IS THERE A DISTINCTIVE CONSERVATIVE JURISPRUDENCE?

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INTRODUCTION

Conservative jurisprudence has undergone a change.[1] Many respected figures in the legal profession question whether there is any longer a distinctive conservative legal philosophy. It is charged that conservative jurists no longer hold the high ground in the jurisprudential debate and that we have, in fact, become indistinguishable from those whom we were once wont to criticize. It is said that the contemporary jurisprudence of conservatism now lacks principled foundations. It is contended that we have become attached to ends, not means, and that we have become politicized to the point of undertaking activist ventures to achieve ideologically congenial results. If this were true, it would be most unfortunate. But I do not believe it is.

Many of us came of age concerned about the excessive activism of the Warren and Burger Courts. We lamented judicial attempts to preempt democratic choices and, indeed, to assume the governance of many state and local institutions. The lines of debate in the 1960s and '70s seemed clearly drawn. A judicial liberal believed that the enlightened approach of the courts was the answer to many social problems while a judicial conservative placed faith in traditional democratic processes. In short, a liberal was an activist and a conservative practiced self-restraint.

Have the traditional lines now blurred? Have things turned upside down? Respected critics of the Rehnquist Court have delighted in calling it "activist," as if the use of that one word somehow settled the issue of the soundness of its deci-

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sions. This critique of the Court has come not only in dissenting opinions, but from outside observers. "These folks are judicial activists," Senator Joseph Biden said of the Rehnquist Court's major Commerce Clause rulings. The Court's majority, claimed the Senator, is "saying the federal courts are going to make these judgments, not Congress."[2] The same critique was taken up by former Solicitor General Seth Waxman, who lamented that "the extraordinary act of one branch of government declaring that the other two branches have violated the Constitution has become almost a commonplace." Waxman noted at the time that "[t]he Justices struck down only 128 federal laws during the Court's first two centuries."[3] In contrast, the current Court invalidated at least twenty-four from 1995 to 2000.[4]

"It is still a conservative court that also has become one of the most activist courts in American history," said Stephen Shapiro, National Director of the American Civil Liberties Union.[5] And many in academia have taken up this refrain. "The biggest theme is that this is a very assertive court that is not afraid of invalidating everyone else," argued Professor Akhil Amar of the Yale Law School. "The only thing it's afraid of is admitting it made a mistake."[6] Similarly, Professor Larry Kramer of New York University Law School claimed that "[t]he Rehnquist Court has been using law to reshape politics for at least a decade." Kramer asserted that "conservative judicial activism is the order of the day," and even went so far as to suggest that "[t]he Warren Court was retiring compared to the present one."[7]

These are serious challenges that deserve a thoughtful response. The invitation to join the debate has been tendered in good faith, and it should be accepted. In my judgment, the effort to compare the Rehnquist Court to the activist Courts of the Warren or early New Deal eras is seriously misguided. It is

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2. David G. Savage, *High Court Rejects U.S. Law Allowing Civil Suits in Rapes*, L.A. TIMES, May 16, 2000, at A1.

3. Stuart Taylor, Jr., *The Tipping Point*, NAT'L J., June 10, 2000, at 1816.

4. Edward Walsh, *An Activist Court Mixes Its High-Profile Messages*, WASH. POST, July 2, 2000, at A6.

5. *Id.*

6. *Id.*

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

not the word "activism" that settles the issue. It is whether a court's actions admit of principled justification.

In the following article, I approach the question of whether there is a distinctive conservative jurisprudence from several perspectives. Section I asks whether the interventionism of the Rehnquist Court is really any different from earlier activist eras. Section II examines the often-made criticism that the present Supreme Court's commitment to federalism is little more than a doctrine of convenience. Section III focuses less on criticisms of the present Court than on its positive constitutional vision of a role for mediative institutions in America. Section IV summarizes what I believe to be the major contributions of contemporary conservative jurisprudence.

