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**JUDICIAL ACTIVISM AND
CONSERVATIVE POLITICS**

ERNEST A. YOUNG*

INTRODUCTION

It is very much in vogue these days to accuse the current Rehnquist Court of “conservative judicial activism.”¹ Cass Sunstein asserts that “[w]e are now in the midst of a remarkable period of right-wing judicial activism.”² “For nearly a decade,” Larry Kramer warns, “the court’s five conservative justices have steadily usurped the power to govern by striking down or weakening federal and state laws regulating issues as

* Assistant Professor of Law, University of Texas at Austin. This essay was presented at the *Conservative Judicial Activism Conference*, sponsored by the Byron R. White Center for the Study of American Constitutional Law and the University of Colorado Law Review on Oct. 19–20, 2001. I am grateful to Robert Nagel for organizing the symposium and inviting me to participate and to my fellow panelists for their insights. I am also grateful to the University of Chicago Law School chapter and the Faculty Section of the Federalist Society for opportunities to present preliminary versions of these ideas, to Randy Barnett, Bill Marshall, Cass Sunstein, and Adrian Vermeule for their helpful comments at those panels, to Doug Laycock, H.W. Perry, and Scot Powe for insights on prior drafts, and to Vincent Starzinger, who first introduced me to conservative political theory. Finally, I am indebted as always to Allegra Young for tolerance and inspiration.

1. See, e.g., Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1092 (2001) (“[The Warren Court’s] judicial activism has been replaced with one much harsher and more conservative, protecting state governments from civil rights plaintiffs, state officers from federal regulatory mandates, property owners from environmental regulation, and whites from affirmative action.”); Peter M. Shane, *Federalism’s “Old Deal”: What’s Right and Wrong with Conservative Judicial Activism*, 45 VILL. L. REV. 201 (2000). This sort of criticism has been going on for over half a decade. See, e.g., Linda Greenhouse, *Farewell to the Old Order in the Court: The Right Goes Activist and the Center is a Void*, N.Y. TIMES, July 2, 1995, Week in Review, at 1.

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

varied as gun sales, the environment, and patents—as well as laws protecting women and now the disabled.”³

The accusation is relevant not only to the legal academy’s professional obligation (and favorite spectator sport) of criticizing the Court’s work product, but also to contemporary political debates about the selection and confirmation of federal judicial nominees.⁴ In both contexts, the gravamen of the charge is not simply that the Court is getting things wrong on the merits, but that it has somehow overstepped its institutional role. The Court’s critics in the political arena use this point to justify more searching scrutiny of Republican judicial nominees than might otherwise be thought legitimate.⁵ In the academy, the charge of activism has sometimes amounted to liberal “pay-back” for conservative attacks on the Warren Court;⁶ for more right-leaning academics committed to judicial restraint, the current debate raises the question whether an “activist” court can truly be “conservative” at all.⁷ As both the academic and political debates become increasingly acrimonious and destructive,⁸ it is worth trying to sort out what “conservative judicial activism” really means.

3. Larry D. Kramer, *The Supreme Court v. Balance of Powers*, N.Y. TIMES, Mar. 3, 2001, at A13 [hereinafter Kramer, *The Supreme Court*]; see also Larry D. Kramer, *No Surprise. It's an Activist Court*, N.Y. TIMES, Dec. 12, 2000, at A33 [hereinafter Kramer, *No Surprise*].

4. See, e.g., *Should Ideology Matter? Judicial Nominations 2001: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary* (June 26, 2001), available at <http://www.senate.gov/~judiciary/oldsite/hr062601sc.htm>.

5. See, e.g., Simon Lazarus, *Don't Be Fooled. They're Activists Too*, WASH. POST, June 3, 2001, at B3; Sunstein, *Tilting the Scales*, *supra* note 2, at A23. I have no wish to take a position here on what is the appropriate level or focus of scrutiny for judicial nominees. The point is that many participants in the process seem to perceive the Senate’s current approach as unusual, and that perceived departure tends to be defended as a response to “activism.”

6. William Marshall’s primary objection to the Rehnquist Court’s “activism,” for example, seems to be the “unbridled hypocrisy” of that record in light of conservative attacks on the Warren Court. See William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1244–45 (2002).

7. For an earlier example of an attack on rightward activism by an advocate of judicial restraint, see ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 223–40 (1990).

8. For the overheated tone of the academic debate, see, e.g., Balkin & Levinson, *supra* note 1, at 1109 (asserting that “five Justices [in *Bush v. Gore*] fundamentally betrayed their oaths of office”); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 291 (2000) (asserting that the Justices’ “willingness to wade blindly into the complex processes of government, wielding the power of review as if they knew

Neither "conservative" nor "judicial activism," however, is easy to define. We might define "activism" in any number of different ways by focusing on a court's willingness to strike down laws, to depart from the authority of text, history, and/or precedent, to announce sweeping rules or reach out to decide issues not properly before the Court, or to impose intrusive remedial orders on political actors. Each of these judicial behaviors comports with our intuitive sense of judicial "activism," yet often these different definitions will cut in opposing directions when we try to use them to describe actual rulings. This fact makes the term readily manipulable, with the result that participants in both academic and political debates generally use "judicial activism" as a convenient shorthand for judicial decisions they do not like.

Nonetheless, I want to resist the conclusion that the term is inherently empty.⁹ "Activism" is a helpful category in that it focuses attention on the judiciary's institutional role rather than the merits of particular decisions. Its usefulness depends, however, on the recognition that while we may plausibly describe different *aspects* of judicial acts as either "activist" or "restrained," such terminology will rarely yield persuasive on-balance characterizations of decisions, much less of particular judges or courts.

"Conservative" raises equally difficult problems of definition. I have argued in earlier works that what generally passes for conservative jurisprudence in America today has little to do with conservatism's philosophical roots in Eighteenth Century British political theory.¹⁰ Attention to conservative political theory reveals that "conservatism" might be used in at least three different senses relevant to judicial behavior. "Political" conservatism denotes the substantive valence of judicial results on the merits. "Institutional" conservatism, on the other hand,

processes of government, wielding the power of review as if they knew the consequences of what they were doing, is reckless in the extreme"). On the confirmation mess, see, e.g., Jeffrey Rosen, *Obstruction of Judges*, N.Y. TIMES MAGAZINE, Aug. 11, 2002, at 38 ("The confirmation process for federal judges is in something of a meltdown. Appellate nominations are now provoking a level of partisan warfare that used to be reserved for the Supreme Court.").

9. See, e.g., Randy E. Barnett, *Is the Rehnquist Court an "Activist" Court? The Commerce Clause Cases*, 73 U. COLO. L. REV. 1275, 1275-76 (2002) (stating that he avoids the term based on the belief that it is "generally empty").

10. See Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619 (1994) [hereinafter Young, *Rediscovering Conservatism*].

focuses on the appropriate locus or method of decision making in our political system. Finally, "situational" conservatives are primarily concerned with preserving existing institutions against the threat of radical change, regardless of the nature of the underlying institutions or the proposed changes to them. These different kinds of conservatism yield different perspectives on what amounts to appropriate judicial behavior. Depending on the definitions one adopts, "conservative judicial activism" may or may not be an oxymoron.

This essay has two parts. Part I explores the problems inherent in defining "judicial activism." As the other essays in this Symposium illustrate, many definitions are possible. Most of these definitions are helpful in focusing our attention on one or another institutional aspects of judicial decision making—a focus that is at least somewhat independent of the merits of individual cases. Because I find that focus useful, I seek to retrieve "activism" as a useful descriptor from those who would use it (or discount it) as a mere epithet signifying nothing more than disagreement with particular judicial outcomes. To do that, I must drain "activism" of much of its direct normative significance; one cannot draw normative conclusions from a diagnosis of "activism" or "restraint" without first developing a normative theory of the appropriate role of courts in our system. I also suggest that most interesting decisions are "activist" in some ways and "restrained" in others; as a result, we generally cannot characterize particular decisions, judges, or courts as "activist" or "restrained" on balance.

Part II turns to the nature of conservatism and its implications for the judicial role. I acknowledge three different sorts of "conservative" politics—situational or "Burkean," political, and institutional—although I argue that "conservatism" should generally be understood in the Burkean sense. Each of these positions has different implications for judicial review and the appropriateness of "judicial activism." I conclude that the most appealing position, the Burkean view of conservatism, supports a stronger institutional role for the courts than we generally associate with conservative politics. On this view, "conservative judicial activism" is neither an oxymoron nor—dare I say it—such a bad thing at all.

I. WHAT IS "JUDICIAL ACTIVISM"?

Debates about the law frequently involve charges of "judicial activism," but those charges are rarely accompanied by an attempt to define the term with any sort of precision.¹¹ There is a reason for that: it's awfully hard to do. Section A identifies six different categories of judicial behavior that may reasonably be characterized as "activist," and others have offered similarly compendious lists.¹²

I argue in Section B that the different categories of behaviors generally identified as "activist" in legal debates share a common thread, that is, the assertion of broad judicial decision making autonomy in relation to other actors in the system. These actors may include the federal political branches, state governments, the framers and ratifiers of the Constitution, or other courts that have decided similar issues in the past or that may be called upon to do so in the future. Used in this way, "activist" and "restrained" lack any normative content apart from some institutional theory about the appropriate judicial role relative to these other actors. I also argue that these issues of institutional role should be assessed separately from the merits of particular legal decisions.

Section C confronts a critical difficulty that plagues debates about judicial activism. Because activism may take so many different forms, most cases worth thinking and arguing about can be characterized as "activist" in some ways and "restrained" in others. A given decision may be "restrained," for example, in the sense that it refrains from striking down a state statute but "activist" in that the court must depart from prior precedent in order to do so. This suggests that words like "activist" and "restrained" will be useful primarily to discuss particular aspects of decisions; on-balance assessments, however, will be difficult. To the extent that this is true of individual decisions, moreover, it raises even more serious difficulties in assessing the overall record of the Supreme Court over a particular period of time.

11. Several of the essays in this symposium are helpful exceptions to this norm. See, e.g., Marshall, *supra* note 6, at 1219–21.

12. See Marshall, *supra* note 6, at 1219–20 n.11; The Senate Judiciary Committee, Judicial Nominee Questionnaire (on file with Professor William Marshall) [hereinafter Senate Questionnaire].

Despite these difficulties, I insist in Section D that judicial “activism” is not just an epithet—or at least that it does not *have* to be. Properly used, “activism” and “restraint” focus us on the institutional aspects of judicial decisions, apart from the merits, and this focus will be useful from time to time. We will not get far, however, unless we move past general definitions of “activism” and “restraint” to more particularized manifestations of each—such as the pros and cons of *stare decisis* or judicial minimalism. Unfortunately, most contemporary attacks on the Supreme Court for its “activism” attempt no such precision.

Finally, Section E evaluates one particularly innovative and provocative approach to “activism”: Michael Stokes Paulsen’s idea of “activist judicial restraint.”¹³ In Professor Paulsen’s view, a court is “activist” whenever it refuses—for various reasons traditionally associated with “judicial restraint”—to act upon its “first best” interpretation of the Constitution or a statute.¹⁴ Although I remain ultimately unpersuaded by Professor Paulsen’s characterization, I find this idea helpful in clarifying the issues that are at stake in debates about “activism” and “restraint.”

A. *The Many Faces of Activism*

In this introductory Section, I survey six broad categories of judicial behavior that probably strike most of us as “activist” in some ways:

- (1) second-guessing the federal political branches or state governments;
- (2) departing from text and/or history;
- (3) departing from judicial precedent;
- (4) issuing broad or “maximalist” holdings rather than narrow or “minimalist” ones;
- (5) exercising broad remedial powers; and
- (6) deciding cases according to the partisan political preferences of the judges.¹⁵

13. Although Professor Paulsen’s argument was originally propounded as part of this Symposium, it is being published elsewhere. See Michael Stokes Paulsen, *Activist Judicial Restraint* (2002) (unpublished manuscript prepared for this symposium).

14. See *id.*

15. This list is almost identical to Professor Marshall’s “Seven Deadly Sins of Judicial Activism,” with the obvious difference that his addition of a seventh category makes for a catchier title. The Marshallian “sin” that I have omitted is

These behaviors, I suggest, are linked by a common thread: they all involve a refusal by the court deciding a particular case to defer to other sorts of authority at the expense of its own independent judgment about the correct legal outcome.¹⁶ Each sort of behavior, then, tends to increase the significance of the court's own institutional role vis-à-vis the political branches, the Framers and Ratifiers of the Constitution, or other courts deciding cases in the past or in the future.

As I argue in Section C, this particular institutional aspect of judicial decision making will often be important, and it is useful to have terms like "activism" and "restraint" that focus our attention upon it. For that reason, my discussion of the various definitions of activism tends to resist variants of those definitions that would collapse the "activism" issue into discussions of whether or not the court decided the case correctly on the merits. More broadly, one purpose of attempting to bring more precision to debates about "activism" is to recover that term from those who have used it primarily as an epithet to denote results that they do not like. Indeed, a byproduct of identifying the extremely broad range of judicial activity that may reasonably be considered "activist" in some sense is to suggest that activism cannot always be a bad thing.

1. Activism and the Power of Judicial Review

Judge Posner has defined judicial activism as a court's failure to defer to decisions made by the political branches of the federal government or to the decisions of state governments.¹⁷ The most dramatic instances of such activism, of course, involve courts' exercise of the power of judicial review—that is, the power to strike down laws on constitutional

"judicial creativity," defined as "the creation of new theories and rights in constitutional doctrine." See Marshall, *supra* note 6, at 1220. I have omitted it because I cannot think of an example that would not fit into one of the other categories.

16. As I discuss, the sixth category—decision according to partisan political preference—fits this description only in the somewhat broader sense that it represents a refusal to subordinate a judge's preference about the right result to his view of what the *law* requires. See *infra* notes 61–78 and accompanying text.

17. See RICHARD POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 320 (1996) ("[U]nless a court is acting contrary to the will of the other branches of government, it is not being 'activist' in the sense I should like to see become canonical.").

grounds.¹⁸ Implicitly or explicitly, discomfort with this sort of activism rests on Alexander Bickel's notion of the "countermajoritarian difficulty," which holds that in a majoritarian democracy, the courts' ability to countermand the majority's wishes is an aberrational feature requiring special justification.¹⁹

One virtue of Judge Posner's definition is that it is probably the easiest to measure empirically. At least if we confine ourselves to instances where political-branch decisions are actually struck down, we can simply count the number of invalidations. That is what a number of the Court's critics have done, observing that the Rehnquist Court has invalidated federal statutes at a far higher rate than its predecessors.²⁰ By this measure, as Adrian Vermeule has observed, the Rehnquist Court is the "Mahatma Gandhi of judicial activism."²¹

A court's refusal to defer to the political branches may also take a more subtle form. Rather than strike a statute down, a court may instead interpret it in a way that departs from the likely intent of its enacting legislature. As Michael Paulsen has rightly perceived,²² a court's use of canons of statutory construction—such as the canon that statutes should be inter-

18. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (striking down portions of the federal Violence Against Women Act); *Roe v. Wade*, 410 U.S. 113 (1973) (striking down various state abortion laws); see also POSNER, *supra* note 17, at 319–20 ("A decision overruling *Marbury v. Madison* would be wild stuff but it would be self-restrained in my terminology because it would reduce the power of the federal courts vis-à-vis the other organs of government.").

19. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–18 (1962); J. Harvie Wilkinson III, *Is There a Distinctive Conservative Jurisprudence?*, 73 U. COLO. L. REV. 1383, 1384 (2002).

20. See *id.* at 1398. Judge Wilkinson quotes former Solicitor General Seth Waxman's complaint that the Court invalidated twenty-four federal statutes in the six-year period between 1994 and 2000, as compared to only 128 federal invalidations in the Court's first two centuries. *Id.* (citing Stuart Taylor, Jr., *The Tipping Point*, NAT'L J., June 10, 2000, at 1810; Edward Walsh, *An Activist Court Mixes Its High-Profile Messages*, WASH. POST, July 2, 2000, at A6). Interestingly, these sorts of complaints rarely give comparative numbers on how many state statutes have been struck. It would be hardly surprising if the state law casualty rate for the Rehnquist Court were more in line with prior eras, such as the Warren Court period. Or it might not be; as I discuss in Section II.C, the Rehnquist Court has not been shy about invalidating state laws on traditional liberal grounds. In any event, the implicit judgment by the Court's critics—that federal invalidations are noteworthy, while state invalidations are not—has a strong ideological bias.

21. Adrian Vermeule, Remarks at Federalist Society panel on "Conservative Judicial Activism" at the University of Chicago Law School (Apr. 19, 2001).

22. See Paulsen, *supra* note 13.

preted in such a way as to avoid constitutional "doubts"²³—has much in common with the more widely-recognized "activism" involved when a court actually strikes down a law.²⁴ A number of respected scholars of statutory interpretation have made similar observations.²⁵

2. Departures from Text and History

Charges that a court exceeds its legitimate institutional role when it refuses to defer to the political branches are usually answered by appeal to a higher authority. The classic account of judicial review is thus that, when a court strikes down a legislative act, it acts not on its own authority but to enforce the People's will as embodied in the Constitution.²⁶ This defense of judicial review gives rise to a second definition of activ-

23. See, e.g., *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

24. We should distinguish for these purposes between the use of "descriptive" and "normative" canons of statutory interpretation. "Descriptive" canons are tools for resolving statutory ambiguity in ways that the enacting legislature—were the court able to ask it—would most likely intend. See, e.g., Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 563 (1992) (distinguishing between descriptive and normative canons). This sort of canon is a tool of deference to the legislature, not a form of judicial activism. My point in the text is concerned with normative canons, which are means by which judges push statutory construction in the direction of values derived from something other than the legislature's intent. See *id.*; Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743, 749 (1992) (stating that "normative canons may or may not coincide with legislators' values or intentions").

25. See, e.g., Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 807 (1983) [hereinafter Posner, *Statutory Interpretation*]; Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 74; see generally Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 380 (1989) ("As much as in constitutional interpretation, judicial interpretation of statutes raises a problem of legitimacy, i.e., justification for unelected and unrepresentative judges making law in a representative democracy."); Martin H. Redish, *Judge-Made Abstention and the Fashionable Art of "Democracy Bashing"*, 40 CASE W. RES. L. REV. 1023, 1025 (1990) (arguing that the tendency of judges to "manipulate or ignore legislative intent on the sub-constitutional level of statutory construction" is "[f]ar more pernicious to the values of popular sovereignty" than constitutional judicial review).

26. See, e.g., THE FEDERALIST No. 78, at 525 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 8–9 (1980); Thomas C. Grey, *Do We Have an Unwritten Constitution*, 27 STAN. L. REV. 703, 705 (1975); Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL'Y 5, 10 (1988).

ism as departures from the constitutional authority—whether it be text, structure, or history—that legitimated judicial power in the first place.²⁷

“Departures” in this formulation might mean either of two things: first, we might mean departure as a matter of *method*. A court’s use of any interpretive methodology other than textualism or originalism, in other words, would be “activist.”²⁸ We would not, under this version of the argument, be so concerned about the actual outcome of the textual or historical analysis—so long as it was conducted along the correct methodological lines. Neither the majority nor the dissent in the *Term Limits* case,²⁹ for instance, could be called activist since each opinion is steeped in the minutiae of constitutional history. The problem with this definition of activism is that it collapses the “activism” debate into longstanding debates about interpretive method. The label is appropriate, however, to the extent that participants in those earlier debates have always stressed institutional arguments about the role of courts.³⁰

27. See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3 (1971) (“[T]he Court’s power is legitimate only if it has . . . a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom. If it does not have such a theory but merely imposes its own value choices . . . the Court violates the postulates of the Madisonian model that alone justifies its power.”).

28. Critics employing this sort of definition of activism do not generally discuss how a court should choose *between* textualism and originalism when these two methods point in different directions. As I have discussed elsewhere, for example, the Court’s state sovereign immunity decisions have required the majority to abandon a methodology focused on the original understanding of the constitutional text in favor of a focus on broader historical understandings of structure. See Ernest A. Young, *Alden v. Maine and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601, 1617–24 (2000). This conflict cannot be resolved, as Professor Barnett seems to wish to do, by saying that the original understanding of the text does not *foreclose* the immunity recognized in *Seminole Tribe* and *Alden*. See Barnett, *supra* note 9, at 1277. The ordinary textualist default rule in cases where Congress is conceded to be employing an enumerated textual power—in *Seminole Tribe*, for example, the Indian Commerce Power—is that all actions falling within that power are permitted unless foreclosed by another textual provision. While we might challenge that default rule through historical understandings of structure and the like, we should understand that we have abandoned textualism in so doing.

29. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 789–93, 800–15, 819–26, 832–34 (1995) (collecting evidence on the original understanding of the Qualifications Clause and state power to regulate candidacy for federal office); *id.* at 884–916 (Thomas, J., dissenting) (considering similar evidence).

30. See, e.g., BICKEL, *supra* note 19, at 24–25 (stating that “[t]he search must be for a function which . . . is peculiarly suited to the capabilities of the

Second, we might also call "activist" any judicial decision that departs from the *correct* understanding of the constitutional text and history. This approach has the advantage of foreclosing courts from insulating themselves from the "activist" criticism simply by citing the Farrand's *Records*³¹ a few times in their opinions. It has the significant liability, however, of largely collapsing debates about activism into the merits of the individual case.

Professor Barnett, recognizing this difficulty, seems to adopt an intermediate solution. He is willing to accept even incorrect decisions as non-activist, so long as they make a reasonable effort to faithfully interpret the text and history of the Constitution.³² This does not solve the problem, however, to the extent that the central metric for determining activism is still a function of rightness or wrongness. When we ask whether a court's reasoning was "close" or "reasonable," we are still asking a question about the merits—not about the institutional stance that the court has adopted in deciding the case.

3. Departures from Precedent

Courts may also be criticized as activist when they depart from the authority of judicial precedents. Before the Rehnquist Court got into the full swing of striking down federal laws on federalism grounds, complaints about "conservative judicial activism" tended to focus on its willingness to overrule or at least to cut back on settled precedents from a more liberal era.³³ Departures from precedent may undermine confidence that the Court is simply applying norms found in the text and history of the Constitution; after all, if successive courts disagree about the meaning of those sources of law, perhaps they are simply using those sources as cover for their own values and policy choices.³⁴

courts" and concluding that "courts have certain capacities for dealing with matters of principle that legislatures and executives do not possess").

31. THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1986).

32. See Barnett, *supra* note 9, at 1277–78.

33. See, e.g., Michael Wells, *French and American Judicial Opinions*, 19 YALE J. INT'L L. 81, 123 (1994) ("The current Court's dismantling of the federal *habeas corpus* remedy for state prisoners is as fine an example of unrestrained judicial activism and lack of candor as anything the Warren Court ever did.").

34. See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 853 n.3 (1991) (Marshall, J., dissenting) ("[T]o rebut the charge of personal lawmaking, Justices who would

More broadly, the authority of precedent is generally thought to be one of the most important institutional characteristics of judicial decision making.³⁵ The power to disregard such precedents suggests a *legislative* discretion; it is legislatures, after all, that generally lack the authority to bind their successors.³⁶ Alexander Hamilton thus urged that "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them."³⁷ Judges were cut off from popular control, Hamilton argued, precisely so that they might pursue "inflexible and uniform adherence" to binding legal materials.³⁸

A focus on precedent raises some of the same problems that I discussed in the previous section. That is, we must ask whether "activism" covers only deliberate and self-conscious departures from precedent or, more broadly, those cases in which the judges get the precedents wrong. I favor the former definition for reasons similar to those I have already discussed. Focusing on whether a particular decision *correctly* applies the relevant precedents is indistinguishable—for those of us who think precedent a legitimate source of authority, at least—from simply evaluating the decision on its merits.

By restricting "activism" to those instances in which courts assert autonomy from precedent, we maintain focus on the institutional aspects of the decision. Self-conscious departures from precedent share the common "activist" theme of a refusal to place other sources of authority above the court's own judgment on the merits. Here, rather than choosing not to defer to

discard the mediating principles embodied in precedent must do more than state that they are following the 'text' of the Constitution; they must explain why they are entitled to substitute *their* mediating principles for those that are already settled in the law.").

35. See, e.g., *Anastasoff v. United States*, 223 F.3d 898, 900 (8th Cir. 2000) (concluding that "the Framers of the Constitution considered [the doctrine of precedent] to derive from the nature of judicial power, and intended that it would limit the judicial power delegated to the courts by Article III of the Constitution"), *vacated as moot en banc*, 235 F.3d 1054 (8th Cir. 2000).

36. See, e.g., Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379; H.L.A. HART, *THE CONCEPT OF LAW* 145 (1961). But see Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1666 (2002) (arguing "that the rule barring legislative entrenchment should be discarded").

37. THE FEDERALIST No. 78, at 581–82 (Jacob E. Cooke ed., 1961).

38. *Id.* at 581.

the political branches or the framers of the Constitution, the court refuses to defer to *prior courts* which have considered the same issue.

4. The Scope of Judicial Rulings: Minimalism vs. Maximalism

A different kind of "activism" has more to do with the *way* the courts decide cases than with the substance of the decisions they reach. Cass Sunstein's distinction between judicial "minimalism" and "maximalism"³⁹ captures the relevant qualities. Minimalism may operate with respect to at least three aspects of the judicial decision making process. First, a minimalist judge may seek to forestall decision altogether through a variety of avoidance techniques and "passive virtues."⁴⁰ Second, a judge may be minimalist or maximalist in her resolution of the case. A minimalist will tend to decide cases narrowly, leaving as much as possible undecided for consideration in the next case.⁴¹ To use more familiar terminology, the minimalist judge is incrementalist in her approach; she proceeds in small steps. Finally, a judge may be minimalist in her reading of prior decisions by interpreting *them* to have actually decided as little as possible.⁴²

39. See Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6 (1996) [hereinafter Sunstein, *Foreword*]; CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999) [hereinafter SUNSTEIN, *ONE CASE AT A TIME*].

40. See, e.g., *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 345–48 (1936) (Brandeis, J., concurring) (discussing various avoidance techniques); BICKEL, *supra* note 19, at 111–198 (discussing the "passive virtues" of justiciability doctrines and the Supreme Court's discretion over *certiorari*); Sunstein, *Foreword, supra* note 39, at 51 (observing that "principles of justiciability—mootness, ripeness, reviewability, standing—can be understood as ways to minimize the judicial presence in American public life").

41. See Sunstein, *Foreword, supra* note 39, at 6–7 (defining "decisional minimalism" as "saying no more than necessary to justify an outcome, and leaving as much as possible undecided").

42. Professor Sunstein offers the following catalog of "minimalist" techniques:

[C]ourts should not decide issues unnecessary to the resolution of a case; courts should deny *certiorari* in areas that are not 'ripe' for decision; courts should avoid deciding constitutional questions; courts should respect their own precedents; courts should, in certain cases, investigate the actual rather than hypothetical purpose of statutes; courts should not issue advisory opinions; courts should follow prior holdings but not

A maximalist judge, on the other hand, tends to use individual cases as an opportunity to announce sweeping rules or to reach out and decide issues that could have been avoided or put off for another day.⁴³ *McCulloch v. Maryland*⁴⁴ and *Roe v. Wade*⁴⁵ were maximalist decisions, announcing sweeping principles all at once. The Court's decision five years ago in *Denver Area Telecommunications Consortium v. FCC*,⁴⁶ on the other hand, is a good example of minimalism. In that case, Justice Breyer's plurality opinion steadfastly refused Justice Kennedy's invitation to state categorical rules to govern public- and leased-access cable channels, preferring to proceed on a case-by-case basis in the face of a rapidly evolving technological and regulatory environment.⁴⁷

When we call the Court "activist" because it "reaches out" to decide an issue not strictly before it, or announces a principle broader than the case requires, or tries to settle an issue definitively before society is ready for it to be settled, we are complaining about judicial maximalism. This form of activism shares with the other types already discussed a refusal to defer to other actors in the system. A court that habitually reaches out to decide constitutional issues unnecessary to resolution of the particular case before it, for example, or that eschews the "passive virtues" that might avoid decision entirely, will tend to increase the occasions for invalidation of political-branch decisions.⁴⁸ A court that tends to announce sweeping rules—

necessarily prior dicta; courts should exercise the passive virtues associated with doctrines involving justiciability.

Sunstein, *Foreword*, *supra* note 39, at 7. All of these techniques, Sunstein argues, "involve the *constructive uses of silence*." *Id.*

43. See *id.* at 15 ("Minimalism contrasts with maximalism, understood as an effort to decide cases in a way that establishes broad rules for the future and that also gives deep theoretical justifications for outcomes."). I am speaking here primarily of a judge's approach to defining the content of constitutional rights and limitations. Similar issues of "activism" arise on the remedial side, when the judge has to devise ways to *enforce* the Constitution as he has interpreted it.

44. 17 U.S. (4 Wheat.) 316 (1819).

45. 410 U.S. 113 (1973).

46. 518 U.S. 727 (1996).

47. Compare *id.* at 741–43 (plurality opinion) and *id.* at 774–78 (Souter, J., concurring) (defending the Court's refusal to articulate sweeping rules to define the limits of First Amendment rights in the context of cable television), with *id.* at 784 (Kennedy, J., concurring in part and dissenting in part) (criticizing "the most disturbing aspect of the plurality opinion: its evasion of any clear legal standard in deciding these cases").

48. A related example of "minimalism"—construction of statutes to "avoid" constitutional doubt—may actually *enlarge* the set of circumstances in which the

thereby leaving less leeway for future judicial decisions—is refusing to defer to *future* courts in much the same way that courts departing from precedent have refused to defer to *past* tribunals.

When a court defers to future incarnations of itself by leaving issues undecided, of course, it may sometimes be charged with the activist “sin” of maximizing judicial freedom of action overall. As Justice Scalia has urged, a requirement that judicial decisions be framed in terms of bright-line rules ties the judiciary down to a particular position and leaves non-judicial actors a clear legal background against which to act. “When . . . I adopt a general rule,” Justice Scalia points out, “I not only constrain lower courts, I constrain myself as well. If the next case should have such different facts that my political or policy preferences regarding the outcome are quite the opposite, I will be unable to indulge those preferences; I have committed myself to the governing principle.”⁴⁹

Justice Scalia has a point, and his observation highlights the more general phenomenon that many judicial actions that tend to increase judicial authority or autonomy in some ways may decrease it in others. It remains the case, however, that the articulation of a categorical rule maximizes the authority of

court will prefer constitutional values to legislative choices. See Posner, *Statutory Interpretation*, *supra* note 25, at 816; Paulsen, *supra* note 13. I argue in Section I.E, however, that the avoidance canon is nonetheless appropriately viewed as a tool of judicial “restraint” in important respects. See *infra* notes 134–162 and accompanying text.

49. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989). This sort of criticism frequently has been directed at the majority opinion in *Bush v. Gore*, which stated in classic minimalist fashion that “[o]ur consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.” 531 U.S. 98, 109 (2000). Frank Michelman, for example, has accused the majority of framing its equal protection holding “with a remarkable precision expressly meant to leave its authors unfettered in any future case that any of them are remotely likely to see in their lifetimes.” Frank I. Michelman, *Suspicion, or the New Prince*, 68 U. CHI. L. REV. 679, 687 (2001). For my own part, I read the quoted language from the *Bush* majority as unremarkable narrowing boilerplate that one sees in opinion after opinion. As a friendly bet with my colleagues, I predicted that I could find similar language in other opinions joined by the *Bush v. Gore* dissenters within twenty minutes on LEXIS. It actually took more like *three* minutes. See, e.g., Bartnicki v. Vopper, 532 U.S. 514, 535 (2001) (Breyer, J., concurring) (“I join the Court’s opinion. I agree with its ‘narrow’ holding limited to the special circumstances present here.”). Imagine how many more such statements one might find if one spent an entire *hour* on-line. The more basic point, of course, is that the minimalism or maximalism of a given opinion depends on the breadth of its *rationale*, not the presence or absence of this sort of language.

the *present* court at the expense of courts that may confront similar issues in the future. The more cases that a rule purports to cover, the greater likelihood that those future courts will consider themselves constrained from making new doctrine in their own right. When a present court adopts a narrow rule or a flexible standard, by contrast, it allows future courts to contribute to the evolution of the law in a common law fashion.

5. Activism and Remedies

We might call a fifth sort of activist behavior “remedial activism,” signifying “the expansive remedies imposed and monitored by federal district courts pursuant to evidentiary showings of constitutional injury.”⁵⁰ Remedial activism would include, most prominently, what Owen Fiss has called the “structural injunction”—that is, broad injunctive relief designed to restructure public institutions to conform to constitutional norms.⁵¹ Such relief may include intrusive judicial involvement in the day-to-day running of public institutions, court-ordered expenditures amounting to millions of dollars, and continuing judicial supervision for periods of years or even decades.⁵² Court-ordered busing to achieve racial integration of public schools, as well as judicial administration of prisons and

50. William Wayne Justice, *The Two Faces of Judicial Activism*, 61 GEO. WASH. L. REV. 1, 2 (1992); see also *Brzonkala v. Va. Polytechnic Inst.*, 169 F.3d 820, 892 (4th Cir. 1999) (en banc) (Wilkinson, J., concurring) (stating that activist decisions of the Warren Court “overextended the institutional capacity of the federal courts, installing judges as long-term supervisors of basic state functions”).

51. See Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979) (“The structural suit is one in which a judge, confronting a state bureaucracy over values of constitutional dimension, undertakes to restructure the organization to eliminate a threat to those values posed by the present institutional arrangements. The injunction is the means by which these reconstructive directives are transmitted.”); see also Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

52. It may be that what made such injunctive orders “activist” was not so much the degree of intrusiveness and continuing judicial oversight as the view, implicit in the orders, that the remedy selected need not be tied precisely to the right at issue. See Chayes, *supra* note 51, at 1293–94. Under this tradition in the law of remedies, “once there is a violation that brings a case into the equity court, the chancellor has a roving commission to do good.” DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 281 (3d ed. 2002); see also *id.* at 290–91 (discussing the Burger Court’s decision in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), as a paradigm case of this approach to remedies). In any event, little turns on this distinction for present purposes.

mental health institutions, are some of the most prominent examples.⁵³

This sort of activism has been much criticized, primarily by judges and commentators on the rightward end of the political spectrum.⁵⁴ It continues to be the focus of political resentments grounded in the era of busing to achieve school desegregation; four of the five characteristics of "activism" identified in the Senate Judiciary's questionnaire for judicial nominees arguably focus on remedial activism.⁵⁵ Such activism is not, however, a vice usually attributed to the Rehnquist Court.⁵⁶ Instead, criticism of the current Court's decisions on issues of structural remedies has focused on its willingness to depart from prior precedents that had permitted broad remedial orders in school desegregation and similar cases.⁵⁷ This criticism shows, once

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

54. See, e.g., John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121 (1996); GRAGLIA, *supra* note 53, at 13–17.

55. See Senate Questionnaire, *supra* note 12. Remedial activism is generally associated with Burger Court decisions such as *Swann* rather than with the Warren Court. Nonetheless, it is important to remember that *Miranda* and *Mapp v. Ohio*, 367 U.S. 643 (1961), were both cases about remedies for constitutional violations, and that the Warren Court's decision in *Green v. New Kent County*, 391 U.S. 430 (1968), set the stage for the Court's abandonment move toward aggressive judicial supervision of integration. See LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 295 (2000).

56. See Wilkinson, *supra* note 19, at 1386 ("The Rehnquist Court has not, by and large, attempted such acts of ongoing institutional supervision."); Marshall, *supra* note 6, at 1242.

57. See, e.g., *Lewis v. Casey*, 518 U.S. 343 (1996) (holding that the district court exceeded its remedial authority in prison case); *Missouri v. Jenkins*, 515 U.S. 70 (1995) (invalidating district court order in school desegregation case as exceeding the scope of the court's remedial authority). For criticisms of these and other remedial decisions, see, e.g., *Jenkins*, 515 U.S. at 174 (Souter, J., dissenting) (criticizing the majority for departing from prior precedent); Raina Brubaker, Comment, *Missouri v. Jenkins: Widening the Mistakes of Milliken v. Bradley*, 46 CASE W. RES. L. REV. 579, 589 (1996) (accusing the *Jenkins* Court of "strong activism from the conservative side of the bench"); Gary Orfield, *Conservative Activists and the Rush Toward Resegregation*, in *LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY* 39 (Jay P. Heubert ed., 1999).

The Rehnquist Court's more important set of remedial decisions has involved damages claims against state governments. Those decisions have involved a cluster of constitutional, statutory, and common law principles. See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (holding that Congress may not abrogate the states' sovereign immunity except pursuant to its power to enforce the Fourteenth Amendment); *Will v. Mich. Dept. of State Police*, 491 U.S. 58 (1989) (holding that states are not "persons" subject to liability under 42 U.S.C. § 1983); see also *Alexander v. Sandoval*, 532 U.S. 275 (2001) (refusing to recognize an implied right of

again, how different sorts of "activism" may press in different directions once we try to categorize the results of particular cases.

The Rehnquist Court's controversial decision in *Bush v. Gore*⁵⁸ may be an exception to its general avoidance of remedial activism. Much of the criticism of that case has focused not so much on the Court's equal protection holding that the Florida presidential recount was being conducted in an unconstitutional manner, but rather on the Court's remedial decision to halt all further counting rather than to permit such counting under a reformulated standard.⁵⁹ Although this aspect of the Court's ruling imposed no ongoing judicial control over the electoral process, it arguably intruded upon Florida's discretion to choose how to respond to a judicial ruling of unconstitutionality on the merits in much the same way that the busing decisions denied local school districts discretion as to the best way to bring about meaningful desegregation.

Criticism of the remedy in *Bush v. Gore* may, on the other hand, stem from the fact that this aspect of the Court's ruling—unlike the holding of unconstitutionality—attracted only a bare five-vote majority.⁶⁰ The holding on the merits, in other orders, was joined by justices who likely preferred Al Gore in their individual political capacities; the remedial holding attracted only Bush supporters. This aspect of the case suggests another, more basic, definition of judicial activism: decision ac-

action—here against a state agency but presumably against private entities as well—to enforce administrative regulations promulgated under Title VI of the 1964 Civil Rights Act). As in the structural relief cases, the Court's strong tendency has been to limit the remedial authority of the federal courts. See generally Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 481–84 (2002) [hereinafter Fallon, *Conservative Paths*]. The subset of these decisions involving state sovereign immunity has been a particularly popular target for accusations of activism. See, e.g., Balkin & Levinson, *supra* note 1, at 1053–54 (taking *University of Alabama v. Garrett*, 531 U.S. 356 (2001), as "a symbol of the constitutional revolution").

58. 531 U.S. 98 (2000).

59. See, e.g., Cass R. Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757, 758 (2001) (arguing that the remedial aspect of the decision was "[f]ar more problematic, as a matter of law" than the equal protection ruling on the merits); Ward Farnsworth, *"To Do a Great Right, Do a Little Wrong": A User's Guide to Judicial Lawlessness*, 86 MINN. L. REV. 227, 232–33 (2001) (collecting conclusions from both political liberals and political conservatives that the remedial ruling was the most troubling aspect of the Court's decision).

60. See *Bush*, 531 U.S. at 134 (Souter, J., dissenting) (agreeing that the count violated equal protection); *id.* at 145–46 (Breyer, J., dissenting) (suggesting agreement with that position).

cording to partisan political preference. I discuss that definition in the next subsection.

6. Decision According to Partisan Preference

Courts are sometimes accused of a final form of activism: "the use of judicial power to accomplish plainly partisan objectives,"⁶¹ with partisan denoting *party* allegiance rather than ideology. The Court's resolution of the disputed 2000 election in favor of the Republican candidate, with the Justices split along "political" lines,⁶² has given rise to more of this sort of accusation than usual.⁶³ But claims of partisan activism are not confined to *Bush v. Gore*. In his contribution to this Symposium, William Marshall suggests partisan motives for a range of recent decisions, including the recent census case as well as various rulings arising out of President Clinton's several scandals.⁶⁴

Philosophically-motivated activism does not generally seem to be viewed with the same opprobrium as that motivated

61. Marshall, *supra* note 6, at 1220.

62. Claims that *Bush v. Gore* involved "partisan" activism in the party sense must deal with the complication that both David Souter and John Paul Stevens are life-long Republicans. The Court's critics must fall back on claims that those justices are not "real" Republicans based on their tendency to vote with the liberals on the Court. But that move risks collapsing the partisan claim into a more commonplace assertion of *ideological* activism.

