the Commerce Power, its decision could fairly be labeled as more activist than its actual holding that there was an insufficient nexus among guns, schools and com-

Similar problems inhere in the definition of "conservative." Whether a judicial decision is perceived as conservative more often depends on how the result in the decision plays into the larger (extra-judicial) political debate than it does upon grand jurisprudential theory. Thus, *Clinton v. Jones*[4] is considered by some to be a conservative decision—even though prior to the Clinton administration a decision subjecting the President to civil suit while in office would have been considered very liberal.[5] Some might also regard *R.A.V. v. City of St. Paul*[6] as a "conservative" decision, although protecting offensive speech from government regulation has, at times, been considered a liberal hallmark.[7]

Defining "conservative" in the context of judicial activism, moreover, faces another challenge. There are dual—and sometimes conflicting—usages of the term as it pertains to judicial decision making. Overturning the conviction of a defendant

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merce to support the invocation of federal power in that case. 514 U.S. 549, 551 (1995).

It might also be argued that the judicial activism question is misguided because judicial activism is not inherently wrong. Rather, the proper inquiry should simply be whether a case was correctly decided—not whether it was activist. Although I agree that a determination of activism is not the same as a determination of merit (an activist decision is not necessarily wrong, a non-activist decision is not necessarily correct), the activism inquiry can shed light on the merits issue. A decision that overturns a federal law while ignoring precedent, text, history, and jurisdictional limitations would appropriately be subject to an activist critique regardless of result. In addition, one need not be completely in the camps of Alexander Bickel, Robert Nagel, Mark Tushnet, and others to recognize that there is value in judicial restraint. Court overreaching may negatively affect the political capital of the judiciary. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962). Abrupt judicial action invalidating politically achieved results may undermine long-term support for the principles the decision was designed to achieve. ROBERT F. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW (1989). Courts may well be less receptive to progressive social and economic action than are the political branches. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999). Finally, the activism critique is important in that it sets rhetorical constraints on actions that might otherwise appear unbounded. The legitimacy of a particular decision cannot be completely appraised without evaluating the deciding court's methodology. Activism is a part of that inquiry.

4. 520 U.S. 681 (1997).

5. After all, one can only imagine the outcry from the right had such a decision been issued during the Reagan Administration.

6. 505 U.S. 377 (1992) (holding an anti-hate speech ordinance unconstitutional).

7. *See generally* Daniel A. Farber, *Civilizing Public Discourse: An Essay on Professor Bickel, Justice Harlan, and the Enduring Significance of* Cohen v. California, 1980 DUKE L.J. 283.

who has committed an opprobrious act is not generally considered conservative. However, when the dismissal is based on the conclusion that the federal government lacked the power to enact the governing statute, the decision will likely be viewed as conservative.[8] A non-conservative result, in short, can be the product of a conservative opinion.[9]

Nevertheless, the lack of definitional precision will not deter my exposition. In using the term "conservative," I will rely on popular assumptions regarding its meaning. I will accept the consensus, for the purpose of discussion, that the new federalism decisions, the anti-affirmative action cases, the opinions limiting the rights of criminal defendants, the pro-takings cases, and the decision affirming an organization's right to discriminate against homosexuals are examples of "conservative" judicial decision making.[10]

I will try a somewhat different tack, however, when working with the concept of judicial activism. Rather than coming up with a single definition, I have attempted to identify the indices of judicial activism that are often noted in the literature. I have reached a total of seven:[11]

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8. *See, e.g.*, *Lopez*, 514 U.S. at 564.

9. The reverse can also be true in defining what is a liberal opinion. Strict enforcement of free speech protections is generally considered liberal. When applied to issues of hate speech, campaign finance, or publicly funded student religious speech, however, the labeling becomes somewhat cloudy. Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604, 626 (1996) (invalidating campaign finance restrictions on political parties); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 317 (2000) (striking down a school district policy of student-led prayer before football games as against the Establishment Clause of the First Amendment).

10. For a more theoretical definition of conservative, see Professor Ernest Young's contribution to this symposium, Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1181-1204 (2002).

11. Other lists of judicial activism indices are, of course, also possible. *See* Young, *supra* note 10, at 1145-61. Young's list closely parallels the one offered here, although he presents one category that I do not (judicial maximalism and minimalism) and does not include two criteria that I do (judicial creativity and jurisdictional activism). *See also* Bradley C. Canon, *A Framework for the Analysis of Judicial Activism*, *in* SUPREME COURT ACTIVISM AND RESTRAINT 385 (Stephen C. Halpern & Charles M. Lamb eds., 1982). Canon's set of indices includes majoritarianism, interpretive stability, interpretive fidelity, substance-democratic process distinction, specificity of policy, and availability of an alternate policy maker. The Senate Judiciary Committee, in its questionnaire for judicial nominees, has set forth the characteristics of judicial activism as follows: a tendency by the judiciary toward problem-solution rather than grievance-resolution; a tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals; a tendency

(1) **Counter-Majoritarian Activism**: the reluctance of the courts to defer to the decisions of the democratically elected branches;[12]
(2) **Non-Originalist Activism**: the failure of the courts to defer to some notion of originalism in deciding cases, whether that originalism is grounded in a strict fealty to text or in reference to the original intent of the framers;[13]
(3) **Precedential Activism**: the failure of the courts to defer to judicial precedent;[14]
(4) **Jurisdictional Activism**: the failure of the courts to adhere to jurisdictional limits on their own power;[15]
(5) **Judicial Creativity**: the creation of new theories and rights in constitutional doctrine;[16]
(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;[17] and
(7) **Partisan Activism**: the use of judicial power to accomplish plainly partisan objectives.[18]

These indices are, of course, not always consistent with each other. For example, adherence to precedent may involve invalidating decisions of democratically elected branches.[19] A decision that is non-activist in one sense may be activist in another. For this reason, a categorical listing of these indices

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by the judiciary to impose broad, affirmative duties upon governments and society; a tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and a tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities. The Senate Judiciary Committee, Judicial Nominee Questionnaire (on file with author).

12. *See infra* notes 28–62 and accompanying text.
13. *See infra* notes 63–80 and accompanying text.
14. *See infra* notes 81–112 and accompanying text.
15. *See infra* notes 113–137 and accompanying text.
16. *See infra* notes 138–152 and accompanying text. The term "judicial creativity," as used here, means a type of judicial activity that is qualitatively distinct from the creative use of precedent or text: decision making that sends constitutional law into entirely new directions, the creation of constitutional law, if you will, out of whole cloth.
17. *See infra* notes 153–156 and accompanying text.
18. *See infra* notes 174–222 and accompanying text.
19. *See* United States v. Eichman, 496 U.S. 310, 319 (1990) (relying on *Texas v. Johnson*, 491 U.S. 397 (1989), in striking down a federal flag-burning prohibition).

cannot be combined to form a single definition of judicial activism. Measuring a court's actions against each and all of these indices, however, may provide an overview of a court's activism (or restraint), and that is exactly the purpose for which they will be used in this article.

I should offer two clarifying points before proceeding. First, I do not suggest either that an activist decision is necessarily "wrong" or that a decision that exhibits restraint is necessarily correct.[20] The questions of whether a decision is correct or whether it is activist may interrelate, but they are distinct.[21] For example, I suggest below that the Court's activism in the federalism cases is justified. By this I do not mean to affirm that a specific result is correct in any given case; I simply mean that the Court's inclination to transgress a number of activism indices (e.g., to overturn congressional judgment, engage in judicial creativity, etc.) is defensible jurisprudentially. Conversely, decisions that exhibit marked judicial restraint are not always correct. Had the Court in *Burstyn*[22] held that the First Amendment did not apply to motion pictures, its decision would have had many of the virtues of judicial restraint (deference to Congress, text, non-creativity), but the result would surely have been "wrong."

Second, I should add a word about methodology. This article does not purport to present a statistical summary of judicial activism. Rather, my discussion rests upon a review of selected cases and opinions of the Court's conservative wing.[23] There is a problem in this approach. As some might argue, one case alone does not make an activist court and more cases are needed to establish a pattern. This is a fair observation (although the same could also be said of the attacks on liberal judicial activism). After all, most judicial decisions are routine; a court generally will earn its notoriety from a few controversial decisions. Nevertheless, in response to a potential concern of

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20. For the record, I should note that I have actively defended some of the conservative decisions that are discussed in this essay. *See* William P. Marshall, *Understanding* Alden, 31 RUTGERS L.J. 803 (2000); William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism,* 58 U. CHI. L. REV. 308 (1991).

21. *See supra* note 3.

22. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952) (holding that the First Amendment protects motion pictures).

23. For the purpose of defining the parameters of the following discussion, the "conservative wing" of the Court will include Justices Scalia, Thomas, Chief Justice Rehnquist and, at various times, Justices Kennedy and O'Connor.

distortion, I will not argue that the conservatives have been activist under a specific criterion unless multiple examples demonstrate the point. I will also, outside of the category of partisan activism, refrain from using *Bush v. Gore*[24] as a case that helps establish a pattern. This is no small concession. *Bush v. Gore* is not only activist under the categories noted above (remedial activism excepted); it works as a virtual hornbook demonstration of each activism category. Nevertheless, relying on *Bush v. Gore* to demonstrate conservative activism may be unfair as well as too easy. Whatever else might be said, the case arose in extraordinary circumstances and may have legitimately required extraordinary action.[25] Extrapolating a broader pattern from that decision therefore is not necessarily justified or useful. Thus, with the exception of partisan activism, I do not treat the case as representative of the conservatives' jurisprudence.