I

Differentiating on a principled basis what is happening now from what took place in the New Deal and Warren eras is essential to understanding contemporary conservative jurisprudence. The points of distinction are legion. The activist Courts of earlier eras were not afraid to constitutionalize freely. In particular, they were willing to extend constitutional rights to a point that impaired the democratic process at both the federal and state levels.

The Rehnquist Court has not similarly sought to preempt the workings of democracy. Placing a modest brake upon the exercise of federal power under Article I, Section Eight, or under Section Five of the Fourteenth Amendment is not the same thing as halting democratic solutions at all levels of our federal system. One need only compare two of the past century's best known decisions, *Lochner v. New York*[8] and *United States v. Lopez*,[9] to understand the point. It is not just ninety years that separate these two decisions. *Lochner*, the great exemplar of early twentieth century activism, immobilized federal and state government alike by invalidating a state maximum hours law in the name of substantive due process. *Lopez*, the great exemplar of late twentieth century interventionism, invalidated the federal Gun Free School Zones Act.

8. 198 U.S. 45 (1905).
9. 514 U.S. 549 (1995).

Yet there is a difference. States after *Lochner* were not free to enact a maximum-hour law, whereas states after *Lopez* were free to criminalize the act of bringing a firearm within a school zone. *Lopez*, in other words, restructured democratic responsibilities. *Lochner* simply shut the democratic process down.

There are also differences in today's activism and the judicial activism of the 1960s and '70s. All manifestations of activism involve by definition judicial intervention into the democratic process. For this reason, the Court's activist ventures must rest not only on a sound legal foundation, but on a profound sense of judicial modesty and caution. By that measure, the interventionism of the Warren and Burger Courts seems especially problematic, because it often invoked the Court's broad equitable powers to justify ongoing judicial supervision of basic state functions. These equitable powers were deemed "remedial."[10] In the name of redressing the asserted violations, state schools, prisons, and a variety of other institutions were subject for many years to federal judicial decree.

The Rehnquist Court has not, by and large, attempted such acts of ongoing institutional supervision. To the contrary, it has tried to rein these efforts in.[11] Its own acts of intervention have, to be sure, invalidated democratic enactments. But activism comes in many shapes and sizes. The Rehnquist Court, to its credit, has not thrust federal judges into managerial roles for which they are ill-suited.

I believe the historical view of the Rehnquist Court will be different from those of its activist predecessors.[12] The historical view of *Lochner* and the early New Deal Court is one of the judicial promotion of a pro-business and anti-labor agenda. The historical view of the Warren Court is much more mixed. Some of its decisions such as *Brown v. Board of Education*,[13]

10. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

11. *See* Freeman v. Pitts, 503 U.S. 467, 490 (1992) (stating that "[r]eturning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system"); Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 389 (1992) (stating that "[f]ederal courts may not order States or local governments, over their objection, to undertake a course of conduct not tailored to curing a constitutional violation that has been adjudicated").

12. I have explored this point at some length in *Brzonkala v. Virginia Polytechnic Institute*, 169 F.3d 820, 889 (4th Cir. 1999) (Wilkinson, C.J., concurring), *aff'd sub nom.* United States v. Morrison, 529 U.S. 598 (2000).

13. 347 U.S. 483 (1954).

Reynolds v. Sims,[14] *Gideon v. Wainwright*,[15] and *New York Times v. Sullivan*,[16] have achieved a place of great respect and permanence within our jurisprudence. Other cases, however, seem to reflect little more than the siren calls of the 1960s.

I suspect that history will regard many of the interventions of the Rehnquist Court as reflecting less of a predetermined substantive agenda and more of a structural approach to constitutional adjudication. In strictly political terms, the invalidation of federal enactments under the present Supreme Court is not easily characterized. The subject matter of the cases is disparate, the nature of the statutes eclectic, the lineups of the litigants varied, with even the states themselves ironically supporting in many instances the exercise of federal power. For example, the Rehnquist Court has heard cases involving the Indian Commerce Clause,[17] the Gun Free School Zones Act,[18] the Religious Freedom Restoration Act,[19] the Age Discrimination in Employment Act,[20] the Americans With Disabilities Act,[21] the Fair Labor Standards Act,[22] the Violence Against Women Act,[23] the Patent and Trademark Acts,[24] the Low-Level Radioactive Waste Policy Amendments Act,[25] and the Brady Handgun Violence Protection Act.[26] It is possible to charge, of course, that the Justices simply took personal umbrage at one or all of these congressional enactments. But I think there is something more principled at work. The Court's approach to these cases has been that of a structural referee, not an ideological combatant.