63. See, e.g., Michael Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721, 1725 (2001) ("[T]he Bush outcome was a product of . . . partisan political preference for George W. Bush, which . . . may have been enhanced by [a] desire to retire from the court while a Republican President is in office . . ."); Margaret Jane Radin, *Can the Rule of Law Survive Bush v. Gore?*, in BUSH V. GORE: THE QUESTION OF LEGITIMACY 114 (Bruce Ackerman ed., 2002) [hereinafter THE QUESTION OF LEGITIMACY] ("[I]nstead of deciding the case in accordance with preexisting legal principles, . . . five Republican members of the Court decided the case in a way that is recognizably nothing more than a naked expression of these justices' preference for the Republican Party.").

64. See Marshall, *supra* note 6, at 1246–54. The census case that Professor Marshall describes is *Department of Commerce v. United States House of Representatives*, 525 U.S. 316 (1999). As this article goes to press, the Court has just decided another census case, *Utah v. Evans*, 122 S. Ct. 2191 (2002). Although both space and personal inclination foreclose a comprehensive analysis of the extent to which the fractured opinions of the allegedly pro-Republican justices fit Professor Marshall's thesis, I do note that Chief Justice Rehnquist joined Justice Breyer's opinion for the Court upholding an aspect of census procedure that had the effect of transferring one House seat from the Republicans to the Democrats. See Mary Clare Jalonick, *Court Ruling Liberates Primary Hopefuls*, CONG. Q., June 21, 2002, at <http://www.washingtonpost.com/wp-dyn/articles/A24533-2002Jun21.html>.

by naked party allegiance. Professor Marshall, for example, states that "[u]nlike the other forms of activism discussed in this essay, partisan activism is an indefensible exercise of judicial power."⁶⁵ There is no doubting the intuitive force of this statement. Deciding a case in order to help a particular political faction just seems, well, *sleazier* than even a willful preference for the judge's own legal judgments over those of other political actors.

It is unclear, however, how much this definition of activism really adds to the others. Partisan activism, after all, goes to the mental state of the judge and not the content of his actions. If a particular decision is "restrained" in terms of all the other indicia I have discussed—it is deferential to the political branches, consistent with precedent, minimalist in scope, and imposes no sweeping remedies—would we really say it is "activist" simply because the judge has a partisan motive in the back of his mind? If not, then identifying instances of "partisan" activism may not be worth the poisoning of legal discourse that frequently accompanies such an allegation.

The other difficulty with partisan activism has to do with how it is detected and measured. As Professor Marshall acknowledges, "[p]artisan motivation is notoriously difficult to prove."⁶⁶ Unlike the other forms of activism, one will never see partisan motive acknowledged on the face of the opinion. One must therefore infer it from some combination of a result beneficial to the judge's partisan allies and the absence of plausible non-partisan explanations for that result. A charge of partisan activism, in other words, will critically depend on a claim that the result on the merits was *so wrong* that no reasonable, non-partisan judge could accept it. This is frequently the claim of

65. See Marshall, *supra* note 6, at 1254.

66. *Id.* at 1253–54. Professor Marshall supports his assertion that "[o]ccasionally some evidence does appear" by recounting a report that "Justice O'Connor, . . . on election night, expressed dismay that Gore might have won the election because she did not want a Democrat to name her successor." *Id.* at 1254 n.218. But surely it is okay for millions of Americans to vote one way or the other in the election itself, based in part on which candidate they would prefer to name Justice O'Connor's successor; the Democrats, after all, worked hard to make this a central issue in the campaign. May Justice O'Connor not exercise her own franchise on similar grounds? Does anyone doubt that Justice Stevens likewise had a preference concerning who would name his (or Justice O'Connor's) successor? The critical question is whether such preferences influenced the votes of these Justices in the legal case before them; the mere fact that they (obviously) had such preferences proves very little.

Bush v. Gore's critics,⁶⁷ and Professor Marshall's discussion of the census case seems to rely on a similar argument.⁶⁸ Alternatively, we might stress the inconsistency of the arguments supporting a result benefiting the judge's party with positions taken by the judge on similar issues in the past.⁶⁹

Both these approaches have their problems. The argument from inconsistency tends to assume that a judge is being dishonest if she proves unwilling to take a principle she has espoused in the past and extend it without limit to cover the instant case. So, for example, *Bush v. Gore*'s critics argue that the majority's past solicitude for federalism in cases like *Lopez*⁷⁰ and *Printz*⁷¹ forecloses the sincere acknowledgment of a strong federal interest in a state's conduct of presidential elections.⁷² Moreover, most interesting cases will present a judge with crosscutting imperatives derived from prior commitments. Professor Marshall cites *Clinton v. Jones*⁷³ as inconsistent with

67. See Michelman, *supra* note 49, at 679–85. Similar assertions are legion in the literature. Most, but not all, come from left-liberal academics whose own partisan preferences about the outcome of the election are no more in doubt than those of the justices. See, e.g., Klarman, *supra* note 63, at 1726–27; Jed Rubenfeld, *Not as Bad as Plessy. Worse., in THE QUESTION OF LEGITIMACY*, *supra* note 63, at 20 (“[T]he breathtaking indefensibility of *Bush v. Gore* is of an entirely different order from cases like *Plessy* and *Roe*.”).

68. See Marshall, *supra* note 6, at 1249–53 (discussing the majority and concurring opinions in *Department of Commerce v. United States House of Representatives*, 525 U.S. 316 (1999)). Professor Marshall acknowledges, however, that the result in the census case is not “indefensible.” *Id.* at 1253.

69. See *id.* at 1247–48 (arguing, *inter alia*, that the conservative justices abandoned their traditional solicitude for executive power in *Clinton v. Jones*, 520 U.S. 681 (1997)).

70. *United States v. Lopez*, 514 U.S. 549 (1995).

71. *Printz v. United States*, 521 U.S. 898 (1997).

72. Never mind that members of the frequently pro-states majority have been willing to limit state sovereignty in any number of recent cases. See, e.g., *Reno v. Condon*, 528 U.S. 141 (2000) (unanimously rejecting anti-commandeering challenge to Drivers' Privacy Protection Act); *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366 (1999) (Scalia, J.) (rejecting arguments that the Telecommunications Act of 1996 should be interpreted narrowly to preserve state regulatory authority over local telephone markets); *California v. Deep Sea Research*, 523 U.S. 491 (1998) (holding that the Eleventh Amendment did not bar federal jurisdiction over an admiralty suit involving rights to sunken treasure); see also *South Dakota v. Dole*, 483 U.S. 203 (1987) (Rehnquist, C.J.) (articulating a permissive test for the use of federal spending power to induce state regulatory action); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (Rehnquist, C.J.) (holding that state sovereign immunity does not apply when Congress legislates under Section Five of the Fourteenth Amendment). See generally Fallon, *Conservative Paths*, *supra* note 57, at 474 (“To draw the most banal conclusion, even the most pro-federalism justices care about values besides federalism.”).

73. 520 U.S. 681.

the conservatives' "traditional concern with protecting presidential power."⁷⁴ The decision is consistent, however, with traditional conservative preferences for textualism and suspicion of federal common law.⁷⁵ In order to make the inconsistency charge stick, we would have to survey the whole range of potentially applicable prior commitments and come up with some sort of on-balance judgment. Most charges of partisan activism, however, include no such comparative analysis.

Focusing on the plausibility of the court's offered (nonpartisan) rationale has somewhat different liabilities. For one thing, implausibility is often in the eyes of the beholder. It is hard enough to reach consensus among lawyers and scholars about the "right" and "wrong" answers to legal questions. To slice the salami yet thinner—that is, to seek agreement on whether a decision is *so wrong* that it must be motivated by partisanship—hardly seems an auspicious enterprise. As even one of the Court's more strident critics acknowledges, "degrees of unreasonableness are notoriously difficult to quantify or otherwise measure objectively."⁷⁶ Such claims, moreover, tend to poison the tone of legal debate. To support a charge that a particular outcome is partisan, one must claim not only that people who think the case rightly are wrong on the merits, but also that they are *unreasonably* or *disingenuously* wrong. This is not a recipe for civil debates about constitutional meaning.

The difficulties of identifying partisan decisions multiply when we shift our focus from single judges to multi-member panels, some of whom may "buy" any given argument on its own merits while others subscribe to it for partisan reasons.

74. Marshall, *supra* note 6, at 1248. As Professor Marshall acknowledges, his cite for this traditional conservative concern—Justice Scalia's dissent in *Morrison v. Olson*, 487 U.S. 654, 697 (1988)—is highly problematic. *Id.* at 1248 n.195. After all, every other "conservative" justice on the Court in 1988 was in the *Morrison* majority. Those justices may well have had perfectly plausible "conservative" reasons for voting the way they did.

75. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 286–89 (2001) (refusing to create, as a matter of federal common law, an implied right of action not inferable from the statutory text). Similarly, it is possible to read the conservative Justices' decision to intervene in state processes in *Bush v. Gore* as concerned with protecting the finality of the original election result against attack through subsequent judicial proceedings. Those justices have expressed a strong analogous commitment to finality in the context of protecting state criminal convictions from collateral attack via federal *habeas corpus* actions. See, e.g., *McCleskey v. Zant*, 499 U.S. 467 (1991); *Teague v. Lane*, 489 U.S. 288 (1989); *Wainwright v. Sykes*, 433 U.S. 72 (1977).

76. Klarman, *supra* note 67, at 1746.

My own view concerning *Bush v. Gore*, for instance, is that the case *might well* have come out the same way if the parties had been reversed—but with a different line-up.⁷⁷ One can imagine *some* justices in the majority sticking with their votes on principled grounds, and *some* justices in the dissent being tempted to switch by partisan preference.⁷⁸ It would be surprising if the tension between principle and partisanship played out exactly the same way for each member of the respective factions in the case.

No doubt some judicial decisions are motivated, in whole or in part, by partisan advantage. Such decisions share the common theme of a court's refusal to defer to other sources of authority—here, to the rule of law itself. But beyond that kinship in theory, partisan activism unaccompanied by any of the more familiar kinds has little to do with the institutional role of courts vis-à-vis the other branches. Given the extreme difficulty of identifying instances of partisanship and the incendiary nature of the accusation, I suspect that this is one category of “activism” the liabilities of which outweigh its usefulness.

B. A Common Thread

As I have already suggested, these different categories share a common theme. Each judicial behavior that I have described tends to increase the importance and freedom of action of the court making the present decision vis-à-vis the political branches, the Framers and ratifiers of the Constitution, and both past and future courts. This occurs in a variety of ways. The Court may reject limits on its interpretive discretion by re-

77. *Contra* Marshall, *supra* note 6, at 1247 (“How many truly believe that the conservatives would have voted the same way had the candidates been reversed?”).

78. After all, the dissenters voted their electoral preference just as sure as the majority did. One almost *never* hears liberal critics of *Bush v. Gore* acknowledging this fact, however. Professor Michelman admits that the dissenters “no doubt, had reasons parallel to those of the majority for preferring an opposite electoral outcome . . .” Michelman, *supra* note 49, at 689. He insists that “[t]he dissenters get an exemption because they all maintain that the Court should have denied or dismissed the writs of *certiorari* in the election cases.” *Id.* One cannot imagine Professor Michelman taking this sort of action/inaction distinction seriously in any other context, however. If we are presuming that the justices acted according to how they wanted the election resolved—which, to repeat, I am urging us *not* to presume—then the dissenters could reasonably have expected that letting the Florida Supreme Court’s decision stand by denying *certiorari* would have given Vice-President Gore his best chance to win.

fusing to defer to the views of the political branches, historical and textual sources of constitutional meaning, or the judgments of past courts. Or it may frame its decision in ways that minimize the subsequent discretion of other actors, such as a future court deciding the next case or the officials who must act to remedy the wrong identified by the court.

Several observations follow from framing the broader theme of "activism" in this way. First, it ought to drain the term "activism" of much of its normative significance. Even commentators who define "activism" in the same sort of institutional terms that I have stressed here often add a strong pejorative connotation. Thomas Baker, for example, has spoken broadly of "judicial hubris":

The justices think they know better than everyone else. They think they are smarter than the President in determining which federal regulations are good and bad. They are better than Congress in protecting rights.

They even know more about the game of golf than does the PGA . . .⁷⁹ Let there be no doubt, this is an activist court. Judicial restraint is not in their vocabulary.⁸⁰

For almost any participant in debates over the judicial role, however, there will be some appropriate point of judicial authority along the continuum from absolute passivity to absolute judicial hegemony.⁸¹ "Activist" behaviors that assert judicial authority up to that point will be legitimate; those that go further, illegitimate. Virtually no one, for instance, seems to believe in an absolute rule of *stare decisis*. If a court chose to overrule one prior decision every hundred years, that individual decision could be viewed as "activist" for that reason. But

79. See *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001) (holding, in the course of applying the Americans with Disabilities Act, that walking the course is not an essential element of the game of golf).

80. Quoted in Mark Curriden, *Supreme Court Divided Despite Conservative Bent*, DALLAS MORNING NEWS, Sept. 30, 2001, at 1J (footnote added).

81. My colleague Lino Graglia may come closest to the polar position in restricting judicial review. He argues that "[o]nly policy choices clearly prohibited [by the Constitution] should be judicially disallowed," and that "[t]he paucity and noncontroversial nature of constitutional restrictions means that if judicial review [were limited to this standard], occasions for its exercise would be so rare as to make it a matter largely of academic interest." Lino A. Graglia, *Constitutional Law: A Ruse for Government by an Intellectual Elite*, 14 GA. ST. U. L. REV. 767, 772 (1998).

surely no one would think that the court had pushed its activism *too far*.⁸²

"Activism" and "restraint," in other words, connote directions on the continuum between judicial passivity and hegemony. Movement in a particular direction carries no normative weight unless we can explain why that movement has gone too far. Observations like Professor Baker's, unfortunately, implicitly criticize the Court for *too much* activism without providing any articulate standard for how much "too much" might be. As I discuss in the next section, moreover, this enterprise is made even more difficult by the fact that most judicial decisions may be activist in some respects and not in others.⁸³ Any effort to classify a given decision or court as inappropriately activist will have to cope with these potential tradeoffs.

The second point is that "activism" and "restraint," according to this definition, are independent of the merits of any particular judicial decision. Instead, they go to the allocation of decision making authority within the judicial system and between that system and other participants in government. Contemporary debates about that allocation have frequently been influenced by the Legal Process notion of "institutional settlement," which holds that "decisions which are the duly arrived at result of duly established procedures . . . ought to be accepted as binding upon the whole society unless and until they are duly changed."⁸⁴ That principle, as Richard Fallon has explained, holds that "authority to decide must at least sometimes include authority to decide wrongly."⁸⁵ Institutional settlement, in other words, decouples the institutional appropriateness of a judicial decision from its rightness or wrongness on the merits. We might think a federal court's interpretation of a state statute as being more "correct" in some

82. Cf. Barnett, *supra* note 9, at 1276 (rejecting Judge Posner's definition of activism as *any* judicial invalidation of a political branch act, on the ground that almost everyone would concede that *some* invalidations are necessary and appropriate). Professor Barnett points out that if "*judicial activism* is a bad thing, this cannot be what the term means." *Id.* (emphasis added). But the definition is surely coherent if we drop the normative implication often associated with the term.

83. See *infra* notes 87–124 and accompanying text.

84. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 4 (William N. Eskridge, Jr. & Philip P. Frickey, eds., 1994).

85. Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 962 (1994).

Platonic sense, for example, and still think that the federal court should have deferred to a contrary interpretation by the state supreme court.⁸⁶

Once we view correctness on the merits and institutional assertiveness as separate issues, we need terminology for describing different points along the latter continuum. "Activism" and "restraint" serve that useful function. For that reason, it is worth trying to recover this terminology from those who would use "activist" as an epithet to describe results that they do not like. As I discuss in the next section, however, the variety of forms that activism may take suggests extreme caution whenever we try to apply that term to particular decisions.

C. *Conflicts among Definitions*

Given the variety of forms that activism may take, it is not surprising that these definitions of activism will quickly come into conflict in particular cases. Most interesting decisions—that is, those worth debating about in the law reviews—will be activist in some respects but not in others. In many instances, each of the options available to a court may be "activist" in some sense, and the court must choose the least troubling course.

I start again with Judge Posner's definition: a court is activist when it refuses to defer to the judgments of the political branches, and particularly when it holds an act of the political branches unconstitutional.⁸⁷ In some situations, the alternatives open to a court may each involve a ruling of unconstitutionality. The Court's recent *Good News Club* decision, for example, struck down a New York public school's policy of excluding religious groups from using school buildings after hours, despite the fact that secular groups were allowed to do so.⁸⁸ The School's justification for the policy, however, was that it was necessary to prevent an Establishment Clause violation.⁸⁹ So which result is activist: striking down the policy, as the Court did, on free speech grounds? Or upholding the policy

86. See, e.g., *Garner v. Louisiana*, 368 U.S. 157, 166 (1961); see also *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875) (holding that the Supreme Court generally lacks jurisdiction to review state court decisions of state law).

87. See *supra* note 17 and accompanying text.

88. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001).

89. *Id.* at 112.

on the ground that failing to have such a policy would itself be unconstitutional under the Establishment Clause? Each possible holding would involve declaring that a particular public policy (either exclusion or inclusion of believers) is unconstitutional. It is true that the latter ruling would defer to the school board's own constitutional judgment. On the other hand, surely a judicial decision invalidating a school access policy on Establishment grounds would fit Judge Posner's definition of activism.⁹⁰

In other situations, the invalidation criterion may conflict with other measures of activism, such as the overruling of judicial precedent. Consider the Court's recent decision in *Dickerson v. United States*.⁹¹ *Dickerson* involved the constitutionality of 18 U.S.C. § 3501, a federal statute enacted in the wake of the Warren Court's *Miranda* decision.⁹² Section 3501 required federal courts to admit confessions into evidence if they were "voluntary," based on the sort of totality-of-the-circumstances inquiry that *Miranda* had eschewed. The statute had lain defunct for 30 years, ignored by the Justice Department due to doubts about its constitutionality, until the Fourth Circuit invoked it on the court's own motion, forcing the issue.⁹³ The Supreme Court held the statute unconstitutional in *Dickerson*,⁹⁴ and yet there were no cries of judicial activism. Indeed, one suspects that the Court would have been accused of being activist, if it had *not* struck the statute, for refusing to adhere to its 34-year-old precedent in *Miranda*. The fact that *Miranda* itself was considered an activist decision⁹⁵ only heightens the confusion.

90. The same situation was presented in *Rosenberger v. Rector of University of Virginia*, 515 U.S. 819 (1995). In both cases, the Court could have avoided the dilemma discussed in the text by refusing to find that the school policy discriminated against religious viewpoints—thereby avoiding the need to find an Establishment Clause interest to support the policy. But to my mind, the argument that there was no viewpoint discrimination in the cases was far less plausible than the claim that the alternative to the school's policy—allowing religious worship on school property—presented an Establishment Clause problem.

91. 530 U.S. 428 (2000).

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

93. See *United States v. Dickerson*, 166 F.3d 667, 672 (4th Cir. 1999), *rev'd*, 530 U.S. 428 (2000). On the government's doubts, see POWE, *supra* note 55, at 410 (noting that "[a]fter passage the attorney general ordered United States attorneys to follow *Miranda* and *Wade* and not to invoke [§ 3501]").