Part I of this article evaluates the jurisprudence that the Court's conservative wing currently offers (both in majority and in dissent) against the first six indices of judicial activism noted above. In this section, I discuss whether selected decisions are fairly susceptible to the activist label under each criterion and, if so, whether there are reasons that suggest that the cases are nevertheless defensible, even to those who generally oppose activist decisions. Part II presents an overall appraisal of whether the conservatives can be fairly labeled as activist and, if so, what that conclusion might say about the meaning of judicial activism and the enterprise of judicial decision making generally.[26] Additionally, because measuring a court's activism may require one to ask "activist compared to what?," I will evaluate the judicial activism that has achieved conservative results against the activism that has achieved liberal outcomes. Part III discusses the seventh sin—partisan activism. I separate this criterion from the others because it is potentially the most damning. While some level of activism may necessarily inhere in the process of constitutional interpretation, using judicial power to accomplish purely partisan

24. 531 U.S. 98 (2000).

25. *See, e.g.*, William P. Marshall, *The Supreme Court,* Bush v. Gore *and Rough Justice*, 29 FLA. ST. U. L. REV. 787 (2001); Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1.

26. *See infra* notes 157–173 and accompanying text.

ends does not.[27] Finally, I conclude that the conservatives have indeed been activist with respect to five of the first six indices (remedial activism being the exception), but that in many instances, this activism is defensible, and that their overall record is neither unprecedented nor excessive in comparison to historical norms. Their fault, if any, is in their disingenuousness. They, or more often their defenders, claim that theirs is a jurisprudence more principled and more restrained than that of their liberal counterparts when in fact it is nothing more than a jurisprudence designed to effectuate particular results. I reach no conclusion, however, on the seventh sin. Partisan activism is a serious charge and the cases neither establish nor refute whether it has occurred.

I. THE FIRST SIX SINS

A. Counter-Majoritarian Activism

The term judicial activism is most often associated with judicial invalidation of decisions by elected representatives.[28] Under this "counter-majoritarian" criterion, the current Court has been one of the most activist in history. As former Solicitor General Seth Waxman noted, the Court has invalidated over twenty-six federal laws since 1995.[29] This number is indeed striking given that the Court voided only 127 federal laws in the first 200 years after constitutional ratification.[30]

Many, though certainly not all, of the more recent decisions invalidating federal laws are conservative.[31] These in-

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27. *See infra* notes 174–222 and accompanying text.

28. Peter M. Shane, *Federalism's "Old Deal": What's Right and Wrong with Conservative Judicial Activism*, 45 VILL. L. REV. 201, 225 n.119 (2000) (citing RICHARD POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 211 (1985)).

29. Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1074 (2001).

30. *Id.*

31. The Court has also invalidated federal laws to reach "liberal" results in a number of cases. These include *Dickerson v. United States*, 530 U.S. 428, 444 (2000) (invalidating a congressional attempt to overturn *Miranda v. Arizona*, 384 U.S. 436 (1966)), *Bartnicki v. Vopper*, 432 U.S. 514, 555 (2001) (striking down a congressional effort to impose liability on the press for publishing intercepted communications), and numerous federal efforts to restrict sexually explicit speech. *See, e.g.*, Reno v. ACLU, 521 U.S. 844 (1997); United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000). Some might also consider *Clinton v. City of New York*, striking down the line item veto, a liberal decision. 524 U.S. 417, 448–49 (1998).

clude decisions voiding numerous federal provisions, including those prohibiting firearms near schools,[32] protecting religious exercise,[33] awarding damages against states for discrimination based on age[34] or disability,[35] creating a civil damage remedy for violence against women,[36] maintaining set-asides for minority contractors,[37] providing for the disposal of nuclear waste,[38] authorizing citizen standing under the Endangered Species Act,[39] and limiting non-coordinated political party expenditures on behalf of candidates.[40] Under any definition, this list represents an extraordinary variety of judicial action and the tally does not even include the cases in which the Court reached conservative results by striking down state laws.[41]

It would be facile, however, to rely on sheer volume to sustain a charge of undue activism. Even a "non-activist" Court would (and should) strike down a law if the enacting Congress did not have the appropriate regard for constitutional limitations. Perhaps the most salient defense of judicial review is that the Court's scrutiny is needed when there are reasons to suspect that legislatures may not adequately be representing particular constituencies or protecting constitutional interests. The arguments in favor of judicial deference to elected bodies wane when considerations suggest that representative entities may not be doing their jobs fairly.

Correcting for representative failure strongly supports judicial intervention, for example, in cases involving laws that discriminate against minority groups.[42] Similarly, it supports defending the rights of political participants in order to preserve the democratic processes, thereby protecting the legiti-

32. United States v. Lopez, 514 U.S. 549, 567–68 (1995).
33. City of Boerne v. Flores, 521 U.S. 507, 536 (1997).
34. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91–92 (2000).
35. Bd. of Trustees v. Garrett, 531 U.S. 356, 374 (2001).
36. United States v. Morrison, 529 U.S. 598, 627 (2000).
37. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237–39 (1995).
38. New York v. United States, 505 U.S. 144, 188 (1992).
39. Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992).
40. Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604, 626 (1996).
41. The Court has also been expansive in its use of grounds of decision in reaching these conservative results. The conservative cases striking down federal law have rested on numerous legal theories including the Eleventh Amendment, the Commerce Clause, the First Amendment, the Fourteenth Amendment, Article III, and penumbral federalism concerns.
42. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

macy of majoritarian political choice.[43] It even offers a primary theoretical basis for the dormant Commerce Clause cases that protect out-of-staters from protectionist legislation.[44]

The Court's conservative decisions, virtually by definition, have not protected minority groups or out-of-staters from discrimination. Nor, with the possible exception of the campaign finance decisions or the redistricting cases, have they involved the protection of political processes.

Nevertheless, if protecting against representative failure justifies judicial review, then there is a strong defense for the conservatives in their federalism cases. The current political climate in Washington does not protect state interests to any real extent; and the states, because of this, have become victims of representative failure.[45] Any enforcement of federalism interests, accordingly, must rest with the Court, and this is exactly the phenomenon that occurred in the recent New Federalism cases.

Theoretically, of course, the Court should not be the guardian of state interests against federal intrusion. The theory of process federalism advanced by such leading scholars as Jesse Choper and Herbert Wechsler,[46] and endorsed by the Supreme Court in the *Garcia* decision,[47] posited that state interests were protected in Congress because federal officeholders are elected through the states. For this reason, so the theory goes, the officeholders will be responsive to state interests.

For a number of reasons, however, the theory of process federalism has not proven to be descriptively accurate.[48] Because of both media concerns and the realities of contemporary politics, national politicians increasingly respond to national, not local, agendas. The example of a national carjacking law

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43. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

44. *See, e.g.*, S.C. State Highway Dept. v. Barnwell Bros., Inc., 303 U.S. 177, 185 (1938).

45. *See infra* notes 48–52.

46. JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

47. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

48. William P. Marshall, *American Political Culture and the Failures of Process Federalism*, 22 HARV. J.L. & PUB. POL'Y 139 (1998); William P. Marshall, *Federalization: A Critical Overview*, 44 DEPAUL L. REV. 719 (1995).

illustrates the point about the media. When the media broadcast a dramatic report of a carjacking in Florida to the entire nation as if it occurred next door, a national outcry for a response ensues. A politician, wanting to appear out-front on an issue of concern to his constituency, will therefore quickly propose carjacking legislation—whether he holds federal, state, or local office. After all, in an era of media saturation, the competition for favorable media coverage is intense. At the same time, a fellow congressional member who opposes such legislation on federalism grounds will be reluctant to voice her opposition for fear of appearing unresponsive to constituent concerns or soft on crime. Indeed, even state politicians may be wary of opposing federal legislation against carjacking for fear that they too will be seen as protecting criminals.

Media demands, moreover, are only one part of the picture. Many federal politicians are not products of state politics and therefore do not see themselves as protectors of state concerns.[49] Fundraising is often as much national as local, meaning that federal politicians may be as beholden to out-of-state concerns as to those in their states. Lobbyists also have learned that it is more efficient to seek legislation at the federal rather than at the state level. One federal lobbyist is more efficient than fifty state lobbyists, and in any event, national legislation can quickly preempt multiple hard-fought lobbying successes achieved at the state level.[50] Finally, in the current political climate, lobbying success at the federal level is regarded as a reflection on the importance of an issue. For example, efforts to federalize some domestic laws have been defended on grounds that by relegating these matters to the states, the country has signaled that such concerns are not national priorities.[51]

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49. This does not mean, of course, that national politicians are not concerned with promoting constituent interests. Certainly they are. What they are not concerned with, however, is protecting the prerogative of state government from federal intrusion. This latter concern of protecting state prerogative is what has been at issue in the Court's federalism cases.

50. *See* Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 271 (1990) (observing that "[i]t is simply less expensive to obtain passage of one federal statute than to obtain passage of fifty state statutes"); *id.* (noting that "political support must still be provided to federal regulators to induce them to forbear from later preempting the field").

51. *See, e.g.*, Judith Resnik, *"Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1749 (1991) (arguing that

Because of these factors, it is not surprising to see both liberal and conservative politicians in Congress constantly working to federalize areas of the law. Republicans lobby for national tort legislation, imposing national standards on juvenile justice, prohibitions on assisted suicide, and national regulations on the treatment of the unborn. Democrats seek to federalize domestic violence law, gun laws, and drunk driving restrictions. The list of federalization efforts is endless and apparently nothing is sacred.[52]

Conversely, legislators generally raise federalism objections only when they oppose legislation on substantive grounds.[53] In the corridors of Washington, federalism has become little more than a rhetorical point to throw into a policy debate when one opposes a proposed measure on other grounds.

For these reasons, the Court's counter-majoritarian activism on behalf of federalism concerns is defensible.[54] This is not to say that all the Court's decisions in this area are correct.[55] It only means that the Court is justified in its inclination not to reflexively defer to the judgment of the Congress.

Representative failure, however, cannot justify the anti-affirmative action cases or the *Dale* decision invalidating the application of a law prohibiting discrimination on the basis of sexual orientation to the Boy Scouts.[56] In the affirmative ac-

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federal law should address domestic law matters because silence on matters of particular concern to women indicates that women "are assumed not to be related to the 'national issues' to which the federal judiciary is to devote its interests").