The decisions of the present Court thus appear to reflect less of a fidelity to an agenda or a desired outcome than they do to the textual and structural dictates of the Constitution. The

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14. 377 U.S. 533 (1964).
15. 372 U.S. 335 (1963).
16. 376 U.S. 254 (1964).
17. Seminole Tribe v. Florida, 517 U.S. 44 (1996).
18. United States v. Lopez, 514 U.S. 549 (1995).
19. City of Boerne v. Flores, 521 U.S. 507 (1997).
20. Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).
21. Bd. of Trustees v. Garrett, 531 U.S. 356 (2001).
22. Alden v. Maine, 527 U.S. 706 (1999).
23. United States v. Morrison, 529 U.S. 598 (2000).
24. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999).
25. New York v. United States, 505 U.S. 144 (1992).
26. Printz v. United States, 521 U.S. 898 (1997).

Court believes, correctly I think, that the Constitution assigns it a modest role in ensuring that the grand design of our government does not get hopelessly out of balance. As a textual matter, the proposition that regulable commerce must mean something short of everything is hardly debatable. So too is the proposition that the term "enforce" in Section Five of the Fourteenth Amendment entrusts Congress with broad but still finite powers. The enumeration of and limitations upon federal power and the numerous references to state authority in our founding document must have entrusted the Supreme Court with at least some role in striking the balance of dual sovereignties. To contend the Supreme Court has no role as a textual interpreter or as a structural referee is almost to say that *Marbury v. Madison*[27] doesn't exist.

Of course, judicial deference to the efforts of the coordinate federal branches is not only appropriate but essential. Yet the Constitution functions not only as a guarantor of rights. It also sets forth the basic blueprint of American government. Must not the Supreme Court, as the ultimate interpreter of the Constitution, play some role in ensuring structure as well as in preserving rights? Indeed, the Framers were convinced that the diffusion of power between the federal government and the states served to guarantee rights in and of itself. Thus constitutional structure and constitutional rights cannot be viewed as antithetical. Referring in *Federalist 51* to "the compound republic of America," Madison wrote that "the power surrendered by the people, is first divided between two distinct governments." Because "[t]he different governments will control each other" in addition to controlling themselves through the separation of powers, "a double security arises to the rights of the people."[28]

The efforts of the Rehnquist Court to make good on the Framer's structural vision of government does not merit the criticism that is presently being directed at it. The argument has been made by able scholars that the safeguards of structure should be fundamentally political and that the states are more than capable through their representatives of fending for themselves.[29] It is contended, for example, that individuals are

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27. 5 U.S. (1 Cranch) 137 (1803).

28. THE FEDERALIST NO. 51, at 264 (James Madison) (Garry Wills ed., 1982).

29. *See generally* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL

powerless and need the Court's assistance while the states are actually represented within the councils of the federal government. The Court appears to have rejected this argument on two different grounds. The first is textual. To enforce certain provisions of the Constitution against legislative authority (the Bill of Rights) and to decline to enforce others (the Commerce Clause and Section Five) is difficult to justify when both sets of provisions are integral parts of the same legal text.[30] The second ground is simply historical. It is doubtful, to say the least, that many states would have joined the national Union if Congress had been given the unfettered right to subject their treasuries to private suit.[31] Such a textual and historical approach to law is the antithesis of a headstrong course of judicial activism, which makes the vehemence of some of the Court's critics all the more puzzling.