94. See 530 U.S. at 442–43.

95. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 89, 96 n.282 (citing *Miranda* as one of "[t]he

For a more familiar example, consider a hypothetical decision by the current Supreme Court to overrule *Roe v. Wade*⁹⁶ and *Planned Parenthood v. Casey*.⁹⁷ Surely such a decision would be criticized by supporters of *Roe* and *Casey* as activist; in fact, fear of such criticism seems to have been a powerful part of the Court's *stare decisis* analysis in *Casey*.⁹⁸ But it was *Roe* and *Casey* that struck down legislative acts; a decision overruling those decisions would amount to a *refusal* to invalidate legislative restrictions on the right to an abortion.⁹⁹ On the other side of the coin, several members of the current Court have refused to adhere to the Court's recent precedents on state sovereign immunity, precisely because the dissenters viewed those precedents as activist decisions that illegitimately invalidated legislative acts.¹⁰⁰

Activism as departure from text and history may similarly conflict with activism as departure from precedent. For example, Justice Thomas has recently argued that the Constitution's text and the original understanding of its structure would require a dramatically narrower reading of the federal commerce power than current doctrine provides for,¹⁰¹ as well as substantially stricter limits on Congress's ability to delegate authority to federal administrative agencies.¹⁰² The Justice's view of history enjoys substantial support, yet I think it is fair to say that most academic observers would see adoption of Justice Tho-

most famous exercises in Warren Court activism"); POWE, *supra* note 55, at 394 ("If *Miranda* is not the most controversial decision by the Warren Court, it is close enough, and it is the most controversial criminal procedure decision hands down . . .").

96. 410 U.S. 113 (1973) (striking down Texas law prohibiting abortion).

97. 505 U.S. 833 (1992) (refusing to overrule *Roe*).

98. *Id.* at 864-69 (joint opinion of O'Connor, Kenney, & Souter, JJ.).

99. See also *Texas v. Johnson*, 491 U.S. 397 (1989) (adhering to settled First Amendment precedent and striking down Texas's flag desecration statute). Once *Johnson* itself was on the books, that precedent in turn required the Court to invalidate a federal flag-burning statute in *United States v. Eichman*, 496 U.S. 310 (1990).

100. See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 98-99 (2000) (Stevens, J., dissenting) ("The kind of judicial activism manifested in cases like *Seminole Tribe* represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises.") (citations omitted); see generally Linda Greenhouse, *At the Court, Dissent Over States' Rights Is Now War*, N.Y. TIMES, June 9, 2002, Week in Review Section, at 3.

101. *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring).

102. *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 486-87 (2001) (Thomas, J., concurring).

mas's views by the full Court as judicial activism of the most radical kind.¹⁰³ The reason is that limiting the Commerce Clause to regulation of buying and selling (as opposed to manufacturing, agriculture, and all other forms of economic activity) or outlawing the delegation of legislative power would require overruling at least 70 years of judicial precedent.¹⁰⁴ Such a shift would also throw open to constitutional question a substantial portion of the U.S. Code.

Similar conflicts arise when we define "activism" as "judicial maximalism." For example, as Professor Sunstein points out, both *United States v. Lopez*,¹⁰⁵ invalidating the federal Gun Free School Zones Act on Commerce Clause grounds, and *Romer v. Evans*,¹⁰⁶ striking down Colorado's anti-gay amendment to its state constitution, were extremely narrow, minimalist decisions. Each holding, after all, was tied closely to the facts of the individual case before the court, and neither purported to announce sweeping principles to control future cases.¹⁰⁷ Nonetheless, both decisions are frequently cited as instances of judicial activism on the grounds that they invalidated legislative acts, departed from precedent, or contravened the Constitu-

103. See, e.g., Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 727-39 (1988) (concluding that "insistence upon original intent as the only legitimate standard for judicial decision making entails a massive repudiation of the present constitutional order"). In fairness, Justice Thomas himself has recognized the radical reshaping of present doctrine that adoption of his views might require, and for that reason has suggested only that the Court should consider the issue in a proper case. For similar concessions to precedent by originalists, see Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 229 (1988) and Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 382 (1981).

104. On the Commerce Clause, see generally, e.g., *Perez v. United States*, 402 U.S. 146 (1971) (upholding a federal loansharking statute against a Commerce Clause challenge), *Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding the authority of Congress to restrict home consumption of wheat on individual farms) and *United States v. Darby*, 312 U.S. 100 (1941) (upholding Congress's commerce authority to regulate wages and hours of workers engaged in manufacturing). On delegation, see generally, e.g., *Touby v. United States*, 500 U.S. 160 (1991) (rejecting a delegation challenge to aspects of the Controlled Substances Act), *American Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946) (upholding the Public Utility Holding Company Act of 1935 against a delegation challenge) and *Yakus v. United States*, 321 U.S. 414, 420, 423-26 (1944) (rejecting a delegation challenge to wartime executive price fixing authority).

105. 514 U.S. 549.

106. 517 U.S. 620 (1996).

107. See Sunstein, *Foreword*, *supra* note 39, at 23.

tion's text and history.¹⁰⁸ Similarly, the minimalist techniques of avoiding constitutional decisions through doctrines of justiciability have occasionally led the Court to invalidate federal jurisdictional grants¹⁰⁹ or to depart from those grants by fashioning additional limits on federal jurisdiction.¹¹⁰ Martin Redish, for example, has argued that judge-made abstention doctrines represent "the height of undue judicial activism" because "a judicial refusal to act, in the face of a constitutionally valid legislative directive to the contrary, constitutes the effective exercise of a judicial veto power over legislative action."¹¹¹

Finally, the same sorts of problems may arise with our last two categories: remedial and partisan activism. As I have discussed, the Warren and Burger Court eras left behind two decades of precedent for remedial activism;¹¹² the Rehnquist Court's retreat from that mandate has itself been criticized for activist disregard of *stare decisis*.¹¹³ Similarly, a judge acting from partisan motivation may behave in a way that, motive aside, meets any of the other definitions of restraint. The *Bush v. Gore* dissenters, for example, are widely perceived as paragons of judicial restraint for urging the Court to stay out of the Florida election controversy;¹¹⁴ for at least several—and possibly all—of the dissenting justices, however, an order letting the

108. See, e.g., Donald H. Zeigler, *The New Activist Court*, 45 AM. U. L. REV. 1367, 1389 (1996) ("*United States v. Lopez* is another striking example of judicial activism."); Louis Michael Seidman, *Romer's Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67, 68 (arguing that the *Romer* opinion "recaptures the moral drama and ambiguity of Warren Court activism years after the culture had seemingly discarded it").

109. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (holding that the citizen suit provision of the Endangered Species Act violates Article III's "case or controversy" requirement).

110. See, e.g., *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) (suggesting that federal courts should abstain from issuing decisions where parallel proceedings are taking place in state court); *Younger v. Harris*, 401 U.S. 37 (1971) (holding that federal courts should abstain from enjoining state criminal proceedings); see also *Warth v. Seldin*, 422 U.S. 490, 499–500 (1975) (discussing prudential requirements for standing not required by Article III but constructed by the courts as a matter of "judicial self-governance").

111. Redish, *supra* note 25, at 1031; see also *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."). Professor Paulsen likewise argues that these doctrines are instances of unconstitutional judicial activism. See Paulsen, *supra* note 13. I address Professor Paulsen's argument in Section D, *infra*.

112. See *supra* note 55.

113. See *supra* note 33 and accompanying text.

114. See, e.g., Michelman, *supra* note 49, at 689.

Florida Supreme Court's ruling stand would have coincided with partisan interest.¹¹⁵

These conflicts do not render the term "judicial activism" meaningless; they simply demonstrate that a given decision may enhance judicial authority in some ways even while cutting it back in others. This fact does, however, make it difficult to make on-balance assessments of a given decision as "activist" or "restrained" overall. In order to categorize a case that overrules prior precedent in order to uphold a state law, for instance, we would have to develop some common metric of judicial authority and assess the impact of both overruling precedents and invalidating laws in those terms. That seems difficult to do.

Nor are we likely to be able to make categorical judgments in assessing these different sorts of activism. There are weak precedents and strong ones, invalidations that are controversial and those that are less so. In some cases, invalidating the statute will seem the more restrained course,¹¹⁶ in others, overruling the precedent.¹¹⁷ But these are largely intuitive judgments. If there is a rigorous way of rendering the values of precedent, deference to the political branches, and the like commensurable for purposes of trading off these values in individual cases, I have not discovered it.¹¹⁸

What's worse, the relative salience of these different sorts of activism may change over time. In *Marbury v. Madison*,¹¹⁹ for example, Chief Justice Marshall struck down a provision of

115. See *supra* note 60. Likewise, the same dissenters in the Census case acted in a way that—had they prevailed—was expected to benefit the Democratic party. See *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 357 (1999) (Stevens, J., dissenting, joined in part by Souter, Ginsburg, and Breyer, JJ.). This is not to say that any of the justices in either case *actually* acted out of partisan motivation. My own view is that the actual incidence of crude partisan activism described by Professor Marshall is vanishingly small, and that we have insufficient evidence in any of the cases he discusses to make the charge stick.

116. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (refusing to overrule *Roe* and striking down part of a Pennsylvania abortion statute).

117. See, e.g., *United States v. Darby*, 312 U.S. 100 (1941) (overruling *Hammer v. Dagenhart*, 247 U.S. 251 (1918) in order to uphold the federal Fair Labor Standards Act).

118. Cf. *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (complaining that because "the interests on both sides [of the Court's dormant Commerce Clause balancing test] are incommensurate" the judicial enterprise "is more like judging whether a particular line is longer than a particular rock is heavy").

119. 5 U.S. (1 Cranch) 137 (1803).

the Judiciary Act of 1789 and, in so doing, established the power of judicial review—surely activist stuff indeed. That resolution, however, avoided what would most likely have been considered even *more* activist at the time: issuing a writ of mandamus to a high-ranking executive official forcing him to perform an act that he did not wish to perform.¹²⁰ Nowadays, of course, such a remedy is hardly inconceivable,¹²¹ and the course chosen by Marshall seems the more activist one.

Likewise, *Chisholm v. Georgia*'s¹²² holding that a federal court could entertain private damages actions against a state government was considered an outrageous act of judicial activism in 1793. According to Justice Bradley, writing a century afterwards, the decision "created such a shock of surprise throughout the country that, at the first meeting of congress thereafter, the eleventh amendment to the constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the states."¹²³ Two hundred years later, however, the Supreme Court's decisions *upholding* state sovereign immunity are often Exhibit A in support of more general accusations of conservative activism.¹²⁴ If I am right that most hard cases have both activist and restrained components, then cases like *Marbury* and *Chisholm* suggest that the relative salience of those components is strongly influenced by historical context.

120. See, e.g., Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 306-07 (1994):

Marbury's argument for judicial review broke little new analytic ground and was largely uncontroversial at the time. What was extraordinary about *Marbury*—and extraordinarily controversial at the time—was the Court's assertion, in dictum, that it lay within the judicial power (albeit not within the Supreme Court's original jurisdiction) to issue a writ of mandamus to a high executive branch officer (Secretary of State James Madison) to compel him to perform the executive branch function of delivering a completed commission to an officer claiming it.

121. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (upholding injunction barring executive officials from carrying out presidential order); 28 U.S.C. § 1361 (1993) ("The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.").

122. 2 U.S. (2 Dall.) 419 (1793).

123. *Hans v. Louisiana*, 134 U.S. 1, 11 (1890).

124. See, e.g., Balkin & Levinson, *supra* note 1, at 1053.

D. *Is Activism Just an Epithet?*

The variety of these definitions and the shifting relationships between them make “activism” an easily manipulable concept. It is easy to cry “activism” whenever one simply disagrees with how a court has interpreted and/or applied the law. As Justice Ginsburg observed at her confirmation hearings, judicial activism is “a label too often pressed into service by critics of court results rather than the legitimacy of court decisions.”¹²⁵ Although the disagreements underlying a claim of “activism” may be important, the generic reference to “activism” itself adds little of substance to that disagreement.¹²⁶ Thus it is understandable that several participants in this Symposium wanted to dispense altogether with “activism” as a concept and cut to the chase of substantive debates on the merits.¹²⁷

I have already suggested, however, that terms like “activism” and “restraint” perform important functions in a legal system permeated by the idea of institutional settlement—that is, one in which the allocation of authority to decide is at least as important as the correctness of decisions on the merits in some Platonic sense.¹²⁸ The problems surveyed in the last Section, however, suggest that those terms will be useful only if careful attention is paid to their limitations as descriptors. In particular, “activist” or “restrained” may be useful to describe specific aspects of a decision—e.g., the court’s decision to frame a rule broadly or narrowly, or to adhere to or depart from precedent—but will be less helpful in reaching overall characterizations. A court might announce a broad rule while adhering to precedent, for example, leaving us with no obvious way to weigh the decision’s activist aspect against its restrained one. “Activist” and “restrained” will help highlight the particular institutional

125. Quoted in Ziegler, *supra* note 108, at 1367–68.

126. See Justice, *supra* note 50, at 1–2 (“In most cases, the mindless incantation of this phrase amounts to a political ritual, which touches the congregation of voters on an emotional level without provoking any reasoned discourse among them.”).

127. See, e.g., Barnett, *supra* note 9, at 1288–90; Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism*, 73 U. COLO. L. REV. 1401, 1402 (2002) (suggesting that the phrase “judicial activism” should “be taken out of circulation”); Rebecca L. Brown, *Activism is Not a Four-Letter Word*, 73 U. COLO. L. REV. 1257, 1273 (2002) (urging that the important question is whether a court uses its power for “just ends,” not whether it is “activist” or not).

128. See *supra* Section I.B.

costs and benefits of each aspect of the court's decision, but on-balance assessments will be more problematic.

My analysis also suggests that general debates about the merits of "activism" and "restraint" in the abstract are unlikely to take us far. In the second Part of this Essay, I argue that "activism"—broadly conceived as an important role for courts in relation to the other branches in the interpretation and enforcement of constitutional norms—is consistent with a particular form of conservative political theory. Even that discussion, however, must distinguish between particular forms of activism, some of which fit the argument and others of which are more problematic. Most of the time, we will do better if we break "activism" and "restraint" down into their component parts and debate the merits of, say, originalism, maximalism, or the structural injunction. The more specific we can be, the less likely we are to talk past one another.

Many, if not most, contemporary attacks on the Rehnquist Court have failed to make any of these distinctions. The Court's federalism decisions—the line of cases that seems to have drawn the most charges of "activism" from liberals—vividly illustrate the point that decisions may be activist in some respects and restrained in others.¹²⁹ One gets no sense of this complexity, however, from the Court's critics—especially those writing for public, non-scholarly consumption.¹³⁰ This is unfortunate. As David Strauss has observed,

129. The contributions of Randy Barnett and Saikrishna Prakash both consider the charge of activism against the federalism cases. See Barnett, *supra* note 9, at 1281–88; Saikrishna Prakash, *Are the Judicial Safeguards of Federalism the Ultimate Form of Conservative Judicial Activism?* 73 U. COLO. L. REV. 1363, 1363–67 (2002). For that reason, I have not focused on the issue here. I do note, however, that the most widely criticized aspect of the Court's federalism jurisprudence—the state sovereign immunity cases—are clearly not activist in the sense of being a major break with the past. On the contrary, the Court's current expansion of state immunity continues a trend that reaches back through *Hans v. Louisiana*, 134 U.S. 1 (1890), to the ratification of the Eleventh Amendment in 1795. The nationalist surges of Reconstruction and the New Deal—so important in other areas of federalism doctrine—left relatively little imprint on the law of state sovereign immunity. That does not mean that the Court's present cases are rightly decided. See *Seminole Tribe v. Florida*, 517 U.S. 44, 100–185 (1996) (Souter, J., dissenting) (giving ample reasons why they are not).

130. See, e.g., Kramer, *The Supreme Court*, *supra* note 3; Kramer, *No Surprise*, *supra* note 3. A related problem is that the Court's liberal critics in public debate tend to paper over the *political* complexity of the Court's record. For every instance of politically "conservative" activism, it is possible to cite equally compelling instances of politically "liberal" activism by the Rehnquist Court. See *infra* Section II.C.

Sometimes the most valuable lesson that a lawyer or philosopher can convey to a lay audience about concrete practical issues, like the regulation of pornography or hate speech, is that those issues are not straightforward matters in which one side is principled and the other is not. One does not have to be equivocal or inconclusive in order to acknowledge the weight of the arguments on the other side and the vulnerabilities of one's own position.¹³¹

That observation is just as true of the activism debate as it is of the particular constitutional issues that Professor Strauss addresses. Charges of "judicial activism" go to the public standing of the Court as well as the more concrete political issue of judicial confirmations. While legal academics have a valuable role to play in helping make these issues intelligible for a broader audience, that role carries an obligation not to paper over complexities that may not support the scholar's own political preferences.

A considerably more fair-minded approach, taken by several contributions to this Symposium, has eschewed condemning the current Court's decision making as illegitimate. Rather, Professor Marshall and others have instead suggested that the current Court's activism—and presumably its acceptance by conservatives who criticized the activism of earlier eras¹³²—is hypocritical. That may well be so. To really support that sort of claim, however, one would have to show either that the Rehnquist Court is engaged in the same sorts of activism that characterized the Warren or Burger Courts,¹³³ or that the kinds of activism that characterizes the current Court are as bad or worse on balance. It may be consistent, for example, for someone who saw court-ordered busing as the height of illegitimate judicial activism to condone the kinds of institutional assertiveness engaged in by the Rehnquist Court. Whether

131. David A. Strauss, *Principle and Its Perils*, 64 U. CHI. L. REV. 373, 386 (1997) (reviewing RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996)).

132. It is not clear to me that conservatives outside the judiciary do, in fact, support the current Court in anywhere near the proportion that liberals seem to condemn it. As I suggest in Section II.C, *infra*, the extensive range of politically liberal decisions by the Rehnquist Court have deprived it of many politically conservative defenders.

133. *But see* Marshall, *supra* note 6, at 1253–54 (conceding that the Rehnquist Court has not engaged in the remedial activism that drew criticism during the Warren Court era).

remedial activism is in fact worse is, of course, a different question. My point is simply that these debates will be more edifying if we carefully distinguish—as Professor Marshall’s paper in particular has done—between the different sorts of activism.

E. “Activist Judicial Restraint”

This Part has been primarily concerned with making sense of traditional definitions of judicial activism. Before moving on, however, a brief word is in order concerning Michael Stokes Paulsen’s *un*-traditional discussion of “activist judicial restraint.” Professor Paulsen defines activism as “decision-making contrary to the original public meaning of authoritative legal texts”¹³⁴—an approach that seems to track the definition of activism as departures from constitutional text and history discussed previously.¹³⁵ Paulsen takes this definition in a characteristically provocative direction, however, by using it to criticize “a genus of procedural doctrines or judicial practices of ostensible ‘judicial restraint,’” including the political question doctrine, federal judicial deference to state interpretations of state law, the abstention doctrines, the doctrine of *stare decisis*, and the use of various canons of statutory construction.¹³⁶ Not only are these doctrines “activist,” Paulsen says, they are *unconstitutional*.¹³⁷

The problem with these doctrines, according to Professor Paulsen, is that they encourage judges to subordinate their “first best” interpretation of the Constitution to a different rule of decision derived from some principle of judicial “restraint.”¹³⁸ Paulsen’s argument thus adds an interesting component to the more common claim, discussed previously, that textualism and/or originalism are the only non-activist modes of interpretation. That claim, as I have suggested, would simply collapse the activism debate into longstanding feuds over interpretive method. Paulsen’s claim is different in that it focuses on situations in which the court may well have interpreted the Constitution correctly, but then chooses not to follow that interpretation for reasons of judicial restraint. An obvious example

134. See Paulsen, *supra* note 13.

135. See *supra* Subsection I.A.2.

136. See Paulsen, *supra* note 13.

137. *Id.*

138. See *id.*

would be a court that accepts Justice Thomas's narrow view of the Commerce Clause as a correct interpretation of the relevant text and history, but then adheres to a more expansive view on *stare decisis* grounds.

The main thrust of the objection is thus to the preference of "restrained" reading over the judge's "first best" view of what the Constitution actually means. This objection would retain much of its force even if we decouple it from Professor Paulsen's preference for textualism and originalism as the correct way to reach "first best" interpretations. The interesting point is Paulsen's insistence that once a judge figures out what he thinks the Constitution requires—based on whatever interpretive methodology he concludes is best—he is obligated not to let institutional considerations deter him from implementing that meaning.

For several of the "restrained" doctrines in question, however, the argument fails even on its own terms. It will help to start with the familiar "presumption of constitutionality" that generally exists when a statute is challenged on federal constitutional grounds.¹³⁹ Professor Paulsen is against presumptions. He believes that judges should apply their own best interpretation of the constitutional text, not presume that someone else's (the legislature's) is correct.¹⁴⁰ The problem with this argument is that neither the constitutional text nor its history usually specifies how rigorous judicial review under a given provision is supposed to be. Equal protection doctrine, for example, has for some time been divided into three different standards of review—strict scrutiny, intermediate scrutiny, and rational basis review.¹⁴¹ Each of these standards is ultimately derived from the presumption of constitutionality (and

139. See, e.g., *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."); *Heller v. Doe*, 509 U.S. 312, 319 (1993) ("[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity."); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) ("[L]egislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and . . . the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.").