52. The fact that nothing appears off limits was forcefully underscored recently by Senators Hatch, a Republican and an avowed federalism champion, and Feinstein, a Democrat, joining together in support of new proposed anti-paparazzi legislation. *See* Mark Jurkowitz, *Journalists Take Aim at Anti-Paparazzi Bill*, BOSTON GLOBE, May 21, 1998, at D1. The proposed legislation imposes criminal penalties and civil liability for anyone who "follows or chases a person in a manner that causes the person to have a reasonable fear of bodily injury, in order to capture by a visual or auditory recording instrument any type of visual image, sound recording, or other physical impression of the person for commercial purposes." The Personal Privacy Protection Act of 1998, S. 2103, 105th Cong. § 3(a)(B)(2) (1998).

53. William P. Marshall, *American Political Culture and the Failures of Process Federalism*, 22 HARV. J.L. & PUB. POL'Y 139, 144 (1998).

54. For a strong counter-argument on this issue see Shane, *supra* note 28.

55. Activism does not necessarily mean judicial invalidation. The Court, for example, recently upheld a direct federal restriction upon a state's ability to disseminate driver's license information against a strong federalism-based challenge. Reno v. Condon, 528 U.S. 141, 151 (2000).

56. Boy Scouts v. Dale, 530 U.S. 640, 661 (2000).

tion context, it can scarcely be maintained that whites are political minorities needing protection against majoritarian political forces disinclined to represent their interests. While perhaps such an argument could be maintained in a minority-majority political subdivision,[57] the point would not be persuasive with respect to the national polity that enacted the minority set-aside program in the *Adarand*[58] case or to the Regents of the State of California who promulgated the affirmative action program at issue in *Bakke*.[59]

Dale, in turn, provides an enlightening contrast to a case that has become one of the great conservative jurisprudential anathemas, *Romer v. Evans*.[60] In *Dale*, Court conservatives joined together to hold that a right of association protected the Boy Scouts from a state provision prohibiting organizations from discriminating on the grounds of sexual preference. In *Evans*, these same conservatives angrily dissented from a decision that struck down a state provision barring local communities from enacting protections for homosexuals. The juxtaposition of these two cases is intriguing because in neither case can compensating for representative failure justify the conservative justices' arguments. In fact, from a correcting-for-representative-failure perspective the conservatives got it exactly backwards. Homosexuals form exactly the type of class that has not received a fair shake in the electoral process, but in *Evans* the conservatives dissented from a decision that protected this class from majoritarian action. In the *Dale* case, those same conservatives voided a majoritarian action that would have protected a vulnerable class (homosexuals).[61]

The conservatives' record on counter-majoritarian activism, in short, is mixed. In some cases, the conservatives' fail-

57. *See generally* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

58. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

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

60. 517 U.S. 620 (1996).

61. It may be that the conservatives' actions in these cases can be defended on other grounds. Arguably, from a precedential perspective, the decision in *Dale* is less of a stretch than *Evans*, although neither case could be said to stand on solid ground. *Roberts v. United States Jaycees* did suggest that there was a right of expressive association, although the case did not seem to indicate much support for non-expressive organizations, such as the Boy Scouts, claiming this right. 468 U.S. 609 (1984). *But see id.* at 631 (O'Connor, J., concurring in part and concurring in judgment). There is, of course, no basis for distinguishing between *Dale* and *Evans* on originalism grounds. The right of association is not mentioned in the Constitution.

ures to defer to elected bodies can be justified by a theory of judicial review that allows court intervention to compensate for representative failure. In other cases, however, the Court's failure to defer has no similar justification, and their sin of counter-majoritarian activism is much more pronounced.

Of course, even when the conservatives' invalidations of the actions of the elected branches are defensible, those decisions come at a price. The conservatives must in those cases admit the "liberal" premise that counter-majoritarian activism that compensates for representative failure is legitimate judicial decision making. They also must abandon one of their favorite rhetorical ploys. Conservatives have taken great delight in attempting to appear populist by characterizing liberal counter-majoritarian decisions as the imposition of intellectual, elitist values on popular culture.[62] Similar complaints, however, can now be made from the other side. The conservative decisions are equally susceptible to an attack based on the imposition of the values of an intellectual (conservative) elite upon a purportedly unenlightened majority.

B. Non-Originalist Activism

Deference to originalism is, of course, the conservatives' central mantra. One might expect, therefore, that the conservatives would be particularly reluctant to engage in any activism that veers from an originalist understanding. In fact, the cases exhibit a clear tendency of the conservatives to adhere to originalism[63]—except, of course, when they don't. The Eleventh Amendment cases amply illustrate the point. Adherence to text is supposed to be a touchstone of an originalist understanding. Yet the Eleventh Amendment cases virtually ignore text entirely. The text of the Eleventh Amendment prohibits only suits brought by out-of-state citizens against states in fed-

62. *E.g.*, "This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that 'animosity' toward homosexuals is evil." *Evans*, 517 U.S. at 636 (Scalia, J., dissenting) (internal citation omitted); ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH 103 (1996).

63. Occasionally this even happens when an originalist analysis does not lead to conservative results. Kyllo v. United States, 533 U.S. 27, 40–41 (2001) (holding a search by thermal imaging without a warrant violated the Fourth Amendment).

eral court.[64] The conservatives, however, have applied the amendment to bar federal damage claims brought by in-state citizens against states in federal court,[65] federal damage claims brought by in-state citizens against states in state court,[66] injunctive actions based upon state law brought by in-state citizens against states in federal court,[67] and suits based upon federal law against the states in federal administrative agency proceedings.[68]

The conservatives have attempted to present an originalist defense to their textual deviations. History, they argue, supports expanding the states' Eleventh Amendment immunity beyond the text of the amendment.[69] But the conservatives' reliance on history rather than text as the interpretive tool of choice in the Eleventh Amendment cases seems strikingly selective when compared with their treatment of affirmative action. After all, strong historical evidence indicates that the framers of the Fourteenth Amendment did not intend to preclude affirmative action.[70] But, in the affirmative action cases, the conservatives reject history in favor of a purported reliance on text.[71] The Eleventh Amendment cases are not cited.

Other conservative decisions lack even the pretext of an originalist approach. Consider *Boyle v. United Technologies Corp.*[72] In that case, the father of a Marine pilot sued a helicopter manufacturer on a defective design theory after his son drowned following a helicopter crash. The Court, in an opinion

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64. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

65. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91–92 (2000).

66. Alden v. Maine, 527 U.S. 706, 759–60 (1999).

67. Pennhurst State Sch. and Hosp. v. Halderman, 465 U.S. 89, 124–25 (1984).

68. *See, e.g.*, Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864 (2002).

69. *Alden*, 527 U.S. at 758–60.

70. *See, e.g.*, Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427 (1997); Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477 (1998).

71. There is, of course, no originalist argument supporting the claim that the federal government is precluded from supporting affirmative action. The Fourteenth Amendment's Equal Protection Clause does not apply to the federal government. *But see* Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954) (holding that the Equal Protection Clause applies to the federal government through the Fifth Amendment).

72. 487 U.S. 500 (1988).

authored by Justice Scalia, found for the manufacturer, holding that federal common law provided for a military contractor's defense to tort actions. No originalist understanding could support this result. No text or history supports a military contractor's defense, and no argument from constitutional structure can justify the Court's creation of federal tort law in this case (federal courts are, after all, not common law courts). In fact, the judicial activism demonstrated in this case is breathtaking from any perspective. In one fell swoop the Court transgressed federalism concerns,[73] ignored separation of powers,[74] and undercut key precedent.[75]

Boyle is not alone in its non-originalist activism. For example, contrast *Dale*,[76] *Colorado Republican*,[77] or *Lucas v. South Carolina Coastal Council*[78] against an originalist background. None fare well. Neither text nor history support an argument that the framers intended the First Amendment to protect social groups from anti-discrimination requirements or political parties from campaign expenditure limitations. And in *Lucas*, Justice Scalia's opinion was forced to rely on "constitutional culture"—not text or history—in offering a new vision of the Takings Clause.[79]

Again, the observation that the Court departed from an originalist understanding is not to say that these decisions are wrong. The framers may not have envisioned that the autonomy of social groups would require protection from an activist state seeking to impose uniform social values, that money would become the lifeblood of political campaigns, or that property values might decrease due to environmental restrictions.

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73. The holding of *Boyle* preempted Virginia law. *Id.* at 504.

74. Congress had considered and refused to exact a military contractor's defense. *Id.* at 515 (Brennan, J., dissenting).

75. In no case since *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), had the Court created federal common law to govern a dispute between private parties.

76. Boy Scouts v. Dale, 530 U.S. 640 (2000).

77. Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604 (1996) (invalidating a provision limiting political party expenditures in connection with the general election campaign of a candidate for federal office).

78. 505 U.S. 1003 (1992) (holding state environmental restrictions that do not directly appropriate an individual's property may nevertheless implicate the Takings Clause).

79. *Id.* at 1028 ("[T]he 'implied limitation' that the state may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.").

Recognition of these realities, however, only reflects the notion that rigid originalism is not equipped to confront the practicalities of contemporary society. The conservatives' non-originalist decisions, in short, can be defended, but their defense must rest upon grounds ostensibly hostile to the conservatives' own purported foundational principles. They must acknowledge that a non-originalist judicial "activism" may at times be warranted.

Finally, the discussion of non-originalist activism must include some mention of *Teague v. Lane*.[80] In *Teague*, the Court held that *habeas* relief was not available to a petitioner who based his claim on a "new rule" of constitutional law decided after the petitioner's own case had become final. The effect of *Teague* was to severely limit the availability of *habeas* relief, and, in fact, the case has had a tremendous impact in this respect. But, for our purposes, *Teague* is especially notable in its implicit treatment of originalism: How can there ever be a "new rule" when one truly believes in originalism? It is almost enough to suggest that the conservatives' originalist rhetoric has been little more than pretense.