II

The critique of the present Supreme Court is not just that it practices boundless conservative activism. The critique has a second component as well. It is that the present Supreme Court's commitment to federalism is really nothing more than a doctrine of convenience. The charge is made that federalism will be discarded soon enough when it suits the Court's purposes to do so. The Supreme Court's ruling in *Bush v. Gore*[32] engendered disillusionment not only among those disappointed by the political outcome but also among others who, as E.J. Dionne, Jr. said, were dismayed that the Justices "chose to intrude in Florida's election process having always claimed to be champions of the rights of states."[33]

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).

30. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 519 (1997) ("In assessing the breadth of § 5's enforcement power, we begin with its text. Congress has been given the power 'to enforce' the 'provisions of this article,' . . . not the power to determine what constitutes a constitutional violation.").

31. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 716 (1999) ("The leading advocates of the Constitution assured the people in no uncertain terms that the Constitution would not strip the States of sovereign immunity.").

32. 531 U.S. 98 (2000).

33. E.J. Dionne, Jr., *So Much for States' Rights*, WASH. POST, Dec. 14, 2000, at A35.

It is true that the Court has not consistently ruled in favor of federalism. Indeed, it has rejected federalism arguments in a wide variety of cases. In fact, in many of these cases, the Court was quite correct to do so. One need look no farther than the 1999–2000 term of the Court to understand that federalism arguments did not always carry the day.[34] For example, the Court struck down a Massachusetts statute prohibiting state entities from buying goods or services from companies doing business with Burma,[35] a Washington state statute permitting visitation rights for grandparents,[36] a California provision allowing primary voters to cast a ballot for candidates regardless of the voter's or the candidate's party affiliation,[37] and a Hawaii statute excluding certain non-native Hawaiians from voting in a special election.[38]

The dissenting Justices made much of the fact that the Court was invoking constitutional provisions to restrict the prerogatives of the states. In *California Democratic Party v. Jones*, which struck down California's blanket open primary, Justice Stevens criticized the majority opinion written by Justice Scalia for failing to recognize that "[a] State's power to determine how its officials are to be elected is a quintessential attribute of sovereignty."[39] Justice Stevens would have upheld the law at issue because "principles of federalism require us to respect the policy choice made by the State's voters in approving Proposition 198."[40] In *Geier v. American Honda Motor Co.*, a majority of the Court held that federal transportation regulations preempted a District of Columbia tort action alleging defective design of an automobile for failure to equip the car with a driver's side airbag.[41] Justice Stevens, joined by Justices Souter, Thomas, and Ginsburg, dissented. "[T]he Supremacy Clause," Stevens wrote, "does not give unelected federal judges

34. The discussion of case law in this and the following paragraph comes from my examination of the nature of the Court's commitment to federalism in J. Harvie Wilkinson III, *Federalism for the Future*, 74 S. CAL. L. REV. 523 (2001) (The 2000 J. Lester W. Roth Lecture).

35. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

36. Troxel v. Granville, 530 U.S. 57 (2000).

37. Cal. Democratic Party v. Jones, 530 U.S. 567 (2000).

38. Rice v. Cayetano, 528 U.S. 495 (2000).

39. 530 U.S. at 590.

40. *Id.* at 591.

41. 529 U.S. 861 (2000).

carte blanche to use federal law as a means of imposing their own ideas of tort reform on the States."[42]

What are we to make of this criticism that the Court's majority runs hot and cold on federalism? Like the earlier critique of boundless conservative activism, this latter point misses the mark. It should not surprise us that federalism is a complex theory.[43] In many instances, the Court's allegiance to federalism has clashed with other constitutional values, such as the Court's commitment to mediative institutions discussed in the next section. That does not mean, however, that the Court's fealty to federalism is expedient. The outcomes of any Court's decisions cannot all be expected to fall on one side or the other of the federalism divide. It should suffice to note that the landmark decisions of the Rehnquist Court such as *United States v. Lopez*,[44] *Seminole Tribe v. Florida*,[45] *City of Boerne v. Flores*,[46] *United States v. Morrison*,[47] *Alden v. Maine*,[48] *Kimel v. Florida Board of Regents*,[49] and *Board of Trustees of the University of Alabama v. Garrett*,[50] among many others, have vindicated federalism as an important constitutional value. This vindication is not a plunge off the constitutional cliff, à la *Thelma and Louise*. Rather, it seems a modest and necessary corrective after years of jurisprudence in which the doctrine of dual sovereignty had precious little place.