140. See Paulsen, *supra* note 13.

141. See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439–42 (1985).

its established exceptions) that Professor Paulsen deplors.¹⁴² One of the implications of Professor Paulsen's attack on the general presumption is thus that it would take much of current substantive constitutional doctrine relying on judge-made tiers of scrutiny with it.¹⁴³

Professor Paulsen might not view that sort of doctrinal purge as much of a loss, but even if we rejected currently established presumptions and tiers we would still confront a question about the appropriate general level of review.¹⁴⁴ The few places where the constitutional text does seem to point toward a standard of review do not bode well for the enterprise of doing without judge-made standards. The First Amendment's seemingly determinate "Congress shall make *no law*" has been consistently rejected as a doctrinal standard in practice.¹⁴⁵ Chief Justice Marshall's famous interpretation of "necessary" in the Necessary and Proper Clause, on the other hand, itself created a version of the presumption of constitutionality to which Professor Paulsen objects.¹⁴⁶ Moreover, Marshall's general standard, as applied to the federalism cases with which

142. See *id.* at 440.

143. See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2, at 789-94 (2d ed. 1988) (describing the two "tracks" of First Amendment analysis).

144. The separate opinions of Justices Stevens and Marshall in *Cleburne*, for example, both rejected the current three-tiered structure of equal protection doctrine. Both acknowledged, however, the need to decide on some level of rigor for judicial review in such cases. See *Cleburne*, 473 U.S. at 451-52. (Stevens, J., concurring) (arguing that the basic rational basis test, properly understood, explains all equal protection outcomes); *id.* at 460 (Marshall, J., concurring in the judgment in part and dissenting in part) (arguing for a sliding scale under which the "level of scrutiny employed in an equal protection case should vary with the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.") (internal quotation marks omitted).

145. See, e.g., Owen M. Fiss, *The Supreme Court and the Problem of Hate Speech*, 24 CAP. U. L. REV. 281, 283 (1995) ("[T]he fact remains that Black's First Amendment absolutism never received the support of a majority of the Court. Indeed, over the years, it picked up only one vote . . .").

146. See, e.g., *Oregon v. Mitchell*, 400 U.S. 112, 286 (1970) (Stewart, J., concurring in part and dissenting in part) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819), for the proposition that when Congress acts under its Section Five power, "as against the reserved power of the States, it is enough that the end to which Congress has acted be one legitimately within its power and that there be a rational basis for the measures chosen to achieve that end"); *Scotfield v. NLRB*, 393 F.2d 49, 53 (7th Cir. 1968) (citing *McCulloch* for the basic rational basis test); *NLRB v. Edward G. Budd Mfg. Co.*, 169 F.2d 571, 577 (6th Cir. 1948) (same); *United States v. Chen De Yian*, 905 F. Supp. 160, 163 (S.D.N.Y. 1995) (same).

McCulloch was centrally concerned, has proven sufficiently compendious to allow ferocious debates about the appropriate level of judicial deference to the political branches *within* the context of the standard's application.¹⁴⁷

The important point is that the issue of deference to Congress is often part of the "right answer" in interpreting the Constitution, rather than an extraneous consideration introduced only after the "right answer" has been determined. Professor Paulsen seems to posit a court that arrives at a "first best" interpretation of the relevant text and history, then asks itself whether it should nonetheless apply some other interpretation based on institutional values of restraint.¹⁴⁸ That may well happen in some cases.¹⁴⁹ But much of the time, institutional considerations of deference and restraint enter into the formulation of the substantive constitutional norm. In those cases, Paulsen's arguments against subordinating "first best" interpretations to norms of restraint have little purchase.

This point covers a wide range of the practices that Professor Paulsen criticizes. Louis Henkin, for example, has famously argued that the political question doctrine is, in most cases, "an unnecessary, deceptive packaging" for a conclusion that either the Constitution imposes no applicable limits upon the exercise of government power in question or that no remedy is available for any violation that may have occurred.¹⁵⁰ Pro-

147. Compare, e.g., *United States v. Lopez*, 514 U.S. 549, 557 (1995) (purporting to apply a rational basis test under the Commerce Clause), with *United States v. Morrison*, 529 U.S. 598, 608–09 (2000) (Souter, J., dissenting) (accusing the Court of interpreting "rational basis" to accord insufficient deference to Congress's decisions), and *id.* at 618 (Breyer, J., dissenting) (applying the "rational basis" test in a way considerably more favorable to the government than the majority's approach).

148. See Paulsen, *supra* note 13.

149. Certainly it is the way courts approach civil rights claims in which the defendant government official raises a claim of qualified immunity. See *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) (holding that courts must first determine whether the official violated a federal right, then ask whether the right amounted to "clearly established law" for immunity purposes). The whole idea of qualified immunity is problematic under Professor Paulsen's view, which holds that courts should never allow judge-made rules to trump their "first best" interpretation of the Constitution. Paulsen could avoid invalidating the qualified immunity regime by distinguishing questions of *remedy* for constitutional violations from questions involving the *substance* of the underlying rights. As I demonstrate, however, several of the doctrines that Professor Paulsen attacks can be defended in the same terms. See *infra* notes 154–162.

150. Louis Henkin, *Is There a Political Question Doctrine?*, 85 YALE L.J. 597, 622–24 (1976).

fessor Paulsen's objections would apply in neither situation.¹⁵¹ Likewise, the abstention doctrines are generally explained in terms of the courts' traditional equitable discretion to deny injunctive relief.¹⁵² Finally, I have argued elsewhere that normative canons of statutory construction—including many or most applications of the canon of avoiding constitutional doubts—are best explained as a means of taking constitutional values into account in reaching a "first best" interpretation of ambiguous statutes.¹⁵³

At least two of the doctrines that Professor Paulsen targets, however, arguably involve the operation of institutional considerations—"restraint"—at a level distinct from the court's determination of the "right answer" on the merits. These are the federal courts' nearly complete deference to state courts on interpretations of state law and the doctrine of *stare decisis*. A federal court construing state law self-consciously defers to the interpretations of the state courts; it will generally make no effort to construct its own "first best" interpretation of what state law requires.¹⁵⁴ Likewise, *stare decisis* matters only in cases where the force of precedent causes courts to apply a rule other

151. I do not take Professor Paulsen to be arguing that it is unconstitutional "activist" to fail to provide a remedy for every constitutional violation, at least where the denial of a remedy can be explained in terms of traditional equitable principles.

152. See RICHARD H. FALLON, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1265-66 (4th ed. 1996) [hereinafter HART & WECHSLER]. Compare *Younger v. Harris*, 401 U.S. 37 (1971) (relying on the traditional doctrine that equity will not enjoin a criminal prosecution), with *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 730 (1996) (holding that federal courts generally may employ abstention doctrines to dismiss a lawsuit or remand it to state court only in cases where "a federal court is asked to provide some form of discretionary relief"). But see Douglas Laycock, *The Triumph of Equity*, LAW & CONTEMP. PROBS., Summer 1993, at 53, 71-73 (criticizing this distinction).

153. See Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1589-93 (2000).

154. It is unclear why Professor Paulsen would find such deference unconstitutional. When a court fails to apply its own "first best" interpretation of what a federal constitutional provision means, its decision arguably violates that particular provision. But what constitutional provision does a federal court's failure to apply its own "first best" interpretation of state law violate? In any event, such a decision might still be "activist"—even if not unconstitutional—to the extent that it fails to respect our ordinary expectation that courts sit for the purpose of faithfully applying whatever legal norms govern the particular case.

than the one dictated by their own "first best" reading of the relevant constitutional materials.¹⁵⁵

Professor Paulsen's arguments here challenge the very notion of institutional settlement. That principle, as I have discussed,¹⁵⁶ postulates that we are unlikely to achieve consensus on many issues of "first best" legal interpretation. Because decisions must nonetheless be made, our system allocates decision making authority to particular actors—here, state courts and prior courts—and accords some degree of deference to their conclusions. This principle cannot survive where every other decision maker is charged with applying their own "first best" interpretation of the constitution, with no deference allowed to what other decision makers have done.

This is not the place for a full-fledged defense of the principle of institutional settlement. It is enough to mention that we adhere to that principle in the two cases that Professor Paulsen mentions for good reasons. The understanding that state courts are final on the construction of state law, best embodied in *Murdock v. City of Memphis*,¹⁵⁷ is critical to modern understandings of federalism. As Martha Field has explained,

Without *Murdock*, the content of "state law" would vary according to whether it was reviewed by the Supreme Court. If the Supreme Court followed its own view of the best rule on review, instead of following the pronouncements of the highest state court concerning state law, it would not be possible to identify any body of law as "state law." It is thus

155. See Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994). As Professor Paulsen has pointed out, the very possibility that the Court might choose to depart from precedent will often require the Court to construct a "first best" reading of the constitutional provision and compare it with the precedential reading. See Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effects of Roe and Casey?*, 109 YALE L.J. 1535, 1545 (2000). I have argued elsewhere that what Paulsen calls the "informational" function of precedent—that is, the extent to which prior cases help us arrive at a "first best" interpretation of what the Constitution means, see *id.* at 1544—should play a leading role in constitutional method. See Young, *Rediscovering Conservatism*, *supra* note 10, at 691–92. Nonetheless, I am willing to posit that the "disposition" function of precedent—the obligation to follow prior cases even when they conflict with "first best" interpretations, see Paulsen, *supra*, at 1544—will play a critical role in at least some cases.

156. See *supra* notes 33–86.

157. 87 U.S. (20 Wall.) 590 (1874).

because of *Murdock* that the whole concept of state law as distinct from federal law is a meaningful one.¹⁵⁸

Needless to say, the consequences of abandoning *Murdock* for American federalism would be substantial. Moreover, although I cannot explore the issue in any depth here, it seems unlikely that the sort of deference that *Murdock* prescribes is alien to the Framers' understanding of the "judicial power."¹⁵⁹

The institutional reasons for *stare decisis* are even more fundamental. They involve the need not to start anew in each case—that is, the need for courts to function as part of an ongoing collaborative development of the law that spans generations, rather than as isolated entities who must confront the Constitution in each case as if no court had ever confronted it before.¹⁶⁰ Professor Paulsen is no doubt correct when he suggests that any non-absolute rule of *stare decisis* requires, at least to some extent, a reexamination by the sitting court of its predecessors' decisions.¹⁶¹ There are, however, such obvious differences in degree between the amount of reexamination required under Paulsen's view and the traditional conception of *stare decisis* as to amount to a difference in kind. Paulsen's view, to use my colleague Sanford Levinson's terminology, would make "protestant" interpreters of us all.¹⁶²

It is not coincidental that Professor Paulsen's proposal would, in each of the areas he discusses, radically expand the powers of the federal courts. I have classified adhering to precedent, avoiding constitutional decisions, and other prac-

158. Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 921 (1986).

159. As Justice Miller's opinion for the Court in *Murdock* points out, the 1789 Judiciary Act "in express terms limited the power of the Supreme Court in reversing the judgment of a State court, to errors apparent on the face of the record and which respected . . . Federal questions." 87 U.S. (20 Wall.) at 618. Although not a perfect indicator, the 1789 Act is highly probative of the Founding generation's understanding of Article III. See, e.g., *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888).

160. See Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990).

161. See Paulsen, *supra* note 155.

162. See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 27-37 (1988). According to Professor Levinson, the "protestant" view accords each interpreter the right to interpret the constitutional text by their own lights, much as religious Protestants believe in the "priesthood of all believers." The "catholic" view, on the other hand, holds that the Constitution really encompasses traditions of interpretation that postdate the writing, including judicial precedents. See generally *id.*

tices that Professor Paulsen criticizes as “restrained” because they all embody deference to authorities other than the sitting court; consigning these practices to the dustbin of unconstitutionality, on the other hand, empowers the sitting court to follow its own “first best” view of the Constitution without regard to constraints imposed by other actors. The Paulsenian judge would find himself free, for example, to intrude into areas of executive or legislative preeminence formerly shielded by the political question doctrine; to reshape state law according to the judge’s own lights; to enjoin state criminal prosecutions; and to replace settled understandings of what the Constitution means with whatever happens to be the judge’s own “first best” interpretation. Professor Paulsen’s normative proposal may have much going for it; perhaps the world would be better if federal judges had such powers (although I doubt it). But when a refusal to countenance such an expansion of the courts’ authority is considered “judicial activism,” the term really has lost all meaning.

II. WHAT IS “CONSERVATIVE”?

We might use the term “conservative” in this Symposium’s title for a variety of different purposes. If we could somehow agree on a definition of “judicial activism,” then we might ask whether activism of the “conservative” sort is good or bad.¹⁶³ We might also ask whether the Rehnquist Court’s activism is really “conservative” or just, well, *activist*. Or we might question whether judicial activism can ever be consistent with “conservative” principles—that is, whether “conservative judicial activism” is an oxymoron and its practitioners are being somehow hypocritical. Finally, we might use conservative political philosophy to help us arrive at a definition of “judicial activism” in the first place—or, more likely, to help us distinguish between which sorts of activism are helpful or pernicious.

I hope to do a little of each of these things in this Part. Before I can address any of them, however, we need a working definition of “conservatism.” And that term, like “judicial activism,” is far more slippery than some people seem to think. Sec-

163. Compare, e.g., Shane, *supra* note 1 (defending the Warren Court’s judicial activism but criticizing the “conservative” activism of the Rehnquist Court), with *Brzonkala v. Va. Polytechnic Inst.*, 169 F.3d 820, 889 (4th Cir. 1999) (Wilkinson, C.J., concurring) (taking the opposite position).

tion A proposes three categories of conservatism—situational, political, and institutional—that focus respectively on dispositions toward change, substantive political outcomes, and allocations of institutional power. Section B then discusses the implications of each position for the judicial role and, in particular, for judicial activism. Finally, Section C argues that the “activism” of the Rehnquist Court has not been reliably conservative in a political sense. Rather, the Court’s “conservatism” has manifested itself most consistently in a situational, Burkean acknowledgment that courts have particular institutional strengths vis-à-vis the political branches in some circumstances. The Court has thus not been afraid to function as a coequal interpreter of constitutional values in appropriate cases.

A. *A Typology of Conservative Thought*

We need to distinguish between three distinct sorts of conservatism. In doing so, it will help to begin with Samuel Huntington’s classic distinction between “situational” and “ideational” ideologies.¹⁶⁴ “Situational” ideologies are built around a stance toward the current set of existing institutions, without attempting to evaluate those institutions against any free-standing criteria of political morality.¹⁶⁵ “Ideational” ideologies, on the other hand, are based on a particular vision of the good society.¹⁶⁶ As Professor Huntington has explained,

Most ideologies posit some vision as to how political society should be organized. The words “liberalism,” “democracy,” “communism,” “fascism,” all convey an intimation as to what should be the distribution of power and other values in

164. See Samuel P. Huntington, *Conservatism as an Ideology*, 51 AM. POL. SCI. REV. 454, 455–56, 458 (1957).

165. See *id.* at 455.

166. See *id.* at 458. I use the terminology “vision of the good society” expansively to embrace both sides of the liberal distinction between the “right” and the “good.” Compare, e.g., Michael Sandel, *Introduction* to LIBERALISM AND ITS CRITICS 1, 3 (Michael Sandel ed., 1984) (observing that Kantian liberals “affirm certain liberties and rights as fundamental without embracing some vision of the good life”). The liberal framework of rights certainly fits what Huntington would call an “ideational” position—that is, it is an *a priori* set of substantive beliefs about how society should be ordered that does not rest on a particular view toward change. Cf. JOHN RAWLS, A THEORY OF JUSTICE § 6, at 31 (1971) (acknowledging that the “right” constrains the sort of theories of the “good” that individuals may adopt in a just society).

society, the relative importance of the state and other social institutions, the relations among economic, political, and military structures, the general system of government and representation, the forms of executive and legislative institutions.¹⁶⁷

A situational version of conservatism, however, lacks any such substance. The situational conservative is uninterested in the abstract question how a society *ought* to be organized if one were starting from scratch. Rather, the conservative imperative is to preserve the basic organizational structure that already exists.¹⁶⁸

Situational and ideational versions of conservatism have sharply different implications for judicial activism and the judicial role more generally. Moreover, ideational forms of conservatism may take at least two different forms—which I label “political” and “institutional” here—that likewise yield divergent prescriptions for judges.¹⁶⁹ I discuss each of these variants in turn.

1. Situational Conservatism

Conservatism as a situational ideology is primarily about resistance to change. As Clinton Rossiter has explained, “[t]he philosophical conservative subscribes consciously to principles designed to justify the established order and guard it against careless tinkering and determined reform.”¹⁷⁰ This sort of conservatism is most commonly associated with the British politician and political philosopher, Edmund Burke.¹⁷¹ I have ar-

167. Huntington, *supra* note 164, at 457.

168. *Id.* at 455.

169. This is not a complete typology; Professor Huntington, for example, also discusses “aristocratic” conservatism as an ideology grounded in a particular social class. See Huntington, *supra* note 164, at 454, 467–68. This version of conservatism has never transferred easily to American politics and has little relevance here. But see Mark Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 66 (1999) (describing the Rehnquist Court’s conservatism in class-based terms as “country club Republicanism”). I discuss the more modestly aristocratic elements of situational conservatism at notes 282–284 and accompanying text, *infra*.

170. CLINTON ROSSITER, *CONSERVATISM IN AMERICA* 9 (2d ed. 1982).

171. See, e.g., Huntington, *supra* note 164, at 456–61 (identifying Burke’s conservatism as situational in nature); Young, *Rediscovering Conservatism*, *supra* note 10, at 660–64 (same). For a more contemporary exemplar of the situational conservative tradition, see MICHAEL OAKESHOTT, *RATIONALISM IN POLITICS AND OTHER ESSAYS* (1962).

gued elsewhere that Burke's conservatism centers around the following critical elements:

- (1) a distrust of human reason and a consequent rejection of abstract political theory;¹⁷²
- (2) a preference for tradition and prescriptive wisdom passed down from prior generations and revealed in the structure of existing institutions;¹⁷³
- (3) a characterization of the political community as based on an organic social contract that confers on individuals not only rights but also duties to the community;¹⁷⁴
- (4) an acknowledgment of the possibility and even necessity of evolutionary change in institutions over time, based on the incrementalist model of the common law;¹⁷⁵ and
- (5) a belief in a "natural aristocracy"—that is, a system of mixed government that guarantees a role for elite decisionmakers characterized by education, good character, and institutional independence.¹⁷⁶

Others have characterized the key elements of Burke's philosophy somewhat differently but have emphasized similar themes.¹⁷⁷

In some ways, this situational definition of conservatism is the most familiar and intuitive definition. My own desk dictionary, for example, defines "conservative" as "[t]ending to oppose change; favoring traditional views and values."¹⁷⁸ More poetically, Ralph Waldo Emerson wrote that "[t]he castle, which conservatism is set to defend, is the actual state of

172. See Young, *Rediscovering Conservatism*, *supra* note 10, at 644–47.

173. See *id.* at 648–50.

174. See *id.* at 650–53.

175. See *id.* at 653–56.

176. See *id.* at 656–69.

177. See, e.g., Huntington, *supra* note 164, at 456 (citing six essential elements); RUSSELL KIRK, *THE CONSERVATIVE MIND: FROM BURKE TO ELIOT* 8–9 (7th ed. 1986) (listing six somewhat different points); ROSSITER, *supra* note 170, at 64–66 (cataloging twenty-two different precepts).