C. Precedential Activism

Deference to precedent has not been a conservative hallmark. Indeed, if there is any area where the conservatives have been unabashedly activist, it would be with respect to overturning precedent. From the moment the Court decided *Garcia*,[81] for example, the conservatives have laid claim to its eventual overruling.[82] Although the case has not yet been expressly overturned, the Court has rejected its central premise that political processes and not the courts should be the protectors of Tenth Amendment concerns. In both *New York v. United States*[83] and *Printz v. United States*,[84] conservative-led majorities enforced Tenth Amendment protections against federal legislation.

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80. 489 U.S. 288 (1989).

81. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

82. *Id.* at 557–89 (Powell, J., dissenting).

83. 505 U.S. 144 (1992) (holding the take title provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 to be unconstitutional under the Tenth Amendment).

84. 521 U.S. 898 (1997) (holding the requirement that local officials conduct weapons background checks to be unconstitutional under the Tenth Amendment).

The conservatives have also waged a frontal assault on two liberal hallmarks: *Roe v. Wade*[85] and *Lemon v. Kurtzman*.[86] They have explicitly announced that they would directly overrule both cases if given the opportunity and have otherwise sought to undercut the precedential effect of both decisions.[87]

The conservatives are unrestrained by precedent in other areas as well. They have already overruled *Pennsylvania v. Union Gas Co.*[88] and *Parden v. Terminal Railway*,[89] and they have threatened *Ex parte Young* in the Eleventh Amendment context.[90] They have reversed the leading pro-affirmative action case.[91] They have resurrected the concept of regulatory takings[92] and rejected precedent[93] to the contrary. They have stated that they would overturn *Buckley v. Valeo*'s[94] upholding of campaign contributions. They have undercut precedent by imposing new limits on *habeas corpus*.[95] They would likely overturn *Griffin v. Illinois*[96] and deny indigents access to trial

85. 410 U.S. 113 (1973).

86. 403 U.S. 602 (1971), *aff'd*, 411 U.S. 192 (1973). That an opinion by Chief Justice Burger on the Establishment Clause is now considered a liberal hallmark is but one indication of how far to the right the Court has moved.

87. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring in judgment) (noting the series of decisions limiting *Lemon v. Kurtzman*); Planned Parenthood v. Casey, 505 U.S. 833, 944 (1992) (Rehnquist, J., concurring in part and dissenting in part) ("We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases.").

88. 491 U.S. 1 (1989) (holding Congress may abrogate the states' Eleventh Amendment immunity), *overruled by* Seminole Tribe v. Florida, 517 U.S. 44 (1996).

89. 377 U.S. 184 (1964) (holding states may waive their Eleventh Amendment immunity when they engage in proprietary activities), *overruled by* College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999).

90. 209 U.S. 123 (1908). The conservatives have limited the scope of injunctive relief available through the *Ex parte Young* doctrine in *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984), and *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997).

91. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

92. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

93. *Id.* at 1039–1040 (Blackmun, J., dissenting) (citing Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491–92 (1987); Goldblatt v. Hempstead, 369 U.S. 590, 592–93 (1962)).

94. 424 U.S. 1, 235 (1976) (Burger, White, Marshall, Blackmun, and Rehnquist, JJ., concurring in part and dissenting in part).

95. *See, e.g.*, Teague v. Lane, 489 U.S. 288 (1989); Wainwright v. Sykes, 433 U.S. 72 (1977).

96. 351 U.S. 12 (1956).

transcripts necessary for appeals of criminal convictions.[97] They would undercut much of the scope of the dormant Commerce Clause.[98] They have even overruled a mere two-year-old precedent[99] and ruled, upon second thought, to allow victim impact statements in criminal proceedings.[100]

As with the other forms of activism discussed so far, at least some of this conservative precedential activism is defensible. *Garcia*, for example, was itself a liberal overrule of a conservative precedent. Reestablishing previous law hardly seems activist.[101]

More broadly, however, a blanket attack on the conservatives for disrespecting precedent is unfair. If existing doctrine is truly illegitimate, as the conservatives contend, it is no more acceptable to hamstring the law into a faulty jurisprudence than it would be to constrain a liberal court into rigidly adhering to conservative precedent.

To assert otherwise is to offer, as Randy Barnett argues, essentially a heads-we-win, tails-you-lose approach.[102] If conservatives are seen as specially forbidden from overturning precedent because their judicial philosophy required less precedential activism, constitutional law would be forever on a leftward trajectory. Liberals, unconstrained by precedential niceties, would be free to overturn conservative decisions, while liberal decisions would be immunized from attack by conservative self-restraint.

The fair question is not whether conservative precedential activism exists (it does), but rather whether the activism is un-

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97. M.L.B. v. S.L.J, 519 U.S. 102, 129 (1996) (Thomas, J., dissenting).

98. Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine, 520 U.S. 564, 609 (1997) (Thomas, J., dissenting).

99. Booth v. Maryland, 482 U.S. 496 (1987).

100. Payne v. Tennessee, 501 U.S. 808 (1991).

101. Of course, somewhat problematic in this respect, is the fact that the pre-existing conservative precedent had itself overruled a liberal precedent. Maryland v. Wirtz, 392 U.S. 183 (1968). Similarly, the overruling of *Union Gas* was hardly a radical rejection of *stare decisis*. *Union Gas* was crippled from the moment it was decided. The fifth and deciding vote in *Union Gas*, holding that Congress could abrogate a state's sovereign immunity, was Justice White's enigmatic opinion stating in its most critical part: "I agree with the conclusion . . . that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States, although I do not agree with much of [the majority's] reasoning." 491 U.S. at 57 (White, J., concurring in part and dissenting in part).

102. 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 COURT CASES AND THE COMMENTARY 264–66 (E.J. Dionne, Jr. & William Kristol eds., 2001).

due. The answer to this inquiry, at least in part, is case-specific. It requires analysis of the legitimacy of each precedent under fire as well as the soundness of the holding the conservatives have, or would like to have, reached.

Nevertheless, some general observations about conservatives' precedential activism are in order. First, the tenor of the attacks on precedent waged by the conservatives seems to suggest that precedential weight is of little value.[103] The abortion and religion dissents, for example, are written in a manner that suggest that all is up for grabs. The legitimacy of undoing precedents that one believes are ill-advised, however, does not justify treating the precedential value of the challenged decisions as a nullity. After all, there is precedential weight even in the decisions with which one disagrees. Institutional values are also at stake: demeaning the value of *stare decisis* is destructive to the rule of law.[104] Conservatives, of course, are not alone in dismissive treatment of contrary precedent,[105] but they have done little to promote precedential restraint as an institutional value.[106]

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103. Justice Scalia, notably, was not reluctant to raise a precedential argument in *Romer v. Evans* noting that the case contradicted a prior decision decided only ten years earlier. 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

104. *See Payne*, 501 U.S. at 844 (Marshall, J., dissenting) (discussing the virtues of *stare decisis*).

105. In this respect, Justice Stevens' dissent in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), seems especially remarkable in that it appears to treat deference to precedent as a form of game theory rather than judicial duty:

> Because my decision to join Justice Brennan's dissent is a departure from the opinion I expressed in *Florida Dept. of Health v. Florida Nursing Home Assn.*, a word of explanation is in order. As I then explained, notwithstanding my belief that *Edelman v. Jordan* was incorrectly decided, I then concluded that the doctrine of *stare decisis* required that *Edelman* be followed. Since then, however, the Court has not felt constrained by *stare decisis* in its expansion of the protective mantle of sovereign immunity—having repudiated at least 28 cases in its decision in *Pennhurst State School and Hospital v. Halderman*—and additional study has made it abundantly clear that not only *Edelman*, but *Hans v. Louisiana*, as well, can properly be characterized as "egregiously incorrect." I am now persuaded that a fresh examination of the Court's Eleventh Amendment jurisprudence will produce benefits that far outweigh "the consequences of further unraveling the doctrine of *stare decisis*" in this area of the law.

Id. at 304 (Stevens, J., dissenting) (citations omitted).

106. The conservative response to this charge would be, I suspect, that deference is not due to illegitimate decisions. But the conservative charge of illegitimacy is often based on the purported lack of originalist support for the precedent under attack—an argument that might have more force if the conservatives

Second, the scope of the conservative attack on precedent is notable. Conservatives seem intent upon rewriting much of the constitutional law that was decided during and since the Warren Court. Again, there may be reasons why much of the jurisprudence of the last forty years should be rewritten. A wholesale effort to change constitutional law, however justified, is nonetheless activist under any definition.

Third, the conservatives are also apparently willing to ignore even the most basic tenets of *stare decisis*. For example, in *Holder v. Hall*,[107] Justices Scalia and Thomas rejected the general rule that statutory construction was entitled to strict *stare decisis* effect, arguing in that case that the Voting Rights Act should be reconstrued in a manner inconsistent with over twenty-five years of precedent.

Finally, as in the other areas of activism that I have reviewed, the conservatives have not used a consistent approach to precedential issues. Their eagerness to overturn *Roe*[108] and *Lemon*,[109] for example, differs markedly from the respect they accord *Hans v. Louisiana*[110] or from the outrage they express when conservative decisions such as *Bowers v. Hardwick*[111] are not rigidly followed.[112]

D. Jurisdictional Activism

One of the leading conservative criticisms of judicial activism is the purportedly over-expansive use of federal jurisdiction by liberal judges. Conservative judges have effectively turned this criticism into action. The conservatives have made significant gains in cutting back standing,[113] restricting the availability of *habeas corpus*,[114] limiting suits against states under the

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themselves were less selective in their use of the originalist approach.

107. 512 U.S. 874, 891 (1994) (Thomas, Scalia, JJ., concurring).

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

109. Lemon v. Kurtzman, 403 U.S. 602 (1971).

110. 134 U.S. 1 (1890). *See* Seminole Tribe v. Florida, 517 U.S. 44, 67–69 (1996) (discussing the precedential weight to be accorded previous decisions endorsing state sovereign immunity).

111. 478 U.S. 186 (1986).

112. Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

113. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464 (1982); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); United States v. Richardson, 418 U.S. 166 (1974) (limiting *Flast v. Cohen*, 392 U.S. 83 (1968)).