The current trend does not pose any threat to such basic premises of constitutional law as the binding effect of the Bill of Rights upon the states, or to the constitutional underpinnings of our most basic national civil rights statutes. Intervention carried that far would disrespect the fundamental primacy of democratic governance. Thus, the critics are correct to warn that there may come a point where the Court's invalidation of congressional enactments in the name of the states will have proceeded too far. That a sense of alarm should develop, how-

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42. *Id.* at 894.

43. For a stimulating debate on the theory of federalism, see Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001), and Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001).

44. 514 U.S. 549 (1995).

45. 517 U.S. 44 (1996).

46. 521 U.S. 507 (1997).

47. 529 U.S. 598 (2000).

48. 527 U.S. 706 (1999).

49. 528 U.S. 62 (2000).

50. 531 U.S. 356 (2001).

ever, over the Court's modest corrective action on behalf of the states' rightful place in our federal system of government has been yet another disappointing development.

III

In short, the various critiques of the present Court's work are missing something quite important. In attempting to depict the present Court as just another activist body, and to impeach its commitment to federalism, the critics are denying its distinctive contributions. There is an important thread in the Rehnquist Court's jurisprudence that the critics of the Court have quite missed.

The constitutional vision of the Warren and Burger Courts was a binary one. On one level, there was a commitment to a sweeping and virtually limitless national power. On the second level, there was an equally firm commitment to the recognition of new individual rights.

The binary vision of the Warren and Burger Courts was thus simultaneously nationalized and atomized. Fundamental solicitude was accorded the largest and the smallest elements of our national life. Granted that national powers and individual rights are both essential and important, the problem with the Warren and Burger Courts' vision was an absence of attention to the intermediate levels of America—to our mediative institutions, both public and private, to the vast constitutional in-between. For a healthy social fabric must obviously possess strong mediative institutions, so named because they essentially mediate between the otherwise isolated individual and the rather awesome and remote array of national institutions. Shorn of these mediative institutions, a society becomes a less stable, less vital, and less nurturing place.

What then are these mediative institutions? And how are they important for our future? In a public sense, the mediative and intermediate institutions are our state and local governments. And it is precisely because of the growing dominance of national and international forms of governance that they become important for our future. The development of national institutions and global enterprises does not lessen the importance of state and local governments. If anything, it makes them all the more necessary. The very impersonality of global trends and national bureaucracy will leave state and local governments among the few places where a sense of civic connec-

tion with governing institutions can still be felt. There is another more important reason why state and local governments have a fresh twenty-first century relevance. "States' rights" has historically been a rallying cry for those opposed to racial integration. In view of the advancements made in civil rights over the last half of the twentieth century, however, some entrustment of race relations to state and local governments may now further racial progress. By the year 2050, America will have no racial or ethnic majority. I have noted elsewhere that:

> This unprecedented racial diversity is a true blessing, but the dangers that accompany diversity are also not far off. It is fair to predict that voids in the life of our increasingly diverse nation will be filled by incessant appeals to the politics of ethnicity and race. National symbols and enterprises are often too remote to compete with this impulse to racial or ethnic exclusivity.
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> Shifting responsibility to smaller units of government, however, may help to replace racial loyalties with civic ones. Local, not national, government permits a community to work on common concerns, such as improving schools or simply enhancing livability. Micro-allegiances to state, local and community enterprises are the ones that will most effectively compete in the next century with appeals to ethnicity and race.[51]

Our mediative institutions, however, are not only public; they are private as well. In addition to state and local government, the family, the church, the political party, and innumerable civic groups and associations lend meaning and substance to American life. Thinkers as diverse as Alexis de Tocqueville[52] and Plunkitt of Tammany Hall[53] have celebrated the role of these institutions in our society. But, alas, many of the most famous celebrants were nineteenth century figures.