178. *THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* 312 (2d college ed. 1982). I choose this particular dictionary for the quite conservative reason that it was given to me when I went off to college in 1986, and I have had no subsequent reason to get a new one. Since conservatives tend to like things that are old, we might also try WEBSTER'S UNABRIDGED DICTIONARY 306 (13th ed. 1913). The most directly relevant definition there is "[t]ending or disposed to maintain existing institutions; opposed to change or innovation." As a conservative, I am somewhat embarrassed to admit that I obtained this venerable definition by consulting the Internet version of the dictionary, available on-line at the following address: <http://machaut.uchicago.edu/cgi-bin/WEBSTER.sh?WORD=conservative.htm>.

things, good and bad.”¹⁷⁹ The definition is intuitive only up to a point, however. In American politics, conservatism has been traditionally identified with a set of substantive political positions, including—at various times in our history—*laissez faire* economics and Social Darwinism,¹⁸⁰ anti-Communism,¹⁸¹ and fundamentalist Christianity.¹⁸² Those views, as I discuss in the next two subsections, would amount to different sorts of ideological conservatism in Huntington’s typology.¹⁸³ A situational conservative might or might not also subscribe to these substantive views, depending on whether they were embodied in established institutions.

It is also important to be clear about what the situational conservative opposes. Webster’s Thirteenth defines “conservative” as “opposed to *revolutionary* or *radical*”¹⁸⁴—not, it bears emphasis, as opposed to “liberal.” Indeed, to the extent that the American political community was “born liberal,”¹⁸⁵ an

179. Ralph Waldo Emerson, *The Conservative*, in *ESSAYS AND LECTURES* 175 (Joel Porte ed., 1983).

180. See, e.g., WILLIAM GRAHAM SUMNER, *WHAT SOCIAL CLASSES OWE TO EACH OTHER* 30–31 (10th prtg., Caxton Printers 1986) (1883).

181. See, e.g., Charles R. Kesler, *Introduction* to *KEEPING THE TABLETS: MODERN AMERICAN CONSERVATIVE THOUGHT* 3, 6 (William F. Buckley, Jr. & Charles R. Kesler eds., 1988) [hereinafter *KEEPING THE TABLETS*] (observing that “[w]hat conservatism’s parts had in common above all . . . was a commitment to vigorous anti-Communist policy, i.e., a recognition of the common enemy”).

182. See, e.g., *THE NEW RIGHT PAPERS* (Robert W. Whitaker ed., 1982); RICHARD A. VIGUERIE, *THE NEW RIGHT: WE’RE READY TO LEAD* (1980).

183. See Huntington, *supra* note 164, at 467–68.

184. WEBSTER’S UNABRIDGED DICTIONARY, *supra* note 178, at 307.

185. See LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* 5 (1955); see also 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 14 (Phillips Bradley ed., 1945) (1835) (“The emigrants who colonized the shores of America . . . somehow separated the democratic principle from all the principles that [it] had to contend with in the old communities of Europe, and transplanted it alone to the New World. It has there been able to spread in perfect freedom and peaceably to determine the character of the laws . . .”). The result of this history, as Michael McConnell has observed, is that “[w]e live . . . in the most thoroughly liberal political community in the history of the world, a community in which virtually all serious political figures from Barry Goldwater to George McGovern are ‘liberals.’” Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501, 1514 (1989). The “liberal consensus” school of American historiography has come under attack in more recent years by scholars emphasizing the civic republican aspects of our political tradition. Compare, e.g., GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787* (1969), and J.G.A. Pocock, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975), with Isaac Kramnick, *Republican Revisionism Revisited*, 87 AM. HIST. REV. 629 (1982) (challenging the centrality of republicanism). The important point, however, is that the situational conservative in America must defend an established set of in-

American conservative (of the situational kind) must commit to maintaining a set of institutions—individual rights, egalitarianism, written constitutionalism—that are substantively liberal in nature.¹⁸⁶ Americans, as Clinton Rossiter has observed, “have thought of liberty as a heritage to be preserved rather than as a goal to be fought for. The result is a political tradition that is . . . conservative about liberalism.”¹⁸⁷

The conservative’s opposition to change is also independent of the *direction* of that change. This point highlights an important distinction between the conservative and the reactionary. The reactionary is all for change—it’s just in the direction of institutional arrangements that have already existed at some time in the past.¹⁸⁸ Justice Thomas is a reactionary in this sense (without any of the term’s usual pejorative connotation): he would radically change current law and overrule current precedent in order to return to the Framers’ intent on issues like the Commerce Clause¹⁸⁹ and the Delegation doctrine.¹⁹⁰ These positions are not necessarily wrong, but they are not “conservative” in a situational sense.

It will probably become clear from what follows that I prefer the situational or Burkean definition of conservatism to its political and institutional competitors. This is not the place, however, for a defense on the merits of Burkean political prin-

stitutions that reflect a substantive ideology—whether republican or liberal—that is not itself “conservative.”

186. See generally Huntington, *supra* note 164, at 455; Young, *Rediscovering Conservatism*, *supra* note 10, at 660–64. This works fine as long as liberalism is thought of as connoting a particular set of institutions, such as a Bill of Rights protecting broad individual freedoms. The more difficult point arises to the extent that liberalism also entails an ideal of “progress” and continual social change. See, e.g., KARL MANNHEIM, *IDEOLOGY AND UTOPIA* 222–23 (Louis Wirth & Edward Shils trans., 1936) (1929); Michael Walzer, *The Communitarian Critique of Liberalism*, 18 POL. THEORY 6, 14 (1990) (observing that “liberalism is a strange doctrine, which seems continually to undercut itself, to disdain its own traditions, and to produce in each generation renewed hopes for a more absolute freedom from history and society alike”). Situational conservatives must, of course, reject this optimistic view that change is more likely to amount to “progress” than decline.

187. ROSSITER, *supra* note 170, at 70.

188. See Huntington, *supra* note 164, at 460 (defining the reactionary as “a critic of existing society who wishes to recreate in the future an ideal which he assumes to have existed in the past”).

189. See *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring).

190. See *Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 486 (2001) (Thomas, J., concurring).

ciples. The important point for present purposes is that the situational definition makes the most sense as a term of political analysis. It has the strongest roots in plain meaning and etymology—to “conserve” is “[t]o protect from loss or harm; preserve”¹⁹¹—as well as in the history of political theory.¹⁹² The situational definition also best captures what is unique about conservatism vis-à-vis other ideologies. Much of the content of political and institutional conservatism—ideas such as individualism, *laissez faire* economic policy, and majoritarianism—is either derived from or shared with forms of liberalism. Finally, as I discuss in the next two subsections, both the political and institutional definitions of conservatism confront serious problems of internal coherence.

2. Political Conservatism

Perhaps we should understand “conservatism” as an ideational ideology—that is, one based on a particular vision of the good society. I think it is fair to say that most people do understand it that way today—a conservative is for some combination of free markets, family values, and the like. The “and the like” becomes somewhat more complicated, however, when we ask what it means to be a conservative *judge*. In that context, conservatism has been identified with a set of ideas which, while not embodying a situational conservative resistance to change, are also not tied directly to, say, the political platform of the Republican Party. It may thus help for present purposes to subdivide the ideational sort of conservative ideology into an *institutional* and a *political* component.

I take the “political” side first in this subsection. We have understood since the legal realists, of course, that all judging is “political” at some level, and in that broad sense all of these forms of conservatism have to do with politics. Here, however, I mean something narrower than that. By “political” conserva-

191. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000), available at <http://www.bartleby.com/61/24/C0582400.html>. The word traces back to the Latin *conservare*, which is built from *servare*—to preserve—with the intensive prefix *con*. See *id.*

192. See, e.g., ROBERT NISBET, CONSERVATISM: DREAM AND REALITY x (1986) (“Burke is the prophet—the Marx or the Mill—of conservatism.”); CHARLES W. DUNN & J. DAVID WOODARD, THE CONSERVATIVE TRADITION IN AMERICA 27 (1996) (observing that “[m]odern American conservatism and liberalism trace their roots” to Burke and Rousseau, respectively).

tism I want to denote particular positions on abortion, school prayer, free speech, free markets, and other issues of substance. I will contrast this sort of conservatism in the next subsection with the sort that is primarily interested in the allocation of decision making authority.

Political conservatism is particularly hard to define because it means so many different things to different people. Most discussions have an "I know it when I see it" quality. Richard Fallon's thoughtful discussion of the relationship between conservatism and the Court's federalism jurisprudence, for example, adopts a categorizing scheme developed by political scientists Jeffrey Segal, Harold Spaeth, and others.¹⁹³ In several prominent studies, Professors Segal, Spaeth, and their colleagues attempted to predict the votes of Supreme Court justices as a function of political ideology, measuring the ideological affinity of each justice by newspaper editorial statements about them at the time of confirmation.¹⁹⁴ One of these studies summarized the "liberal" position as follows:

Liberal statements include (but are not limited to) those ascribing support for the rights of defendants in criminal cases, women and racial minorities in equality cases, and the individual against the government in privacy and First Amendment cases. Conservative statements are those with an opposite direction.¹⁹⁵

Professor Spaeth's database of Supreme Court decisions¹⁹⁶ employs a slightly broader set of criteria but one with basically the same structure. Because this tool appears to be widely employed by political scientists studying the Court, and—more important—because it strikes me as typical both of the way in which "conservatism" is defined in current discourse and of the

193. See Fallon, *Conservative Paths*, *supra* note 57, at 447–48.

194. See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993); see also Jeffrey A. Segal, Lee Epstein, Charles M. Cameron & Harold J. Spaeth, *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812 (1995); Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989).

195. Segal & Cover, *supra* note 194, at 559.

196. See HAROLD J. SPAETH, INTER-UNIVERSITY CONSORTIUM FOR POLITICAL AND SOCIAL RESEARCH, UNITED STATES SUPREME COURT JUDICIAL DATABASE, 1953–1997 TERMS (1999) (computer file).

problems arising from such definitions, I have reproduced Professor Spaeth's expanded criteria in the margin.¹⁹⁷

This sort of approach to defining political "liberalism" and "conservatism" strikes me as positively riddled with problems. To begin with, neither the database nor the seminal articles advancing these classifications make any attempt to defend them on the merits. Rather, they are put forward as intuitive and non-controversial. And yet some of the definitions are anything but obvious. Is the pro-taxpayer position always "conservative"? Justice Douglas obviously didn't think so.¹⁹⁸ More importantly, many of the classifications are simply too crude. In

197. Professor Spaeth's introductory documentation section offers the following definitions, with a coding of "1" for liberal and "2" for conservative:

[I]n the context of issues pertaining to criminal procedure, civil rights, First Amendment, due process, privacy, and attorneys

1 = pro-person accused or convicted of crime, or denied a jury trial, pro-civil liberties or civil rights claimant, pro-indigent, pro-Indian, pro-affirmative action, pro-neutrality in religion cases, pro-female in abortion, pro-underdog, anti-government in the context of due process, except for takings clause cases where a pro-government, anti-owner vote is considered liberal except in criminal forfeiture cases, pro-attorney, pro-disclosure in [Freedom of Information Act] issues except for employment and student records

2 = reverse of above

[I]n the context of issues pertaining to unions and economic activity

1 = pro-union except in union antitrust... where 1 = pro-competition, anti-business, anti-employer, pro-competition, pro-liability, pro-injured person, pro-indigent, pro-small business vis-à-vis large business, pro-debtor, pro-bankrupt, pro-Indian, pro-environmental protection, pro-economic underdog, pro-consumer, pro-accountability in governmental corruption, anti-union member or employee vis-à-vis union, anti-union in union antitrust, pro-trial in arbitration

2 = reverse of above

[I]n the context of issues pertaining to judicial power

1 = pro-exercise of judicial power, pro-judicial "activism", pro-judicial review of administrative action

2 = reverse of above

[I]n the context of issues pertaining to federalism

1 = pro-federal power, anti-state

2 = reverse of above

[I]n the context of issues pertaining to federal taxation

1 = pro-United States

2 = pro-taxpayer

See *id.*, documentation section, at 70-71.

198. See BERNARD WOLFMAN ET AL., *DISSENT WITHOUT OPINION: THE BEHAVIOR OF JUSTICE WILLIAM O. DOUGLAS IN FEDERAL TAX CASES 4* (1975) (noting that Justice Douglas strongly favored the taxpayer over the IRS).

free speech cases, for example, the intuitive political valence of an asserted right to burn a cross on a black family's lawn may be quite different from the right to post pornography on the internet¹⁹⁹—yet the Segal/Spaeth classification would treat them the same. And many cases can be classified as either “liberal” or “conservative,” depending on the salience of different factors to the classifier. Was *United States v. Lopez*²⁰⁰ a “liberal” decision, because it was “pro-person accused or convicted of crime,” or was it “conservative,” because it was anti-federal power?²⁰¹ Indeed, Spaeth's classification system renders the topic of this Symposium an oxymoron by classifying “pro-judicial ‘activism’” decisions as inherently “liberal.”

The Segal/Spaeth criteria share a more fundamental problem with many intuitive definitions of “conservatism”—the tendency to treat it as simply the mirror image of “liberal” political positions.²⁰² Sometimes this tendency is merely mislead-

199. See generally Eugene Volokh, *How the Justices Voted in Free Speech Cases, 1994–2000*, 48 UCLA L. REV. 1191 (2001). Likewise, “neutrality” in religion cases—an indicator of liberalism for Spaeth, see *supra* note 197—has generally been the “conservative” position in cases concerning government funding and benefits for religious groups. See, e.g., *Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819 (1995). See also *The Court's Troubling Term*, N.Y. TIMES, July 3, 2002, at A22 (asserting that the Court's decision upholding vouchers provided to religious and non-religious schools alike was a “bombshell” that “advanced a key conservative cause”).

200. 514 U.S. 549 (1995).

201. What, for example, would Professor Spaeth do with the following not-so-hypothetical case: Microsoft sues the Texas Department of Prisons for unauthorized use of its software as a violation of the federal copyright laws. See Mike Ward, *Microsoft: Prison System Violated Copyright*, AUSTIN AMERICAN-STATESMAN, Apr. 12, 2002, at A1. It asserts that the federal statute abrogating state sovereign immunity in such cases is valid as a means of enforcing the Takings Clause against the states. See *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 642 n.7 (1999) (refusing to consider Takings theory for validity of the Patent Remedy Clarification Act on the ground that Congress had not explicitly relied on such a theory). The Court rejects this theory and holds the state to be immune from suit. Such a decision would be “conservative” on the ground that it is pro-state, but “liberal” on the grounds that it is “anti-business” and “pro-government, anti-owner” in a takings case. Spaeth's “judicial activism” criteria would only muddy the waters further. The decision would be “liberal” in the sense that it is “activist” for striking down a federal statute, but “conservative” because it is anti-exercise of judicial power (i.e., refusing to provide a private remedy for government action). Not all cases, of course, can be construed in so many different ways. But I expect *many* of them can be.

202. See *supra* note 197 (classifying the conservative position on each set of issues as simply “reverse of” the liberal positions).

ing. It ignores, for example, the significant areas of overlap between and common historical roots of many conservative and liberal positions,²⁰³ as well as the possibility that conservatism may have autonomous content that cannot be derived from the mere negation of liberalism. Sometimes, however, the Segal/Spaeth approach blatantly stacks the moral deck against conservatives. Professors Segal and Cover, for example, identify a newspaper accusation that a judicial nominee espoused "pure and simple racism" as one of their paradigm cases of a statement showing the nominee to be "conservative."²⁰⁴ This sort of example reveals the pitfalls of classifying ideologies as simple opposites—i.e., liberals are for racial equality, therefore "conservatives" must be against it—and it may reveal strong anti-conservative biases lurking in the research. Given all these problems, it is a wonder that this sort of classification system is taken seriously.²⁰⁵

Although most intuitively-derived definitions of political conservatism are not as systematized as the Segal/Spaeth approach, they tend to share another drawback that is particularly troubling for present purposes. Such definitions rarely display any interest in identifying a coherent set of underlying principles that tie various "conservative" political positions together. It thus becomes impossible to make principled arguments that a particular position is or is not "conservative"; on the intuitive definition, a position is "conservative" simply because some number of people *think* it is. The great political

203. See, e.g., George F. Will, *Foreword to ROSSITER, supra* note 170, at vi ("It sometimes seems that many American conservatives are unreconstructed 'classic' or 'nineteenth-century' liberals who would be recognized as such in a European context. Furthermore, this country was founded by liberal gentlemen who made a conservative revolution.").

204. Segal & Cover, *supra* note 194, at 563 n.2.

205. See, e.g., Thomas R. Hensley & Scott P. Johnson, *Unanimity on the Rehnquist Court*, 31 AKRON L. REV. 387, 400 n.66 (1998) (describing the Segal & Spaeth criteria as "standard definitions for liberal and conservative case decisions used by scholars who apply empirical methods to the study of judicial decision making"). To be sure, one can find even worse ideological definitions out there on LEXIS. A researcher studying the Texas Supreme Court recently stated—apparently with a straight face—that "[f]or purposes of this Study, liberal means 'free in giving; generous; not restrained or narrow-minded; not literal or strict.' Further, liberal means one who supports individual liberties such as freedom of speech, equal protection, and due process rights guaranteed by the Texas Constitution." Julie F. Segal, *High Court Studies: The Supreme Court of Texas from 1989–1998*, 62 ALBANY L. REV. 1649, 1671 n.188 (1999) (quoting BLACK'S LAW DICTIONARY 916 (6th ed. 1990)). Liberals, to paraphrase only slightly, are nice people who care about liberty.

ideologies²⁰⁶ thus become much like our major political parties, characterized by loose alliances of often unrelated and sometimes outright contradictory ideas thrown together by various practical and historical imperatives.

A survey of some of American Conservatism's current political components will illustrate the point. Most of these definitions will be familiar to the point of superfluity, but an attempt to define these groups with some precision should help to support the argument that follows:

Economic Conservatives: American conservatism is often equated with the supposedly anti-regulatory preferences of Big Business.²⁰⁷ This group tends to emphasize individualism and the centrality of economic rights, such as the sanctity of private property.²⁰⁸ Economic conservatives are correspondingly skeptical of both the moral legitimacy and practical efficacy of government regulation and redistribution of wealth.²⁰⁹

Libertarians: Libertarians take the economic conservative's aversion to government intervention in economic affairs and universalize it, advocating "[t]he maximum reduction of social and government action . . . so that the greatest possible room is left for each individual to act."²¹⁰ While few seem to

206. See, e.g., NISBET, *supra* note 192, at vii ("Conservatism is one of the three major political ideologies of the past two centuries in the West, the other two being liberalism and socialism.").

207. See, e.g., Christopher Lee, *Bush Stands Up for Judicial Nominee*, DALLAS MORNING NEWS, July 17, 2002, at 23A (reporting that opponents of Fifth Circuit nominee Priscilla Owen have painted her as a "conservative activist jurist whose rulings illustrate a pro-business, anti-worker bias"); Philip Gailey, *Bush Turning Back the Clock with the Republican Right by His Side*, ST. PETERSBURG TIMES, Apr. 8, 2001, at 3D (lamenting that new appointees to the Bush administration are "ideological conservatives who are . . . anti-government and pro-business"); SEGAL & SPAETH, *supra* note 194, at 305 (classifying pro-business, anti-regulatory rulings as "conservative").

208. See, e.g., MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962). Economic conservatives praise economic rights both as a means to the end of political freedom and as independent goods in themselves. See *id.* at 8-9. Professor Friedman himself has always insisted that he is "a classic 'Manchester' liberal." See Will, *supra* note 203, at viii.

209. See FRIEDMAN, *supra* note 207, at 15, 199-200.

210. DUNN & WOODARD, *supra* note 192, at 39. For a good taste of the libertarian tradition's anti-statist flavor, see Albert J. Nock, *Anarchist's Progress*, in KEEPING THE TABLETS, *supra* note 180, at 120-21 ("[W]hether in the hands of Liberal or Conservative, Republican or Democrat, and whether under nominal constitutionalism, republicanism, or autocracy, the mechanism of the State would work freely and naturally in but one direction, namely, against the general welfare of the people."). In terms of practical prescriptions, however, Nock tended to ex-

advocate the classic libertarian "nightwatchman" state anymore, a more widely-shared libertarian tendency seeks to maximize particular negative freedoms, such as free speech or the right to privacy.²¹¹

Traditionalists: While economic conservatives and libertarians can often be fairly described as the intellectual heirs of John Locke, traditionalist conservatives reach beyond Locke to pre-liberal ideals of community, virtue, and prescription. Different sub-groups seek these values in a variety of particularistic traditions. The Southern Agrarians, for instance, sought it in a de-racialized version of the antebellum South,²¹² while others focused on the English conservative tradition and, in particular, Burke's thought.²¹³ Traditionalists typically combine the situational conservative's critique of rationalism and respect for prescriptive wisdom with more substantive or ideational elements such as a belief in community and a religious moral order.²¹⁴

Social/Religious Conservatives: The social and religious conservatives that made up the American "New Right" in the 1980s shared the traditionalists' concern for a religious moral order, although they tended to be uninterested in the particular intellectual traditions espoused by the traditionalists. The New Right has also tended to be more populist than the traditionalists, who have often had a somewhat elitist cast.²¹⁵

change his radicalism for a conservative resignation to the existing order. *See id.* at 124–25.