114. Teague v. Lane, 489 U.S. 288 (1989).

Eleventh Amendment,[115] curtailing the availability of affirmative remedies against governments,[116] carving out exceptions to statutory grants of jurisdiction under Our Federalism and like doctrines[117] and, until reversed by an Act of Congress, restricting the use of pendent jurisdiction.[118] The overall record is clear. The law of federal courts is now significantly less open for plaintiffs to raise constitutional challenges than it was at the outset of the Burger Court.

Or at least the courts are less open for some plaintiffs. The constrictions in the law of standing fashioned by the conservatives have not affected certain favored groups.[119] For example, the Court has held that white applicants have standing to attack affirmative action programs despite their failure to show that they would benefit from the invalidation of the challenged programs.[120] This pattern starkly contrasts with cases such as *Lewis v. Casey*,[121] holding that a prisoner's standing to challenge a prison's restriction on legal materials depends on a showing that his lack of access would bar his successful appeal, and *Warth v. Seldin*,[122] requiring a low-income plaintiff to show that he would move into a community if purportedly discriminatory zoning rules were invalidated.

The redistricting cases offer the most egregious example of this double standard. In *Shaw v. Reno*,[123] white voters were allowed to challenge a redistricting plan on the grounds that the state improperly used race in drawing the congressional boundaries. But what was their injury? The voters could hardly claim that the redistricting plan would deny them the right to vote or dilute their vote.[124] At best they could argue

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115. *Seminole Tribe*, 517 U.S. at 47; Alden v. Maine, 527 U.S. 706 (1999).

116. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 130 (1984).

117. Younger v. Harris, 401 U.S. 37 (1971) (holding that principles of equity, comity, and federalism require that federal courts may not exercise their jurisdiction to enjoin ongoing state criminal proceedings).

118. Finley v. United States, 490 U.S. 545 (1989). Congress passed 42 U.S.C. § 1367 in response to the *Finley* decision in order to allow pendent party jurisdiction.

119. Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301 (2002).

120. *Id.* at 325 (citing, e.g., Northeastern Fla. Chapter of Associated Gen. Contractors v. Jacksonville, 508 U.S. 656 (1993)); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

121. 518 U.S. 343, 355 (1996).

122. 422 U.S. 490, 504–07 (1975).

123. 509 U.S. 630, 644–49 (1993).

124. Nichol, *supra* note 119, at 314.

that the plan diminished their ability to vote with like-minded citizens or be represented by like-minded officials. As Gene Nichol notes, however, those concerns do not square with "*Shaw*'s foundational premise that voting rights law cannot presume political identity or behavior from race status alone."[125] The plaintiffs' injury, therefore, must have been some sort of harm to sensibilities from exposure to a system that involved race-based classifications. But the Court had rejected exactly this argument in denying black plaintiffs standing to challenge the "stigmatizing" effect of government support of racially segregated schools.[126]

Conservative jurisdictional activism, moreover, is not limited to selected standing cases. This past term in *Palazzolo v. Rhode Island*,[127] for example, the conservatives issued an opinion that virtually invited plaintiffs to bring challenges to environmental restrictions under the Takings Clause. *Palazzolo* held that a property owner who acquired land after the state had enacted environmental restrictions affecting that land nevertheless had the right to challenge those restrictions as a taking. The Court's rationale in reaching this result was enlightening. As the Court stated:

> The theory underlying the argument that post-enactment purchasers cannot challenge a regulation under the Takings Clause seems to run on these lines: Property rights are created by the State. So, the argument goes, by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation. . . . Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have

125. *Id.*

126. Allen v. Wright, 468 U.S. 737, 755–56 (1984). *Shaw* cannot be explained as resting on the notion that if white voters did not have standing to challenge the state's action no one would. In other cases, the Court had made clear that standing could not be based upon the simple desire to have constitutional norms enforced. *See, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 482–86 (1982).

127. 533 U.S. 606 (2001).

> a right to challenge unreasonable limitations on the use and value of land.[128]

Palazzolo is remarkable in its stark contrast to cases outside the takings context in which the Court has restricted federal jurisdiction. *Palazzolo* ignores the concern raised in *habeas* cases that allowing federal court review might encourage strategic behavior by those intent on challenging the state action.[129] It fails to take the oft-stated conservative position that the recourse of "future generations" should be to remedy their harm through political change rather than judicial intrusion.[130] And *Palazzolo*, of course, completely undermines the policy heavily relied upon by conservatives in *habeas* cases—that states should be allowed to put an end to litigation.[131]

The conservatives have been inconsistent in other matters of jurisdictional activism as well. They claim, for example, that in deciding cases they will not overreach and decide matters that are not properly before the Court. Sometimes they honor this principle.[132] In other cases, however, they proceed unrestrained. In *Employment Division v. Smith*,[133] for example, Justice Scalia issued a landmark ruling that repudiated the use of the compelling interest test in free exercise cases. The viability of the free exercise test, however, had been neither briefed nor argued in the *Smith* litigation.[134]

Finally, I would be remiss if I omitted reference to the other activist attacks that can be leveled at the conservatives' jurisdictional holdings. Most obviously, the conservatives'

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128. *Id.* at 626–27 (citations omitted).

129. *Contra* Wainwright v. Sykes, 433 U.S. 72 (1977) (limiting access to *habeus corpus* in order to prevent defendants from manipulating jurisdiction in order to achieve favorable results). *Palazzalo*, in contrast, opened the door for strategic buying and selling of property that would allow federal court challenges to be brought against environmental restrictions.

130. *Cf.* Atkins v. Virginia, 122 S. Ct. 2242, 2267 (2002) (Scalia, J., dissenting) ("There is something to be said for popular abolition of the death penalty; there is nothing to be said for its incremental abolition by this Court.").

131. *Contra* McCleskey v. Zant, 499 U.S. 467 (1991) (prohibiting a prisoner who had previously filed a *habeas* petition from bringing a subsequent petition absent a showing of cause and prejudice). *See also* Teague v. Lane, 489 U.S. 288 (1989) (prohibiting prisoners from taking advantage of "new rules" constitutional law decided after their original conviction became final).

132. Troxel v. Granville, 530 U.S. 57, 73–75 (2000).

133. 494 U.S. 872, 884–90 (1990).

134. *See also* Justice Thomas in *Nixon v. Shrink Missouri Government Political Action Committee*, 528 U.S. 377, 397–98 (2000), arguing that *Buckley v. Valeo* should be overruled in part, although that issue was not before the Court.

overruling of earlier jurisdictional decisions is, of course, precedentially activist. Equally notable, however, is the disregard with which the conservatives treat congressional action in this area. The Court's deliberate refusal to exercise jurisdiction properly granted to it, as exemplified in *Younger*[135] and the abstention cases, is itself activist.[136] It substitutes the Court's self-made rules for congressional judgment.[137]

E. Judicial Creativity

One of the most stinging criticisms conservatives have leveled at liberal judicial activism is the notion that liberals made their constitutional law from whole cloth. The notion of penumbral rights in *Griswold v. Connecticut*,[138] for example, still gets conservatives' dander up, although the decision is now over thirty-five years old.[139]

The conservatives, however, have set up their own cottage industry in weaving new constitutional fabric. In *Employment Division v. Smith*,[140] for example, Justice Scalia invented the concept of "hybrid rights." *Boyle v. United Technologies Corp.* created a federal common law military contractor's defense where one had not previously existed.[141] The "new rule" standard announced in *Teague v. Lane* limiting the claims cognizable in *habeas* petitions was itself a new rule.[142] First Amendment law (both religion and speech) is now replete with a Scalia-manufactured inquiry of whether a challenged law is a "neutral law of general applicability."[143] *New York v. United States*[144] and *Printz v. United States*[145] introduced the concept of "anti-commandeering" into Tenth Amendment jurisprudence

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135. Younger v. Harris, 401 U.S. 37 (1971).

136. Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984).

137. In the *Lujan* case, the conservatives took this activism one step further, holding a congressional grant of standing unconstitutional. Lujan v. Defenders of Wildlife, 504 U.S. 555, 572–78 (1992).

138. 381 U.S. 479, 484 (1965).

139. *See* BORK, *supra* note 62.

140. 494 U.S. 872 (1990).

141. 487 U.S. 500 (1988).

142. 489 U.S. 288 (1989).

143. *Smith*, 494 U.S. at 901; City of Erie v. Pap's A.M., 529 U.S. 277 (2000); Cohen v. Cowles Media Co., 501 U.S. 663 (1991).

144. 505 U.S. 144, 176–77 (1992).

145. 521 U.S. 898, 925–33 (1997).

and also established an entirely new line of constitutional inquiry—whether a federal law interfered with the line of "political accountability" between a state official and her constituents.

Once again, it cannot be asserted that a decision is automatically wrong because it relies on a new theory or creates new doctrine. Judicial creativity might be justified on a number of grounds. First, and most obviously, new problems constantly arise that test the scope and applicability of settled doctrine. Advancements in medical technology, for example, will necessarily force constitutional theorists to rethink principles such as privacy, personhood, and autonomy. That scientific developments may lead to new legal conceptualizations and new doctrinal approaches is to be expected rather than reflexively condemned.

Second, even without social or technological change, the creation of new law may be necessary to limit the unforeseen consequences that can occur when settled doctrine is taken to its logical ends. The inherent conclusion, for example, that there were no limits on federal power over the states in the process federalism doctrine of *Garcia v. San Antonio Metropolitan Transit Authority*[146] could legitimately serve as a catalyst for the creation of novel counterbalances such as the anti-commandeering rule of *New York v. United States*[147] and *Printz*.[148]

Finally, judicial creativity pervades much of contemporary constitutional law, and rejecting its conservative applications would equally undercut its liberal manifestations. *Reynolds v. Sims*,[149] *Miranda v. Arizona*,[150] *New York Times Co. v. Sullivan*,[151] and *Griswold v. Connecticut*,[152] after all, were highly creative decisions. Conservatives, in short, can be defended for their judicial creativity. They cannot, or at least should not, however, simultaneously condemn their "liberal" predecessors for engaging in a form of decision making that the conservatives now employ.