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51. J. Harvie Wilkinson III, *Fear of Federalism*, WASH. POST, Nov. 26, 1999, at A45.

52. As illustrated in ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (J.P. Mayer ed., Anchor Books 1969) (1848).

53. As illustrated in WILLIAM L. RIORDON, PLUNKITT OF TAMMANY HALL, A SERIES OF VERY PLAIN TALKS ON VERY PRACTICAL POLITICS, DELIVERED BY EX-SENATOR GEORGE WASHINGTON PLUNKITT, THE TAMMANY PHILOSOPHER, FROM HIS ROSTRUM—THE NEW YORK COUNTY COURT-HOUSE BOOTBLACK STAND—AND RECORDED BY WILLIAM L. RIORDON (McClure, Phillips & Co. 1905).

Beginning with the 1960s, the role of mediative institutions was sometimes eclipsed by radical assertions of rights. Individual rights and entitlements are an important and cherished part of our American tradition, but can they not also coexist with a commitment to institutional well-being? The strength of communal institutions need in no way presuppose the diminution of individual creativity and fulfillment. Historically, individualism and communitarianism have worked hand-in-glove. From the founding period of our Republic, self-realization and communal welfare have been viewed as interlocking, and it is an act of modern hubris to portray them as primal antagonists in the social order.

Am I simply talking policy,[54] or is this vision constitutionally grounded? I would suggest that the commitment to mediative institutions and to the intermediate layers of American life has a strong constitutional grounding. The United States Constitution references many strong commitments not only to national power, but also to the role of states. Article I bases representation in Congress on the states; Article II, Section One directs that each state shall appoint electors in presidential elections; Article IV, Section Four guarantees states a republican form of government; Article V incorporates the states as well as Congress into the constitutional amendment process; the Tenth Amendment reserves to states powers not delegated to the national government; and the Eleventh Amendment grants states immunity from certain private suits in federal court.

Such references to the role of sovereign states are well known, but there is also a constitutional underpinning for the role of civic associations. The freedom of association protected by the First Amendment[55] and the Free Exercise Clause both serve to reinforce the role of private mediative institutions in national life. And a key concept of both First Amendment associative and free exercise rights has been simply this: organizations, as well as individuals, possess constitutional rights.

The Court has explicitly referenced the rights of organizations, not only individuals, to speak and to choose. For example, in *Boy Scouts of America v. Dale* the Supreme Court upheld the right of the Boy Scouts to determine who could be a

54. *See* Jeffrey Rosen, *Federal Offense*, NEW REPUBLIC, Apr. 9 & 16, 2001, at 24.

55. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

scout leader.[56] The Court held that "[g]overnment actions that may unconstitutionally burden this freedom may take many forms, one of which is 'intrusion into the internal structure or affairs of an association.'"[57] Imposing governmental preferences on an organization's membership practices may, said the Court, "impair the ability of the group to express those views, and only those views, that it intends to express."[58] In *California Democratic Party v. Jones*, the Court fortified the role of political parties by voiding California's blanket primary law, which would have allowed individuals unaffiliated with the party to help select the party's nominee.[59] The Court explained that "[i]n no area is the political association's right to exclude more important than in the process of selecting its nominee."[60]

It is not simply the collective rights of civic associations and political parties that the Court has recognized. The Supreme Court has traditionally been solicitous of the right of religious organizations to make their own decisions, most especially in matters of faith and doctrine. In *Serbian Eastern Orthodox Diocese for the United States and Canada v. Milivojevich*, the Court held that the judiciary must accept such ecclesiastical determinations.[61] The Court stated: "'To permit civil courts to probe deeply enough into the allocation of power within a [hierarchical] church so as to decide . . . religious law [governing church polity] . . . would violate the First Amendment in much the same manner as civil determination of religious doctrine.'"[62] Similarly, in *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in North America*, the Court struck down a New York law that attempted to transfer power from one church hierarchy to another.[63] The Court stated: "Legislation that regulates church administration, the operation of the churches, [and] the appointment of clergy" is constitutionally invalid.[64] These decisions take seriously the

56. 530 U.S. 640 (2000).