211. *See, e.g.,* Volokh, *supra* note 199, at 1198.

212. *See generally* EUGENE D. GENOVESE, *THE SOUTHERN TRADITION: THE ACHIEVEMENT AND LIMITATIONS OF AN AMERICAN CONSERVATISM* (1994). For representative statements, *see generally* RICHARD M. WEAVER, *THE SOUTHERN TRADITION AT BAY: A HISTORY OF POSTBELLUM THOUGHT* (George Core & M. E. Bradford eds., 1968) and *TWELVE SOUTHERNERS, I'LL TAKE MY STAND: THE SOUTH AND THE AGRARIAN TRADITION* (1930).

213. *See, e.g.,* KIRK, *supra* note 177, at 3–70; Jeffrey Hart, *Burke and Radical Freedom*, 29 REV. OF POL. 221 (1967).

214. *See, e.g.,* GENOVESE, *supra* note 212, at 14 ("[The Southern agrarians] counterposed an older Christian notion of a God-given dignity of the personality to the bourgeois notion of the individual as the center of the universe. For them, the very dignity of the personality requires roots in the community and, above all, the family.").

215. *See, e.g.,* VIGUERIE, *supra* note 182, at 15–16 (describing the New Right coalition as composed of, *inter alia*, "hard-working citizens sick and tired of high taxes and ever-rising inflation, . . . born-again Christians disturbed about sex on TV and in movies, parents opposed to forced busing, . . . and middle class Americans tired of Big Government, Big Business, Big Labor and Big Education telling us what to do and what not to do").

Neo-Conservatives: The Neo-Conservatives, a loosely-affiliated group of intellectuals who became an important ideological force in the aftermath of the 1960s, are themselves difficult to define and categorize. They tend to have started out as liberals; as Irving Kristol quipped, a New-Conservative is "a liberal mugged by the Revolution."²¹⁶ Perhaps the most important distinctive features of this new form of conservatism were its acceptance in principle of the modern welfare state (combined with a sophisticated critique of particular liberal policies) as well as its opposition to the more traditional conservative isolationism in foreign policy.²¹⁷

Anti-Communists: Hostility to communism has been a critical unifying force among the otherwise diverse strands of American conservatives, and for many conservatives it was long the essential characteristic of conservative ideology.²¹⁸ The particular *reasons* for opposing communism naturally varied according to one's affinities with the various sorts of conservatism already listed—that is, an economic conservative might oppose the nationalization of industry, while a traditionalist would abhor the destruction of traditional religions.

These descriptions are, of course, merely thumbnail sketches of complex political and intellectual movements. Nonetheless, they should convey some sense of the difficulty in defining "political conservatism." Few, if any, underlying themes unify these diverse groups; indeed, their basic assumptions tend to be more contradictory than their surface policy

216. Quoted in NISBET, *supra* note 192, at 99; see also IRVING KRISTOL, NEO-CONSERVATISM: THE AUTOBIOGRAPHY OF AN IDEA, at x-xi (1995).

217. See NISBET, *supra* note 192, at 101-02; see also IRVING KRISTOL, REFLECTIONS OF A NEOCONSERVATIVE 75-77 (1983) (collecting eight main characteristics of neoconservatism: its academic, intellectual nature; its anti-romanticism; its roots in classical, pre-modern political philosophy; a pragmatic, "detached attachment" to liberal-democratic capitalism; a belief in a predominantly market economy; a pragmatic emphasis on economic growth as "indispensable for social and political stability"; a willingness to tolerate a "conservative welfare state"; and an emphasis on the family, religion, and the "intermediate institutions of liberal society which reconcile the need for community with the desire for liberty").

218. See GEORGE H. NASH, THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA SINCE 1945, at 84-123 (1995) (identifying anti-communism as a critical force in reviving American conservatism since 1945); Richard Brookhiser, *Being Right in a Post-Postwar World*, TIME, Dec. 11, 1989, at 112 ("Communism acted on all these grouplets as a powerful unifying force Like an offensive guest at a lousy party, Communism drew together a lot of people who would otherwise have been standoffish.").

prescriptions. Economic conservatives and libertarians are highly individualistic,²¹⁹ while traditionalists, neo-conservatives, and New Righters emphasize communities and families.²²⁰ Traditionalists tend towards a Burkean skepticism of human reason,²²¹ while economic conservatives rely upon the rational actors of the free market²²² and neo-conservatives trust in technocratic expertise.²²³

All conservatives value private property, but in quite different forms and for quite different reasons. While economic conservatives value market capitalism as a check on the power of the State,²²⁴ Southern Agrarians revere only the small holdings produced by individual labor while deploring the materialism of capitalism on a broader scale.²²⁵ Neo-conservatives likewise reject many of the *laissez faire* prescriptions of the economic conservatives, while agreeing with the latter group on critiques of particular liberal regulatory policies.²²⁶

219. See, e.g., FRIEDMAN, *supra* note 208, at 1–2 (“To the free man, the country is the collection of individuals who compose it, not something over and above them.”).

220. See, e.g., GILLIAN PEELE, *REVIVAL AND REACTION: THE RIGHT IN CONTEMPORARY AMERICA* 39 (1984) (observing that “neo-conservative sociologists . . . want to strengthen the range of intermediate institutions and identities which may be interposed between the individual and the State, whether those identities be linguistic, ethnic, or religious”). For an example of this conflict, see Frank S. Meyer, *The New Conservatism and the State*, in *KEEPING THE TABLETS*, *supra* note 181, at 138, 142 (attacking the embrace of state-sponsored community by Russell Kirk and the traditionalists as accepting “the central tenet of totalitarianism”).

221. See Oakeshott, *supra* note 171, at 35–37; GENOVESE, *supra* note 212, at 27; see also *supra* notes 155–156 and accompanying text.

222. See ROSSITER, *supra* note 170, at 151–54 (highlighting the differences between “*laissez faire* conservatism” and traditional conservatism).

223. See PAUL GOTTFRIED & THOMAS FLEMING, *THE CONSERVATIVE MOVEMENT* 66 (1988) (“One need not search far in the work of Glazer, Moynihan, Lipset, Wildavsky, or Wilson [all prominent neoconservatives] to find proof of what Michael Oakeshott calls ‘rationalism in politics.’ All of them believe that social problems can be properly managed if the state acts on the basis of knowledge.”); PEELE, *supra* note 220, at 20 (“Neo-conservatives would like to think that the dispassionate collection and deployment of data . . . [is] one of their characteristic traits and that their advocacy of objectivity in the public policy process has been one of their major contributions to American administration.”).

224. See FRIEDMAN, *supra* note 208, at 9.

225. See GENOVESE, *supra* note 212, at 34–35.

226. See PETER STEINFELS, *THE NEOCONSERVATIVES: THE MEN WHO ARE CHANGING AMERICA’S POLITICS* 10 (1979) (noting that “what distinguished [neo-conservatism] from existing [economic] conservatism was a positive stance toward the New Deal and a ‘practical’ attitude toward government intervention in the economy”).

Two more basic points should emerge from this survey. The first is that "political conservatism," as currently used in American circles, may be fundamentally incoherent.²²⁷ The political science literature uses intuitive, "I know it when I see it" definitions precisely because attempts to categorize intuitively "conservative" positions as a matter of substantive principle tend to dissolve into hopeless contradictions. Clinton Rossiter, who made a valiant and sophisticated—but also doomed—attempt to wrest a coherent conservative synthesis from American political thought in the 1950s, once confessed that upon reading the manifesto of one prominent "conservative" publication he "considered throwing my notes to the wind and taking up botany, a science whose practitioners have come to some agreement on terminology."²²⁸ If any such agreement is to be had about the meaning of political conservatism, it is likely only to come by jettisoning important elements of the pragmatic coalition that currently travels under that name.

The second point is that any definition of conservatism as a matter of political substance may come into tension with the situational and institutional definitions discussed in the other parts of this Section. A situational conservative might be against *all* the political positions outlined in this subsection if they were contrary to existing institutions.²²⁹ A situational conservative in the Soviet Union in 1988, for example, would have opposed Mikhail Gorbachev's efforts to liberalize the economy along free market lines—even though those reforms would be congenial to political conservatives as a matter of substantive policy.²³⁰ Similarly, Burkean situational conservatives have long been uncomfortable with the profound change wrought by the free market doctrines of economic conservatives,²³¹ as well as with the radical rhetoric of the New Right.²³²

227. One could, of course, make similar arguments about "political liberalism," which is also a rickety coalition of very disparate ideas. That discussion, however, would take us far afield indeed.

228. ROSSITER, *supra* note 170, at 196.

229. See, e.g., Mannheim, *supra* note 186, at 230 ("[Conservative] thought . . . inclines to accept the total environment in the accidental concreteness in which it occurs, as if it were the proper order of the world.").

230. See, e.g., R. Jeffrey Smith, *CIA Assesses Effect of Gorbachev Cuts*, WASH. POST, Dec. 13, 1988, at A3 (describing power struggle "between Soviet reformers favoring radical change and conservatives, who fear it could destabilize the communist system").

231. See, e.g., ROSSITER, *supra* note 170, at 203 ("Looked at from the long view of history, the American capitalist, however 'conservative' his views on gov-

As I discuss in the next subsection, tensions may also arise between situational and/or political definitions, on the one hand, and *institutional* conservatism on the other.

3. Institutional Conservatism

Institutional conservatism contrasts with both the positions that I have discussed so far. An institutional conservative has definite views about how the ideal society ought to be organized. Those views, however, have more to do with institutional arrangements than ultimate outcomes.²³³ These institutionalist views include the conviction that as many decisions as possible should be left to individuals rather than government;²³⁴ that government decision making should be overwhelmingly majoritarian in character;²³⁵ that the state governments should enjoy relatively more power vis-à-vis the federal government than they currently do;²³⁶ and that within the federal government the Executive should be a strong and unitary branch.²³⁷ We might also identify some more particular positions bearing on the methodology of judging, including the general idea of judicial restraint, originalism in constitutional interpretation, and a formalist commitment to textualism and bright line rules.²³⁸

ernment, family, property, school, and church, has been the most marvelous agent of social change the world has ever known.”).

232. On the radical tendencies of the New Right—especially back in the days when it was really “new”—see, e.g., ALAN CRAWFORD, *THUNDER ON THE RIGHT: THE “NEW RIGHT” AND THE POLITICS OF RESENTMENT* 304 (1980) (observing that the New Right “has increasingly manifested itself as a protest movement, waging war with the status quo, unwilling to accept the political and economic order”).

233. See, e.g., Will, *supra* note 203, at ix (“Some persons say that their conservatism primarily concerns governmental due process. They emphasize judicial restraint and federalism, and contend that conservatism is as much about the correct allocation of governmental powers as it is about the advancement of particular policies.”).

234. See, e.g., FRIEDMAN, *supra* note 207, at 1–2.

235. See, e.g., RICHARD A. BRISBIN, JR., *JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL* 5 (1997) (observing that “the conservative movement rests its criticism on a majoritarian democratic argument”).

236. See, e.g., Fallon, *Conservative Paths*, *supra* note 57, at 450–51; ROSSITER, *supra* note 170, at 79 (identifying federalism as a key aspect of the “conservative Constitution”).

237. See, e.g., Fallon, *Conservative Paths*, *supra* note 57, at 450–51; CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* 151–71 (1991); BRISBIN, *supra* note 235, at 97–116.

238. See Young, *Rediscovering Conservatism*, *supra* note 10, at 625–42.

It should be readily apparent that the boundaries between "institutional" conservatism and the other kinds are not airtight. One can think of a commitment to individualism, for example, as either a particular substantive good (such as self-actualization) or a view about the institutional allocation of power. One might likewise see the free market as an institution for distributing power or a particular vision of the good society. I doubt whether anything important depends, however, on having an overly precise divide between these two categories. In many areas, the distinction between institutional and political conservatism will be meaningful and useful. Opposition to abortion because it is morally wrong, for example, is quite different from opposition to *Roe v. Wade* on the ground that decisions about abortion should be made by the majoritarian political process in individual states.

As with political conservatism, the notion of institutional conservatism displays important tensions both internally and with the other forms of conservatism that I have discussed. It is not clear whether any common themes unite these principles of individualism, majoritarianism, federalism, and the unitary executive. Majoritarianism will conflict with individualism whenever the majority seeks to regulate private conduct. Federalism may conflict with either individualism (on Madison's theory that the "tyranny of the majority" is more likely in smaller communities),²³⁹ or with majoritarianism (whenever a national popular majority seeks to aggrandize federal power at the expense of the states). The unitary executive may be linked to majoritarianism through the Framers' concern for centralizing public accountability in the President.²⁴⁰ A strong national Executive may undermine federalism, however, by overcoming barriers to national action,²⁴¹ and executive authority may be used in ways that threaten libertarian individual-

239. See THE FEDERALIST No. 10, *supra* note 37, at 51.

240. See THE FEDERALIST No. 70, *supra* note 37, at 476-77, 399 (Hamilton) (arguing that the unitary executive principle enhances accountability to the People); but see Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161 (1995) (arguing that the unitary executive does not, in fact, promote public accountability).

241. See Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1363 (2001) ("It is no coincidence that the most dramatic incursions on state regulatory authority have come in the wake of the modern administrative state, which was erected in large part to streamline the process of federal law-making.").

ism.²⁴² To generalize somewhat crudely, individualism and federalism seek to limit government, while majoritarianism and unitariness tend to empower it.²⁴³

These sorts of tensions help explain a number of instances in which the conservative Supreme Court has been willing to side with national power against the states. The Court's recent ruling minimizing the ability of state governments to take a stand on international human rights,²⁴⁴ for example, may be explainable primarily by way of an institutional commitment to Executive supremacy in foreign affairs.²⁴⁵ Similarly, the Court's recent decision transferring regulatory authority over local telephone markets from state utility agencies to the Federal Communications Commission²⁴⁶ may be explained primarily by the conservative justices' commitment to the *Chevron* doctrine of deference to administrative agency interpretations of law²⁴⁷—a doctrine which is itself justified by institutionally conservative notions of majoritarianism, the unitary executive,

242. See, e.g., Laurence H. Tribe, *Trial by Fury: Why Congress Must Curb Bush's Military Courts*, NEW REPUBLIC, Dec. 10, 2001, at 18 (arguing that congressional involvement in the development of military tribunals for terrorists is essential to maintain constitutional rights and prevent governmental overreaching).

243. See, e.g., Harold H. Bruff, *On the Constitutional Status of the Administrative Agencies*, 36 AM. U. L. REV. 491, 508 (1987) (observing that "the framers identified an additional advantage in choosing a single executive: increased efficiency due to the energy and dispatch with which a unitary executive could act"); James A. Gardner, *Devolution and the Paradox of Democratic Unresponsiveness*, 40 S. TEX. L. REV. 759, 763–66 (1999) (noting that the federal lawmaking process is designed to impede governmental action by making the government less responsive to the popular will).

244. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000); see also Sanford Levinson, *Compelling Collaboration with Evil? A Comment on Crosby v. National Foreign Trade Council*, 69 FORDHAM L. REV. 2189 (2001).

245. John C. Yoo, *Foreign Affairs Federalism and the Separation of Powers*, 46 VILL. L. REV. 1341 (2001) (explaining the ordinarily pro-states' rights justices votes against Massachusetts in *Crosby* as motivated primarily by concerns about federal Executive authority over foreign affairs). For a different interpretation of *Crosby* as an unfortunate revival of pre-1937 notions of "dual federalism," see Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 177–85 (2001).

246. See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); see also Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 39 (describing *Iowa Utilities Board* as "the biggest federalism case of [the 1998] Term").

247. See *id.* at 41.

and judicial restraint.²⁴⁸ In both cases, federalism could be seen as impeding important federal policy initiatives and clashing with institutionally conservative values designed to empower government.

Judge Wilkinson's contribution to this Symposium offers a sophisticated synthesis of the Rehnquist Court's jurisprudence, finding a unifying institutional theme in the protection of intermediary institutions that exist as buffers between the individual and the State.²⁴⁹ This concern for intermediary institutions unites the Court's federalism cases—which protect the autonomy of state political communities as intermediaries between the individual and the national government²⁵⁰—with other cases protecting rights of association and family autonomy.²⁵¹ Judge Wilkinson's account echoes Tocqueville, who emphasized the critical role of intermediary institutions in his analysis of both the French Revolution and antebellum America.²⁵² This concern for intermediary institutions also finds deep roots in conservative thought, which saw the isolated individual as an inadequate building block for society. Burke, for example, emphasized that "[t]o be attached to the subdivision, to love the little platoon we belong to in society, is the first principle . . . of public affections."²⁵³

By focusing on intermediary institutions, however, Judge Wilkinson necessarily picks and chooses among the broader set

248. See *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 865–66 (1984); Michael A. Fitts, *Retaining the Rule of Law in a Chevron World*, 66 CHI.-KENT L. REV. 355, 356–57 (1990).

249. See Wilkinson, *supra* note 19, at 1392–93.

250. On the states as intermediary institutions, see also Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 136–37 (2001).

251. See Wilkinson, *supra* note 19, at 1394–97 (discussing *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and *Troxel v. Granville*, 530 U.S. 57 (2000)).

252. See 1 ALEXIS DE TOCQUEVILLE, *THE OLD REGIME AND THE REVOLUTION* 118–24 (Francois Furet & Francoise Melonio eds., Alan S. Kahan, trans., 1998) (1855) (describing the elimination of intermediary institutions prior to the Revolution); 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 115–27 (Phillips Bradley ed., 1945) (1840) (describing the importance of civic associations in American public life). For contemporary arguments along similar lines, see ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000); LARRY SIEDENTOP, *DEMOCRACY IN EUROPE* 2–7 (2001); ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985).

253. Edmund Burke, *Reflections on the Revolution in France* (1790), reprinted in 8 *THE WRITINGS AND SPEECHES OF EDMUND BURKE* 97 (Paul Langford ed., Clarendon Press 1989) (1790).

conflict among these institutional prescriptions should be obvious, despite their common roots. Some doctrines of judicial restraint may urge courts to ignore popularly-enacted jurisdictional or remedial statutes;²⁶⁰ strong originalist arguments may be made for invalidating policies adopted by the political branches;²⁶¹ and the stringent application of a bright-line rule may lead to results that seem outrageous to the public eye.²⁶²

Alongside these internal tensions, institutional conservatism also enjoys an uneasy relationship with political and situational conservatism. The political conservative is likely to favor whatever institutional arrangements seem, at the time, most likely to yield the desired political results. Political conservatives confident of strong majority support, for example, will likely be majoritarians; in other areas, however, political conservatives have used countermajoritarian institutions like the courts to defend their interests against populist pressures.²⁶³ Likewise, Lynn Baker and I have argued at length elsewhere that there is not necessarily any politically conservative valence to federalism,²⁶⁴ and Richard Fallon has demonstrated that the Rehnquist Court has frequently been forced to choose between federalism and politically conservative results.²⁶⁵ Federalism means regulatory diversity. Left to their own devices, we would expect individual states to reach a range

260. See *supra* note 104 and accompanying text.

261. See *supra* notes 94–97 and accompanying text.

262. See, e.g., *Newdow v. United States Congress*, 292 F.3d 597 (9th Cir. 2002) (invalidating the Pledge of Allegiance on the ground that the Establishment Clause requires strict government neutrality towards religion and refusing to recognize any *de minimis* exception to this principle).

263. See EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* 1–2 (2000) (observing that in the Progressive era, most observers “came to see the judiciary—especially the federal judiciary—as the branch of government that would most consistently protect private property and interstate corporate enterprise. They viewed state and federal legislatures—and sometimes even state courts—as the branches most likely to threaten those interests”); Rosen, *supra* note 8, at 38 (observing that beginning in the 1980s, “[r]ight-wing groups resolved to use the courts to restrict Congress’s power to pass antidiscrimination laws, affirmative action and environmental regulations”); see also BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 157–59, 265–68 (1998) (contrasting the conservative role of the presidency during Reconstruction with its progressive role during the New Deal).