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146. 469 U.S. 528 (1985).
147. 505 U.S. 144 (1992).
148. 521 U.S. 898 (1997).
149. 377 U.S. 533 (1964) (one person, one vote).
150. 384 U.S. 436 (1966) (interrogation warnings).
151. 376 U.S. 254 (1964) ("actual malice" in libel cases).
152. 381 U.S. 479 (1965) (a constitutional right of privacy).

F. Remedial Activism

There is at least one area where the conservatives have been thoroughly consistent about rejecting a form of judicial activism: the judiciary's use of its remedial powers to impose affirmative obligations on government.[153] In fact, the conservatives have been quite active in bringing this "remedial activism" to an end. They have used the Equal Protection Clause to end court oversight of school desegregation,[154] the Eleventh Amendment to bar judicially imposed reform of mental hospitals,[155] and the standing doctrine to prevent judicial supervision of police enforcement methods.[156] Of course, not many cases arise in which politically conservative plaintiffs seek remedies that require courts to monitor government institutions or to bring governmental facilities into judicial receivership, so it may be that the conservatives have not been fully tested on this point. Thus far, however, under the criterion of remedial activism, the conservatives have been a model of judicial restraint.

II. CONSERVATIVE JUDICIAL ACTIVISM IN PERSPECTIVE

The previous section establishes that the judicial conservatives have issued activist decisions. An immediate response to this point might be: "So what?" The fact that judges in power will at times be activist is not a new development. Robert Nagel has pointed out that activism may be inherent in the enterprise of constitutional interpretation.[157] Judges, he writes, "identify and exploit ambiguity and uncertainty" and "[i]nterpretation itself is a process that is necessary only when established understandings are challenged, when some change in accepted meaning is called for."[158] Thus, as Nagel explains, changes in constitutional meaning are the norm and not the

153. Interestingly enough, the Senate Judiciary Committee has, at times, seemed especially concerned with this form of judicial activism. *See supra* note 11.

154. Missouri v. Jenkins, 515 U.S. 70 (1995); Freeman v. Pitts, 503 U.S. 467 (1992); Bd. of Educ. v. Dowell, 498 U.S. 237 (1991).

155. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 157 (1984).

156. *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95 (1983).

157. *See* NAGEL, *supra* note 3, at 11.

158. *Id.*

exception.[159] The fact that this dynamic has affected conservatives as well as liberals is not itself surprising. The conclusion that there has been conservative activism, standing alone, does not tell us much.

One may call the conservatives' activism excessive, but that invites the question: "Compared to what?" True, the conservatives have led a counter-majoritarian judicial assault on federal legislation that may be unmatched in history, but during that same period the Court has invalidated numerous federal provisions in decisions that arguably demonstrate liberal activism. These include measures regulating sexual expression,[160] restricting the use of federal funds by legal services corporations,[161] imposing ethical limitations on speech by public employees,[162] and empowering the President with the line-item veto.[163] Counter-majoritarian activism is rampant on both ends of the Court.[164]

Similarly, while the conservatives' judicial creativity has been considerable, their record is matched on the liberal side. *Reynolds*, *Miranda*, *Sullivan*, and *Roe* are some obvious examples, and the liberal whole-cloth textile mill is not yet out of business. Does anybody really believe that the Court decided *Romer v. Evans*[165] using standard Equal Protection minimum scrutiny, or that *Saenz v. Roe*[166] does not mark a new direction for the Privileges and Immunities Clause?

Finally, there is no doubt that the conservatives' attack on precedent is highly activist. But their consistent attempts to overturn *Roe v. Wade* and *Lemon v. Kurtzman* are, from a process standpoint, not all that different from sustained liberal attempts to reverse *Gregg v. Georgia*[167] or *Hans v. Louisiana*.[168] The conservatives' activism, in short, cannot fairly be characterized as beyond comparable historical limits.

But that leads to the greater point. The true lesson from the conservatives' record is not that they are engaging in un-

159. *Id.*

160. United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000); Reno v. ACLU, 521 U.S. 844 (1997).

161. Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001).

162. United States v. Nat'l Treasury Employees Union, 513 U.S. 454 (1995).

163. Clinton v. City of New York, 524 U.S. 417 (1998).

164. Louis D. Bilionis, *The New Scrutiny*, 51 EMORY L.J. 481 (2002).

165. 517 U.S. 620 (1996).

166. 526 U.S. 489 (1999).

167. 428 U.S. 153 (1976).

168. 134 U.S. 1 (1890).

bridled activism. It is that they are engaging in unbridled hypocrisy. We have already seen some of this. Originalism is a doctrine of convenience and, even then, not consistently applied. Jurisdiction is limited, but not in key cases where ideological plaintiffs seek conservative results. Judicial creativity is avoided except in pursuit of conservative causes.[169] Ignoring the wisdom of the people is intellectually elitist when used to achieve liberal ends, but is apparently non-elitist when used to accomplish conservative results.

The most egregious hypocrisy of the conservatives, however, is in their overall record—not just in specific cases. The conservatives have loudly portrayed themselves as the true constitutionalists. While liberals purportedly manipulate doctrine, text, history, and precedent to achieve specific results, the conservatives are the self-proclaimed strict constructionists, guided only by fealty to timeless principles and strict allegiance to judicial restraint.[170] As we have seen, their actions do not even remotely approach their rhetoric under any standard.

In the previous section, I argued it was unfair to claim that conservatives should be especially restrained in their use of judicial activism. On the other hand, attempting to hide one's activism behind a rhetorical barrage of anti-activism righteousness invites closer scrutiny. The conservatives' judicial activism may not violate any historical norms, but it invites special condemnation because of the clash with their sanctimonious preachings on judicial restraint.[171]

Most guilty in this respect, I should point out, are not the justices themselves but rather their conservative political allies.[172] The incessant criticism by conservative politicians of "liberal" judicial decisions does not square with the silence that these same political actors display with regard to equally activist decisions that achieve conservative results. The record of

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169. *See* Boyle v. United Techs. Corp., 487 U.S. 500, 502 (1988). *Compare Evans*, 517 U.S. at 636 (Scalia, J., dissenting), *with* Printz v. United States, 521 U.S. 898, 902 (1997).

170. *See, e.g.*, Clarence Thomas, *Judging*, 45 KAN. L. REV. 1 (1996).

171. This is, of course, not to say that liberals are free from similar offenses. The "liberal" justices' impassioned dissent from the grant of *certiorari* in *Patterson v. McLean Credit Union*, 485 U.S. 617, 619 (1988) (Blackmun and Stevens, JJ., dissenting to grant of *certiorari*), because of the ostensible need to defer to *stare decisis* in statutory construction cases, rings remarkably hollow in light of the hatchet job the liberals performed on statutory *stare decisis* in *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

172. *See* Kline, *supra* note 3.

conservative judicial activism compiled in the last section, however, means that conservative politicians no longer have any right to claim that their critiques of liberal decisions are based upon any purported overreaching by the judiciary. It must be understood only as a condemnation of the cases' results and not of their methodology. The resolution to appoint strict constructionists,[173] after the model of Justices Thomas and Scalia, is merely a move for effectuating conservative results—not a call for judicial restraint.

III. PARTISAN ACTIVISM—THE SEVENTH SIN

Thus far this article has avoided discussing the most severe form of judicial activism—when the judiciary uses its power to further a partisan agenda. Recently, Judge Wilkinson defended the conservatives on this point.[174] While candidly admitting that the conservatives' invalidation of federal laws was activist, Wilkinson argued that, unlike the decisions of the *Lochner* Court at the beginning of the twentieth century, which consistently protected commercial interests, the new cases "display no pattern of favoritism."[175] He might be partially correct, at least with respect to the federalism cases. The invalidation of the Guns-Free School Zones Act,[176] the Religious Freedom Restoration Act,[177] the state-suit provision of the Indian Gaming Regulatory Act,[178] the take-title provision of the Low-Level Radioactive Waste Policy Amendments of 1985,[179] the civil remedy of the Violence Against Women Act,[180] and the

173. Elizabeth Bumiller, *Bush Vows to Seek Conservative Judges*, N.Y. TIMES, Mar. 29, 2002, at A24; Terry M. Neal, *Bush Resists GOP Rivals' Nudging on Abortion*, WASH. POST, Jan. 21, 2000, at A5 (describing George W. Bush's promise to appoint "strict constructionists" to the Court).

174. Brzonkala v. Va. Polytechnic Inst., 169 F.3d 820, 893–98 (4th Cir. 1999), *aff'd sub nom.* United States v. Morrison, 529 U.S. 598 (2000).

175. *Id.*

176. United States v. Lopez, 514 U.S. 549 (1995) (invalidating 18 U.S.C. § 922(q)(1)(A)).

177. City of Boerne v. Flores, 521 U.S. 507 (1997) (invalidating 42 U.S.C. § 2000bb to 2000bb-4).

178. Seminole Tribe v. Florida, 517 U.S. 44 (1996) (invalidating 25 U.S.C. § 2710(d)(3)).

179. New York v. United States, 505 U.S. 144 (1992) (invalidating 42 U.S.C. § 2021b et seq.).

180. United States v. Morrison, 529 U.S. 598 (2000) (invalidating 42 U.S.C. § 13981).

local law enforcement provision of the Brady Bill[181] may protect the states but not a special political class. (Judge Wilkinson's observation, however, does not hold true with respect to the anti-affirmative action and redistricting cases, where there has been a pattern of activism favoring non-minority majorities (whites).)[182]

Also, conservatives occasionally have been out-front on positions that might seem contrary to their personal political convictions. Justice Scalia, for example, angered many of his political allies when he joined a Court majority that invalidated a flag-burning law.[183] Justice Rehnquist did the same when he wrote the opinion that invalidated Congress's attempt to overturn *Miranda*.[184]

In one set of cases, however, the conservatives' record is deeply troubling. These cases suggest that in certain circumstances, purely partisan politics has motivated the Court's decisions. I should emphasize that "partisan" in this context does not mean ideological, but rather refers to allegiance to a political party. This charge is severe, and none of the hallmark "liberal activist" opinions provide comfort or precedent for the conservatives' partisan activism. For example, no one has ever suggested that the Court would have decided *Miranda* differently if Ernesto Miranda had been of a different political persuasion, that the result in *Baker v. Carr*[185] was a product of the political party of the plaintiffs, or even that *United States v. Nixon*[186] would have come out differently if the President were a Democrat. The same, however, cannot be said of *Bush v. Gore*,[187] *Clinton v. Jones*,[188] *In re Lindsey*,[189] and *Department of Commerce v. United States House of Representatives*.[190] Each of

181. Printz v. United States, 521 U.S. 898 (1997) (invalidating 18 U.S.C. § 922(s)).

182. *See, e.g.*, *supra* notes 113–137 and accompanying text.