57. *Id.* at 648 (quoting Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984)).

58. *Id.*

59. 530 U.S. 567 (2000).

60. *Id.* at 575.

61. 426 U.S. 696 (1976).

62. *Id.* at 709 (quoting Md. & Va. Churches v. Sharpsburg Church, 396 U.S. 367, 369 (1970) (Brennan, J., concurring)).

63. 344 U.S. 94 (1952).

64. *Id.* at 107.

role of private mediative institutions as influential forces in shaping American society.

The Rehnquist Court has expanded upon *Milivojevich* and *Kedroff*. Religious organizations enjoy First Amendment rights under the Free Speech as well as the Free Exercise Clause. Just recently, in *Good News Club v. Milford Central School*, the Court held that the school's exclusion of a private Christian Bible-study organization for children ages six to twelve violated the "Club's free speech rights and that no Establishment Clause concern justifies that violation."[65] And *Good News Club* was merely the culmination of a trend holding that the exclusion of religious organizations from access to school facilities[66] or funding[67] constitutes impermissible viewpoint discrimination.

The above decisions recognized a constitutional right for mediative institutions, but the Rehnquist Court has also, on occasion, protected these same institutions against constitutional assault. For instance, in *Mitchell v. Helms* the Court rejected constitutional attacks against state supplemental aid to religious schools.[68] Of course the Court was careful not to embrace wholeheartedly the proposition that *all* direct public funding to educational institutions would pass constitutional muster. Nevertheless, the point remains.

The Court has upheld the collective right against constitutional challenge in the more intimate context of the family as well. In *Troxel v. Granville*, the Supreme Court bolstered the right of parental decision making by nullifying a Washington state law that gave grandparents the statutory right to visit their grandchildren, even over the objection of the parents.[69] Here, the Fourteenth Amendment, rather than the First Amendment, provided the substantive parental right at stake. Indeed the Court stated that "[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."[70] The Court also stated: "[T]here will normally be no reason for the State to in-

65. 533 U.S. 98, 102 (2001).

66. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

67. Rosenberger v. Rector of Univ. of Va., 515 U.S. 819 (1995).

68. 530 U.S. 793 (2000).

69. 530 U.S. 57 (2000).

70. *Id.* at 65.

ject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."[71]

In many cases, the Court's commitment to mediative institutions has trumped its commitment to federalism. Indeed, it was the attempt of state and local governing bodies to regulate the Boy Scouts, political party primaries, and the use of school facilities that the Court found unconstitutional. In this respect then, the Court has proved more solicitous of states' rights vis-a-vis the Congress than of states' rights vis-a-vis the Court itself.

Is the Court's commitment to mediative institutions part of a larger pattern of unjustifiable conservative activism? Is the recognition of rights for civic organizations like the Boy Scouts, major and minor political parties, religious clubs and churches, and the family constitutionally out of bounds? I do not believe it is. The rights of mediative institutions are most comfortably located in the First, rather than the Fourteenth Amendment. It is difficult to contend that the First Amendment does not embrace a right of association, a right to collective as well as personal expression, and a right to communal as well as individual religious exercise. If the Fourth and Fourteenth Amendments are held to protect rights of privacy and autonomy, cannot the First be held to safeguard, at least in part, the integrity of institutions and organizations? If the Fourteenth Amendment is held to protect our most intimate, solitary, and isolated selves, cannot the First protect our most communal impulses? Of course, the First Amendment is among the foremost guarantees of our individual right to disassociate, to express the most heretical and unsettling thought. But that is not its only function. To recognize, as the Rehnquist Court has, that the First Amendment protects some right of communal being and expression seems a faithful approach to constitutional intention.