183. Texas v. Johnson, 491 U.S. 397 (1989); United States v. Eichman, 496 U.S. 310, 312 (1990). Justice Scalia has, on a number of occasions, also written or joined opinions highly protective of criminal defendants. Maryland v. Craig, 497 U.S. 836, 860 (1990); Kyllo v. United States, 533 U.S. 27, 28 (2001); Apprendi v. New Jersey, 530 U.S. 466 (2000).

184. Dickerson v. United States, 530 U.S. 428, 431 (2000).

185. 369 U.S. 186 (1962).

186. 418 U.S. 683 (1974).

187. 531 U.S. 98 (2000).

188. 520 U.S. 681 (1997).

189. 158 F.3d 1263 (D.C. Cir. 1998), *cert. denied sub nom.* Office of the President v. Office of the Indep. Counsel, 525 U.S. 996 (1998).

190. 525 U.S. 316 (1999).

these cases offer more than a hint of partisan action. Thus they are entitled to a brief review.

A. Bush v. Gore

Any charge of conservative partisan activism must, of course, begin with *Bush v. Gore*.[191] Part of the claim is purely rhetorical—how many truly believe that the conservatives would have voted the same way had the candidates been reversed?

Part of the partisan activism claim rests on the grounds of the decision. Under any reading, the decision offers a dramatic expansion of equal protection law in voting; rejects federal-state court comity in favor of federal court intrusion; rejects jurisdictional limitations of standing, ripeness, and mootness; turns traditional notions of federalism on their heads; and asserts that political disputes are better resolved by the judiciary than by the political branches. These are all developments that one would normally ascribe to the most extreme liberal activism, and yet all were embraced by the conservatives in this case. The charge of partisan activism, accordingly, must be taken seriously given the implausibility of any last-minute conversions by the conservatives on these issues.[192]

B. Clinton v. Jones

In *Clinton v. Jones*,[193] a unanimous Court decided that President Clinton could be subject to an antecedent claim of sexual harassment while he served in office. Justice Stevens, who wrote the decision, was also in the majority in *Nixon v. Fitzgerald*,[194] the case holding the President immune from damage suits for actions while he was in office and the major

191. 531 U.S. 98 (2000).

192. There has been some suggestion in the literature that the contorted manner in which liberals and conservatives both on and off the Court came out on the issues in *Bush v. Gore* (conservatives defending a decision broadly expanding constitutional protections while ignoring federalism, liberals condemning the broad expansion of rights while espousing federalism) might suggest that the players were led more by a "motivated reasoning" rather than an explicit partisan agenda. *See* THE VOTE: BUSH, GORE, AND THE SUPREME COURT 5 (Cass R. Sunstein & Richard A. Epstein eds., 2001) [hereinafter THE VOTE]. Whether this is true in the case of each individual justice is, of course, hard to ascertain.

193. 520 U.S. 681 (1997).

194. 457 U.S. 731 (1982).

precedential obstacle to the *Jones* decision. Thus, any claim that the case was solely the product of conservative activism would seem immediately off the mark.

The question, however, is why did the conservative justices join the decision? That answer is not obvious. Even if *Fitzgerald* could be distinguished on the grounds that immunity for presidential actions was necessary to avoid distracting or deterring the president with concerns of damage suits, the fact that private suits can be time-consuming, vexatious, and politically embarrassing would remain. One might think the conservatives, because of their tradition of protecting presidential power,[195] would have found these matters dispositive, even if Justice Stevens did not. But one need not rest on speculation to prove the point. Consider the conservatives' issuance of a stay to stop the recount in *Bush v. Gore*. The stay was purportedly approved to protect the presidency from embarrassment if the vote count ultimately reflected that Bush did not win. But why should shielding the President from political embarrassment from a recount warrant any more judicial action than protecting the President from the embarrassment of litigating a sexual harassment law suit (or any other suit) while in office? The former, after all, is only a one time event. The latter is an ongoing and potentially invasive process. If the purpose is protecting the presidency, and not a specific President, the conservatives got it exactly backwards.

C. *In re* Lindsey *(Grand Jury Testimony)*

The Supreme Court conservatives did not issue the decision that attorneys in the Office of the White House Counsel were not entitled to attorney-client privilege in their communications with the President. That decision, denying government attorney-client privilege, was authored by a lower court.[196] The Supreme Court's lack of action in the case, however, is exactly the point. The Court refused to grant *certiorari* in the case despite the importance of the issue and despite the fact that the lower court decision placed immeasurable hardship on the

195. Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). Scalia's dissent, to be fair, cannot be ascribed to Justice Rehnquist who, in fact, wrote the *Morrison* majority opinion.

196. *In re* Lindsey, 158 F.3d 1263 (D.C. Cir. 1998), *cert. denied sub nom.* Office of the President v. Office of the Indep. Counsel, 525 U.S. 996 (1998).

Clinton presidency.[197] The case also graphically illustrated the problems with the independent counsel law foreseen by Justice Scalia in *Morrison v. Olson*.[198] One might have expected that he would have been interested in revisiting the issue.

Of course, even if the Court had granted *certiorari*, its eventual ruling might only have affirmed the lower court's determination,[199] but any decision would have provided needed clarity. One has to wonder whether the conservatives would have let a Republican administration similarly twist in the wind.[200]

D. Department of Commerce v. United States House of Representatives

The *House of Representatives*[201] case involved the statutory and constitutional legality of statistical sampling in the census, and the Court decided it on a 5-4 conservative-liberal split.[202] The case has generated little scholarly legal attention.[203] How-

197. The Court also let stand a decision ordering that the First Lady's communications with the White House Counsel were not privileged. *In re* Jury Subpoena *Duces Tecum*, 112 F.3d 910 (8th Cir. 1997), *cert. denied*, 521 U.S. 1105 (1997).

198. 487 U.S. 654 (1988).

199. On the other hand, the chances of reversal would seem fairly high. The Court's commitment to the need for confidential legal advice was affirmed in *Swidler & Berlin v. United States*, 524 U.S. 399 (1998) (discussed *infra* at note 169 and accompanying text), and, as mentioned, Justice Scalia had already expressed dissatisfaction with the Independent Counsel statute that had allowed the matter to arise in the first place.

200. The dispute between the Government Accounting Office and Vice-President Cheney may ultimately test the Court on this issue. If the Administration loses below, it will be interesting to see if the Court grants review as well as how it rules. *See* Walker v. Cheney, No 1:02CV00340 (D.D.C. filed Feb. 22, 2002); Don Van Natta, Jr., *Agency Files Suit for Cheney Papers on Energy Policy*, N.Y. TIMES, Feb. 23, 2002, at A1.

201. 525 U.S. 316 (1999).

202. The Court again turned to the statutory and constitutional legality of census-taking methodologies this past term in *Utah v. Evans*, 122 S. Ct. 2191 (2002). At issue in *Evans* was a census methodology known as "hot deck" imputation under which the Census Bureau infers that an address or unit "about which it is uncertain has the same population characteristics as those of a nearby sample or donor address or unit . . . ." 122 S. Ct. at 2196 (quotations omitted). *Evans*, like *United States House of Representatives* was decided by a 5-4 margin but this time the Court upheld the counting method. Justice Rehnquist, interestingly enough, changed sides to provide the pivotal vote.

203. *But see* Thomas R. Lee, *The Original Understanding of the Census Clause: Statistical Estimates and the Constitutional Requirement of an "Actual Enumeration,"* 77 WASH. L. REV. 1 (2002).

ever, the question of how to structure the census presented the most heated political fight in the House of Representatives (outside of impeachment) during President Clinton's second term.[204] The reason is simple. Census results could determine the election and, even for those whose seats were safe, it could determine whether they would return from the 2002 election as members of a majority or minority party. Sampling could have a considerable effect on the final census numbers. Democrats favored sampling because it would have included historically undercounted populations in the final numbers—leading to a greater population count in areas of Democratic support. Republicans opposed it for the same reason and brought suit to challenge its implementation.

The Court sided with the Republicans. But it was not easy. First, in order to establish standing, it had to decide that the plaintiffs would somehow be injured by the use of sampling. They found so for the Indiana plaintiffs by relying on speculative evidence that Indiana would have lost a congressional seat if statistical sampling rather than other methods of enumeration were used.[205] The Court struck down sampling. Indiana lost a seat anyway.[206]

Second, with respect to the merits, the Court relied on a statute providing that "[e]xcept for the determination of population for purposes of apportionment of Representatives in

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204. D'Vera Cohn, *Census Sampling Plan Under Fire: Opponents Question Proposal to Let Bureau Decide its Use*, WASH. POST, Aug. 11, 2000, at A23.

205. According to the Court, the loss of a seat would implicate the plaintiffs' interest in not having their vote diluted. *U.S. House of Representatives*, 525 U.S. at 330–32.