The constitutional rights recognized for intermediate institutions can hardly be unqualified. To recognize broadly an associational right in all private, non-religious organizations would fall into the old *Lochner* trap of invalidating democratic authority at both the national and state levels. It would likewise trespass upon core exercises of congressional power under

71. *Id.* at 68–69.

the Commerce Clause and Section Five of the Fourteenth Amendment. For that reason, the right asserted by mediative institutions must be closely tied to the expressive activity protected by the First Amendment, and subject to compelling public interests.[72] When the nexus to expressive activity is weak, the Court will probably be reluctant to extend the *Dale* decision.[73]

However, the jurisprudence in this area is anything but simple. One need only recognize the conflict between a Burger Court case such as *Wisconsin v. Yoder*, which recognized, as a matter of First Amendment right, the prerogative of the Amish religious community to educate children outside of the public system,[74] and *Employment Division, Department of Human Resources v. Smith*, a Rehnquist Court case which held that religious institutions had an obligation to obey laws of neutral applicability.[75] And finally, in *City of Boerne v. Flores*, it was Congress that passed the Religious Freedom Restoration Act, and the Court that struck it down.[76]

IV

We return then to the basic subject of our inquiry. Is there a modern conservative activism? The answer to this question has to be yes. As the critics have noted, the Rehnquist Court has invalidated a rather large number of legislative enactments—at least twenty-four acts of Congress have been struck down in a recent six year span.[77] This is a significant figure. It serves to underscore the danger that activism may get out of hand.

Judicial activism can be heady wine. The act of instructing coordinate branches on their constitutional obligations can become the all too exhilarating exercise of those who occupy the bench. The abiding premise of America is democratic. The limitation on the Court remains its lack of popular accountability. Prior eras of judicial intervention into the affairs of the political branches have met with significant historical disfavor. If

72. *See* Boy Scouts v. Dale, 530 U.S. 640, 648–650 (2000).
73. *See, e.g.*, Roberts v. United States Jaycees, 468 U.S. 609 (1984).
74. 406 U.S. 205 (1972).
75. 494 U.S. 872 (1990).
76. 521 U.S. 507 (1997).
77. Walsh, *supra* note 4, at A7.

the present era, for example, were to become an all-out judicial war against civil rights legislation and environmental regulation, then the Court itself would suffer the same fate.

Though the greater virtue often lies with judicial restraint, there is nonetheless a value to contemporary conservative activism. Modern conservative jurisprudence is not only different from the activism of prior eras; it is making unique contributions of its own. As I have indicated, those contributions are three in number.

The first great contribution is a renewed attention to the structural dictates of the American Constitution. For too long questions of structure have been a matter of judicial neglect. The powers of Congress were seen as virtually unlimited, and the prerogatives of the states were viewed as virtual nullities. Contemporary conservative activism has corrected that, and it has restored a semblance of meaning to the doctrines of enumerated powers and dual sovereignty.

Related to the renewed emphasis on structuralism is a renewed emphasis on federalism. This second contribution of conservative activism was also overdue. The notion that states could serve as useful laboratories in our federal system was long given little more than lip service. That has now changed. The Rehnquist Court has helped to restore the constitutional compact between the nation and the states and to revive respect for the operations of state government. Prior to the Rehnquist Court, courses in constitutional law often reflected an assumption that the Bill of Rights was the only meaningful part of the American charter. The Rehnquist Court's renewed emphasis on structuralism and federalism should bring about a healthier balance.

The third significant contribution is, as I have noted, the renewed commitment to the role of intermediate institutions in our civic life. Again, the picture is not altogether simple or unqualified. At times the claims of public and private mediative institutions are themselves in conflict. But the trend on the Court toward recognizing and reaffirming the role of important intermediate institutions in American life is clear. Of course, states and localities, civic associations and political parties, the church and the family perform vastly different functions. Nevertheless, all these institutions help and assist individuals in finding their way in this bewildering world. Through these institutions, individuals contribute to and sustain the larger social good. These institutions should no longer be constitutional

stepchildren. Respect for them restores an element of our constitutional vision that has been lacking for too long.