206. The other ground upon which the Court found the plaintiffs had standing was that their votes could be diluted by intra-state redistricting because the states generally use the Census results to set district lines. The Court's reliance on this ground, however, was a stretch under existing doctrine and jurisdictionally activist under any definition. To begin with, the redistricting standing claim is at best a third-party assertion. The Census Clause and 13 U.S.C. § 195 (2001) (the provisions upon which the plaintiffs relied) apply to reapportionment not redistricting. Only if the plaintiffs could show that they were in a state that would lose a seat could they claim their rights under these provisions were directly affected. To be sure, the Court has, of course, allowed third-party standing in limited instances. *See* Craig v. Boren, 429 U.S. 190 (1976). But a grant of third-party standing is exceptional and is normally denied when the direct injury to the absent parties is only speculative. *See* Warth v. Seldin, 422 U.S. 490 (1975) (holding that contractors did not have standing to assert the rights of low income plaintiffs challenging zoning restrictions on the grounds that those restrictions discriminated against low income individuals because the direct injury to the low income individuals was only speculative).

Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title."[207] The Department of Commerce accordingly argued that the statute in question required the Secretary to use sampling for some purposes but did not prohibit its use in apportionment.[208]

The Court recognized that because of the except/shall language, the provision "might reasonably be read as either permissive or prohibitive with regard to the use of sampling for apportionment purposes."[209] The Court resolved the issue against the Department, however, based upon "historical context"—because federal statutes have prohibited the use of sampling for more than 200 years.[210] Usually a change in a statute would suggest a new meaning rather than an old one, but the Court was undeterred.

In fact, the real thrust of the opinion might have come from the (conservative) four-justice concurrence arguing that sampling was prohibited by the "actual enumeration" language in the Census Clause.[211] Their primary reed supporting this position came from history. The first censuses, they argued, required the census takers to visit each household and receive information from the head of the household. They also con-

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207. 13 U.S.C. § 195 (2001).

208. Support for the Department's position would also appear to come from the statutory history of 13 U.S.C. § 195. The earlier version of § 195 stated that "[e]xcept for the determination of population for apportionment purposes, the Secretary may, where he deems it appropriate, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." *See* 13 U.S.C. § 195 (1958 ed.). In 1976 the Congress passed two significant amendments. First, it passed 13 U.S.C. § 141(a) which authorized the Secretary of Commerce to use sampling procedures when taking the census. Second, it changed the language in 13 U.S.C. § 195 from "may" to "shall" indicating that the Congress turned the authorization contained in the statute for the Secretary to use sampling for non-apportionment purposes to a command that he do so. As Justice Stevens explains, both changes "unambiguously endorsed the use of sampling." *U.S. House of Representatives*, 525 U.S. at 359.

209. *U.S. House of Representatives*, 525 U.S. at 339.

210. *Id.* at 339–40.

211. *Id.* at 345. The Census Clause reads as follows:

> Representatives shall be apportioned among the several States according to their respective Numbers, counting the whole number of perons in each State . . . . The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, . . . in such Manner as they shall by Law direct.

U.S. CONST. Art. I, § 2, cl. 3, *as amended by* U.S. CONST. amend. XIV, § 2.

tended that history indicated that the framers deliberately chose the language "actual enumeration" in order to prevent political manipulation of the counting process by political forces seeking to shape census-taking in their own interest.[212]

This argument has several weaknesses. First, "actual enumeration" did not literally mean "head count." As the Court recognized this past term in *Utah v. Evans* in upholding another form of statistical counting,[213] "actual enumeration" meant only counting; it did not specify a type of counting.[214] Indeed, the fact that the first census allowed for report by the head of household indicates that there was no literal requirement that the census taker actually count every person. In fact, imposing a completely literal meaning on actual enumeration would suggest that a number of long-used methods of census-taking, such as asking neighbors, landlords, postal workers, or other such sources, would also be unconstitutional.[215]

Second, the conservatives' position that the framers would have intended that counting methods be frozen into an outdated and inaccurate system in a nation that has grown from roughly four million in the 1790 census to over 276 million in 2000 is also a stretch. As the *Evans* Court held in rejecting a similar challenge to imputation:

> Of course, the Framers did not consider the imputation process. At the time they wrote the Constitution "statisticks" referred to "a statement or view of the civil condition of a people," not the complex mathematical discipline it has become. Yet, however unaware the Framers might have

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212. *U.S. House of Representatives*, 525 U.S. at 348.

213. 122 S. Ct. 2191 (2002).

214. *Id.* at 2204:

> [T]he text uses a general word, 'enumeration,' that refers to a counting process without describing the count's methodological details. The textual word 'actual' refers in context to the enumeration that will be used for apportioning the Third Congress, succinctly clarifying the fact that the constitutionally described basis for apportionment will not apply to the First and Second Congresses. The final part of the sentence says that the 'actual Enumeration' shall take place 'in such Manner as' Congress itself 'shall by Law direct,' thereby suggesting the breadth of congressional methodological authority, rather than its limitation.

See also id. at 2205 ("Contemporaneous general usage of the word "enumeration" adds further support. Late-18th-century dictionaries define the word simply as an "act of numbering or counting over," without reference to counting methodology.") (citations omitted).

215. *Id.* at 2206.

> been of specific future census needs, say, of automobiles for transport or of computers for calculation, they fully understood that those future needs might differ dramatically from those of their own times. And they were optimists who might not have been surprised to learn that a year 2000 census of the Nation that they founded required "processed data for over 120 million households, including over 147 million paper questionnaires and 1.5 billion pages of printed material." Consequently, they did not write detailed census methodology into the Constitution.[216]

Finally, the political manipulation argument advanced by the conservatives was also not compelling. First, there was no indication that statistical sampling was a product of political chicanery. The National Academy of Science, a non-partisan group, had endorsed statistical sampling and there was no question it would lead to a more accurate census than its alternatives. The conservatives' argument thus boiled down to the claim that the framers were more concerned with preventing the *mere possibility* of manipulation than they were with preventing a *certain* inaccuracy—an argument explicitly advanced by Justice Thomas's dissent in *Utah v. Evans*.[217] What this argument fails to acknowledge, however, is that a decision to forego counting methods designed to promote accuracy in favor of antiquated and less accurate methods might also be motivated by political goals—specifically the desire to not have the census reflect historically undercounted populations. It was this political reason, after all, that was behind the Republican challenge.

Let me emphasize that I am not calling the *House of Representatives* result indefensible. The conservatives in that case were at least consistent in the use of their interpretive method—originalism—even if there were serious weaknesses in its application. If not for decisions like *Bush v. Gore*, the *House of Representatives* case could simply be explained as flawed. Given other patterns, however, the result in the case might be equally explicable as partisan.

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216. *Id.* at 2207 (citations omitted).
217. *Id.* at 2221 (Thomas, J., dissenting).

E. Summary

To be sure, any charge that the conservatives have been partisan activists has to be tempered. Partisan motivation is notoriously difficult to prove.[218] Indeed, even if a pattern of partisan favoritism is established, that pattern may be as much a product of unintentional "motivated reasoning" as calculated political maneuverings.[219] Moreover, the conservative record is not relentlessly pro-Republican. Justice Rehnquist, after all, wrote the opinion upholding the Office of the Independent Counsel during a period when the office was being used to investigate Republican improprieties.[220] Perhaps even more telling, the conservative attack on majority-minority districts in the redistricting cases is, if anything, more helpful to Democrats than Republicans.[221] Finally, even in the context of the Clinton investigations, the conservatives did not always reject legal positions favorable to administration defenses. For example, the Court, over the dissents of Justices Scalia and Thomas, upheld the claim of attorney-client privilege in the Vince Foster case.[222]

Nevertheless, the conservatives' record in this line of cases is troubling. Unlike the other forms of activism discussed in this article, partisan activism is an indefensible exercise of judicial power. If the charge is accurate, the offending justices deserve to be soundly condemned.

CONCLUSION

A review of the jurisprudence of the Court's conservative wing leads to a number of conclusions about conservative judicial activism. First, conservative judicial activism is pervasive,

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218. Occasionally some evidence does appear. Justice O'Connor, for example, was widely reported to have, on election night, expressed dismay that Gore might have won the election because she did not want a Democrat to name her successor. *See* Evan Thomas & Michael Isikoff, *The Truth Behind the Pillars*, NEWSWEEK, Dec. 25, 2000, at 46.

219. *See* THE VOTE, *supra* note 192.

220. Morrison v. Olson, 487 U.S. 654 (1988). Justice Scalia dissented from the Court's opinion.

221. Majority-minority districting has had a tendency to dilute Democratic strength by concentrating Democratic votes in relatively few congressional districts. *See* SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY 915–24 (2d ed. 2001).

222. Swidler & Berlin v. United States, 524 U.S. 399, 411 (1998).

expansive, and transgresses nearly all activism norms. *Adarand Constructors Inc. v. Pena*,[223] the landmark anti-affirmative action case, for example, is counter-majoritarian,[224] non-originalist,[225] and precedentially[226] and jurisdictionally activist all at once.[227] Second, conservative judicial activism can be defended in some circumstances. Its defense, however, rests on essentially the same jurisprudential grounds that justify so-called liberal activism. The conservatives' federalism cases, for example, may be justified as a legitimate attempt to compensate for representative failure, but the representative failure rationale may also be used to justify much of the so-called liberal activism. Third, the conservatives' record in violating activism norms, even if justified in some cases, is inconsistent and selective. The conservatives rely on originalist arguments when it serves their cause; but will abandon this approach when it does not lead to favorable answers. Fourth, notwithstanding these first three observations, the conservatives' activism, fairly appraised, cannot be characterized as excessive in comparison to the liberal record. Indeed, their record, if nothing else, may simply prove the assertion that some judicial activism is inherent in the nature of Supreme Court decision making.[228] The phenomenon has not disappeared simply because conservatives have taken control of the Supreme Court.

Where the conservatives deserve criticism is in their attempts to claim that their decision making avoids activism and takes the methodological high ground. The cases do not support this assertion. The conservatives' record reflects a jurisprudence of judicial results, not of judicial method—nothing more and nothing less.

223. 515 U.S. 200 (1995).
224. *See supra* notes 37, 58.
225. *See supra* note 71.
226. *See supra* note 91.
227. *See supra* note 120.
228. *See* NAGEL, *supra* note 3.