264. See Baker & Young, *supra* note 250, at 133–62; see also Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CAL. L. REV. (forthcoming fall 2002) (making a similar argument).

265. See Fallon, *Conservative Paths*, *supra* note 57, at 468–74.

of institutional principles often identified with conservatism. There is no room in Judge Wilkinson's synthesis for libertarian individualism. The judicial effort to foster intermediary institutions, moreover, generally involves shielding them from the depredations of majoritarian politics.²⁵⁴ And it is hard to see what intermediary institutions have to do with the promotion of a unitary executive at the federal level. As with political conservatism, we can achieve principled coherence in a definition of institutional conservatism but only at the expense of jettisoning many positions often thought to be "conservative" in contemporary culture.

The judicial manifestations of institutional conservatism—restraint, originalism, and formalism—*do* share a unifying theme: They are each generally justified in terms of majoritarianism. Courts should defer to democratic majorities,²⁵⁵ they should second-guess those majorities only when forced to do so by clear evidence of text and/or history;²⁵⁶ and they should formulate their rulings in such a way as to constrain themselves in future cases and provide political actors with a clear background against which to act.²⁵⁷ These principles, of course, basically mirror several of the definitions of judicial restraint that I discussed in Part I.²⁵⁸ (The exception is rule-based decision making, which judicial conservatives take to embody restraint but which I have described as judicial maximalism—a form of activism.²⁵⁹) Based on my earlier discussion, the potential for

254. See, e.g., *Boy Scouts*, 530 U.S. at 661 (holding that a state legislature may not require a civic group to accept homosexual members); *Troxel*, 530 U.S. at 72–73 (holding that a state grandparent visitation law permitted unconstitutional intrusion into family autonomy).

255. See McConnell, *supra* note 185, at 1538; Wilkinson, *supra* note 19, at 1383 ("A judicial liberal was someone who believed that the enlightened approach of the courts was the answer to every social problem and a conservative was one who placed faith in traditional democratic processes. In short, a liberal was an activist and a conservative practiced self-restraint.").

256. See Lino A. Graglia, "Interpreting" the Constitution: Posner on Bork, 44 STAN. L. REV. 1019, 1048 (1992) (arguing that the originalism debate "is not over how the Court should interpret the Constitution, but over whether it should intervene in the political process only on the basis of the Constitution"); Bork, *supra* note 27, at 2–8 (arguing that only originalism supplies a sufficiently principled justification for exercising the counter-majoritarian power of judicial review).

257. See Scalia, *supra* note 49, at 1179–80 (advocating rule-based decision making as a tool of judicial restraint); see generally Young, *Rediscovering Conservatism*, *supra* note 10, at 627–42 (surveying arguments for all three of these institutional positions by contemporary judicial conservatives).

258. See *supra* Section I.A.

259. See *supra* Subsection I.A.4.

of results on any given issues, some of which will be politically conservative and others politically liberal.

The relationship between institutional and situational conservatism is equally contingent, depending on the structure of existing institutions. To the extent that those institutions are themselves majoritarian, the institutional and situational conservative will find much to agree upon. That agreement, however, is historically contingent; in a society with non-majoritarian institutions, the situational conservative would see the pro-democracy institutional conservative as a dangerous reformer. One might see the institutional conservative as defending a particular version of liberalism—one that is suspicious of the administrative state that arose out of the New Deal and Great Society as well as of the aggressive judicial review practiced by the Warren Court. To the extent that these later developments are now entrenched in our polity, the situational conservative might well feel obligated to defend them against his institutionally-minded colleagues.

B. Conservatism and the Judicial Role

As the preceding discussion suggests, different kinds of conservatives may reach different conclusions concerning the proper role of courts in the constitutional scheme. Much conservative criticism of judicial activism arises out of an institutionalist mindset. Michael McConnell, for example, has argued that “rule by judges is objectionable in this society because it is inconsistent with the principles of self-government. The tradition of this political community cannot accept the proposition that the elite make better decisions than the people, or that popular institutions are inferior to electorally unaccountable ones.”²⁶⁶ Justice Scalia’s bitter dissent in *Casey* focused not on the immorality of abortion *per se*—although Justice Scalia may well hold that position, too—but on the impropriety of placing the issue off limits to majoritarian political processes.²⁶⁷ The

266. McConnell, *supra* note 185, at 1538.

267. *Planned Parenthood v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., dissenting) (“The states may, if they wish, permit abortion on demand, but the Constitution does not *require* them to do so. The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.”); *see also* *Romer v. Evans*, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) (“I think it no business

most troubling form of judicial activism for institutional conservatives thus corresponds to Judge Posner's definition—that is, the second-guessing by courts of judgments made by non-judicial actors.

Institutional conservatives may, on the other hand, be happy about other forms of activism. They may praise, for instance, judge-made restraints on judicial power, like the abstention or justiciability doctrines.²⁶⁸ Institutional conservatives may likewise be all for overturning precedents that shifted power to courts and away from political actors or that depart from the original understanding of the Constitution's text.²⁶⁹ The institutional conservative would thus overrule both *Lochner* and *Roe*.²⁷⁰ And, finally, such a conservative may favor maximalist judicial decision making in the sense of broad rules that give legislators a clear legal background against which to act.

The political conservative will find debates about judicial activism tiresome and largely irrelevant; he cares only about results.²⁷¹ Depending on the overall constellation of political forces, a free market agenda might be better advanced through the courts (as in the *Lochner* era) or through the legislature.²⁷² The same thing is true with respect to abortion. The pro-lifer, for instance, might embrace judicial activism if he could con-

of the courts (as opposed to the political branches) to take sides in this culture war.”).

268. See, e.g., *Younger v. Harris*, 401 U.S. 37 (1971) (abstention); *Allen v. Wright*, 468 U.S. 737 (1984) (justiciability); see also BICKEL, *supra* note 19, at 111–98 (praising judge-made doctrines embodying “passive virtues” as a form of judicial restraint).

269. See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 834–35 (1991) (Scalia, J., concurring) (cautioning against the application of a strong rule of *stare decisis* that would trump the “public sense of justice” and “expectations of a democratic society”); *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) (urging reconsideration of Commerce Clause precedents contrary to the original understanding).

270. *Casey*, 505 U.S. at 998 (Scalia, J., dissenting).

271. To be sure, most conservatives will harbor a combination of views. A person who would vote against a pro-abortion law on politically conservative grounds might also favor leaving that issue to the legislative process on institutional grounds. My point is only that political conservatism does not itself provide a reason for concern about the institutional allocation of decision making authority, except to the extent that a particular allocation is instrumental to reaching a particular ultimate result.

272. See generally, PURCELL, *supra* note 263, at 37–38, 64–69, 258–64 (recounting how political groups with particular preferences on economic regulation shifted their preferences concerning the institutional allocation of power among the federal branches over time).

vince the Supreme Court to hold that a fetus is a person under the Fourteenth Amendment, so that the state is constitutionally required to protect it from harm. Similarly, this sort of conservative would both overrule *Roe* and strike down a federal statute preempting state anti-abortion laws. The important point, in both cases, would be the impact on abortion rather than whether judicial action was pressing with or against the actions of the political branches. Finally, political conservatism would favor originalist constitutional interpretation or fidelity to precedent only if those sources of law happened to favor politically conservative results in particular cases.

This is not to say that the political conservative has no regard for consistency or principle. Such a conservative might, for example, acknowledge both the need for some sort of general interpretive theory and the need to apply it consistently, even if it yielded unfavorable results in some cases. In that case, the interpreter would need to make an on-balance judgment as to which interpretive framework will, more often than not, yield results congenial to political conservatism. A political conservative may, in other words, be perfectly principled across a range of institutional issues. My point is that the adoption of a particular set of institutional principles is instrumental to the vindication of ultimate political goals.

For the situational conservative, finally, the worst kind of judicial activism is disregard for precedent. That will be true whether or not overruling a prior holding returns decisions to the democratic process or takes them away. It is the change in the existing institutional arrangements that is to be feared and resisted. Only the situational conservative, as a result, would see *Roe* and *Casey* as presenting sharply different issues. In *Roe*, the situational conservative might well align himself with political and institutional conservatives on the ground that striking down state anti-abortion laws throughout the nation would severely disrupt existing institutional arrangements. By the time *Casey* was decided, on the other hand, the settled expectations of a generation of women accustomed to reproductive choice loomed large.²⁷³

The weight of precedent to a situational conservative may, however, vary in particular circumstances. In *Garcia v. San*

273. See *Casey*, 505 U.S. at 856 (joint opinion of O'Connor, Kennedy, & Souter, JJ.).

Antonio Metropolitan Transit Authority,²⁷⁴ for example, the Court overruled its prior decision in *National League of Cities v. Usery*,²⁷⁵ which had held that the federal government may not regulate state governmental institutions in the performance of their traditional governmental functions. *Usery*'s rule had the potential to drastically alter the settled relation between the federal government and the states,²⁷⁶ yet in nearly a decade of decisions following *Usery* the Court had failed to apply it to strike down any further federal regulation.²⁷⁷ A situational conservative in those circumstances might plausibly have viewed the continued existence of *Usery*'s rule as a greater threat to settled institutional arrangements than a decision to overrule the neglected precedent.

To say that the situational conservative judge will always rule in favor of settled institutional arrangement is to oversimplify the Burkean position. As I have discussed,²⁷⁸ situational conservatism arises out of a set of beliefs about the imperfection of human reason and the organic nature of society and social change rather than an attachment to the existing order *per se*. This more fundamental set of views will sometimes yield impulses to reform.²⁷⁹ For instance, a conservative judge confronted with a highly ambitious and rationalistic legislative scheme might well seek to interpret its provisions in such a way as to temper that ambition.

Situational conservatism may influence the form of judicial rulings as well as their direction. Such conservatives, for example, can be expected to resist maximalist judicial holdings. Burkeans tend to be incrementalists, because their fear of change is grounded in a more fundamental respect for the limits of human rationality. We should not, under this view, attempt to make categorical rules because our ability to antici-

274. 469 U.S. 528 (1985).

275. 426 U.S. 833 (1976).

276. See, e.g., Martha A. Field, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84, 105-06 (1985) (observing that *Usery* could have been a "first step" toward a more profound recalibration of the federal balance).

277. See Field, *supra* note 276, at 86-87.

278. See *supra* note 168 and accompanying text.

279. See generally CONOR CRUISE O'BRIEN, *THE GREAT MELODY: A THEMATIC BIOGRAPHY OF EDMUND BURKE* (1992) (emphasizing Burke's efforts as a reformer).

pate the future is limited.²⁸⁰ If courts must act, they should act in small steps so as to disrupt as little of the status quo as they can, and to leave open the possibility of changing course if things don't work out.²⁸¹

So long as courts observe these strictures, however, the situational conservative may well favor an "active" judicial role in reviewing and checking the actions of the political branches and the state governments. Such conservatives have historically favored a model of "mixed" government—that is, a government made up of diverse components with different institutional qualities.²⁸² Edmund Burke, for example, defended the British division of power among the King, the aristocracy, and the Commons—corresponding to even older ideas of the one, the few, and the many²⁸³—as part of the hierarchical ordering necessary to assure liberty. These different components of the government both ensure that the various social classes composing the society are represented and operate as checks upon one another's exercise of power.²⁸⁴

One cannot simply transplant the British idea of mixed government into American soil. American society, after all, lacks a hereditary monarch or aristocracy; as a result, "the colonists transmuted the British system of mixed government based on social classes to a government in which three

280. See Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 117 (1992) (identifying judicial resistance to bright-line rules with Burkean distrust of "excessively confident contemporary rationality"); Burke, *supra* note 252, 112–13 (favoring balancing over categorical conceptions of rights).

281. See Young, *Rediscovering Conservatism*, *supra* note 10, at 654–56, 688–97 (arguing that Burkean conservatism favors a "common law," incremental model of judicial change); Burke, *supra* note 252, at 217 (articulating a strong commitment to incrementalism); cf. Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 785–86 (1993) [hereinafter Sunstein, *Analogical Reasoning*] (criticizing broad and abstract theories of constitutional law as beyond the institutional capacities of courts).

282. See Young, *Rediscovering Conservatism*, *supra* note 10, at 676–77. On mixed government, see generally BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 70–77* (2d ed. 1992).

283. See ARISTOTLE, *POLITICS*, Bk. III, Ch. VII, at 189 (T.A. Sinclair trans., rev. ed. 1981) ("Sovereignty necessarily resides either in one man, or in a few, or in the many."). Aristotle derived the three basic types of constitution—monarchy, aristocracy, and "polity"—from these three social elements. See *id.* at 189–90.

284. See BAILYN, *supra* note 282, at 70 (observing that the elements of English society "entered simultaneously . . . in a balanced sharing of power. The functions, the powers, of government were so distributed among these components of society that no one of them dominated the others.").

branches, the legislative, executive, and judicial, would check each other, regardless of the social class from which the officials were drawn."²⁸⁵ But the British conservatives admired mixed government not only because it reflected the British class structure, but also because each component of the government possessed different and important institutional capacities.²⁸⁶ Most important for present purposes, conservatives valued the aristocracy for their education and political independence, both of which were made possible by hereditary wealth.²⁸⁷ In our society, federal judges may play a similar role even absent hereditary titles and fortunes. Such judges are, after all, well-educated professionals, and Article III's tenure and salary protections are designed to ensure that they are both economically and politically independent.²⁸⁸ Burke recognized the important checking function played by an independent judiciary when he criticized the French revolutionaries for abolishing the "parlements" of the *ancien regime*: "Whatever is supreme in a state," he argued, "ought to have . . . its judicial authority so constituted as not only not to depend upon it, but in some sort to balance it."²⁸⁹

Perhaps the most important institutional quality of the judiciary from a Burkean standpoint, however, is the incremental quality of judicial decision making. Burke used the incremental and organic model of the common law as his metaphor for how social change should proceed generally. "All the reformations we have hitherto made," he insisted, "have proceeded upon the principle of reference to antiquity; and I hope . . . that all those which possibly may be made hereafter, will be carefully formed upon analogical precedent, authority, and example."²⁹⁰ The fact that judicial decision making takes place in

285. Abner S. Greene, *Checks and Balances in an Era of Presidential Law-making*, 61 U. CHI. L. REV. 123, 139-40 (1994).

286. See Young, *Rediscovering Conservatism*, *supra* note 10, at 676.

287. See *id.* at 656-57.

288. See BICKEL, *supra* note 19, at 25-26 (observing that "courts have certain capacities for dealing with matters of principle that legislatures and executives do not possess. Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government").

289. Burke, *supra* note 252, at 253.

290. Burke, *supra* note 252, at 81; see also J.G.A. Pocock, *Burke and the Ancient Constitution: A Problem in the History of Ideas*, in *POLITICS, LANGUAGE, AND TIME: ESSAYS ON POLITICAL THOUGHT AND HISTORY* 202, 211 (1989) (observ-

the context of a concrete dispute between real parties helps focus the process on actual experience rather than abstract theory;²⁹¹ likewise, the frequent judicial recourse to analogical reasoning from past precedent discourages abstraction and also grounds results in prior practice.²⁹² While the Burkean situational conservative does not oppose change *per se*, he will much prefer that it take place "one case at a time."²⁹³

Situational conservatism, then, is ambivalent on the question of judicial activism. On the one hand, it encourages judges to decide narrowly, adhere to past precedents, and respect the established acts of the political branches. On the other, it encourages judges to value their role as a coequal branch of government with its own unique institutional advantages as an instrument of governance and social change. The Burkean may well accept the view that

Both Congress and the President can obviously contribute to the sound interpretation of the Constitution. But clearly neither branch is so organized as to be able, without aid from the courts, to build up a body of coherent and intelligible constitutional principle, and to carry public conviction that relevant principles are being observed.²⁹⁴

Conservatism, in other words, encourages judges to decide cases carefully—but not to shrink from deciding them.

C. *The Myth of Politically Conservative Activism*

Having argued that some degree of judicial activism—in the form of an assertively coequal role for courts—is defensible

ing that Burke identified "the rules and spirit of English society with the rules and spirit of the common law").

291. See Young, *Rediscovering Conservatism*, *supra* note 10, at 680. This concern for concreteness as a means to better decisions lies at the heart of justiciability doctrine under Article III's "case or controversy" requirement. See Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 13–14 (1984).

292. See Sunstein, *Analogical Reasoning*, *supra* note 281, at 785–86 (discussing the advantages of analogical reasoning from precedent in avoiding abstract theory); Harry H. Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486, 494 (1982) (observing that, because of their reliance on precedent, "the courts may be seen as the key political institution charged with taking account of our public traditions").

293. Cf. SUNSTEIN, *ONE CASE AT A TIME*, *supra* note 39.

294. HART & WECHSLER, *supra* note 152, at 77.

from a Burkean standpoint, let me conclude by suggesting that the sort of judicial activism we are getting from the Rehnquist Court is consistently conservative *only* in this Burkean sense.²⁹⁵ The talk emanating from liberal academics holds that the current Court is on a programmatic mission to advance right-wing political goals. That talk—not to put too fine a point on it—is dishonest. The Rehnquist Court's activism stretches across the political spectrum, from expanding protections for gay rights and pornography on the Left to upholding property rights and questioning affirmative action on the Right.

I have argued, of course, that political conservatism is virtually impossible to define in any coherent way. The same may well be true of political "liberalism." But many of the Court's recent pronouncements are far closer to intuitive conceptions of liberalism than conservatism. The evidence is both broad and deep, covering dozens of major decisions in a variety of subject areas over a sustained period of time. What follows is far from a comprehensive listing, but should give some sense of the judicial record.

Unenumerated Rights: Although conservatives are generally thought to oppose the recognition of unenumerated rights, the Rehnquist Court has not been shy about applying pre-existing "penumbras" and creating new ones. It has not only adhered to *Roe v. Wade*, but extended it to cover partial birth abortions.²⁹⁶ The Court has been willing to create new rights of family privacy under the Due Process Clause,²⁹⁷ as well as to breathe new life into the Privileges and Immunities Clause in the course of striking down a California durational residence requirement for public benefits.²⁹⁸ And the *Boy Scouts* case²⁹⁹

295. To say this, moreover, is not to say that the Court's activism is consistently Burkean overall. As I have discussed *supra*, notes 178–190, some forms of activism are palatable to situational conservatives and others are not.

296. *Stenberg v. Carhart*, 530 U.S. 914 (2000).

297. *See, e.g., Troxel v. Granville*, 530 U.S. 57 (2000).

298. *Saenz v. Roe*, 526 U.S. 489 (1999).

299. *Boy Scouts v. Dale*, 530 U.S. 640 (2000). *Boy Scouts* may have reached a politically conservative result by allowing groups to exclude homosexuals, but the Court's willingness to create a new right can hardly be called conservative. *See also BMW, Inc. v. Gore*, 517 U.S. 559 (1996) (creating a new substantive due process right against excessive punitive damages in civil litigation). The right to association identified in *Boy Scouts* is similar to earlier sorts of protected association promoted by liberals. *See, e.g., NAACP v. Alabama*, 357 U.S. 449 (1958); *POWE, supra* note 55, at 165–69 (discussing the Warren Court's use of association to protect the NAACP). And the next group to assert the *Boy Scouts* right is just as likely to be a liberal as a conservative one.

employed a right of associational privacy broader than anything recognized in prior eras.

Free Speech: It is hard to imagine how the Court could be more aggressive in extending the limits of the Free Speech Clause. Decisions like *United States v. Playboy Entertainment Group*,³⁰⁰ *Reno v. ACLU*,³⁰¹ and the *Denver Area* case³⁰² have taken the constitutional protection of pornography and indecency to heights that would make the Warren Court blush. *Legal Services Corp. v. Velazquez*³⁰³ struck down a restriction imposed by the 104th Congress on the activities of left-leaning legal aid grantees, and, in the process, narrowed the ability of the government to impose funding conditions on individuals that implicate free speech rights. And as this Article goes to press, the Court has just struck down limits on the topics addressed in state judicial campaigns³⁰⁴ and a local ordinance requiring permits for door-to-door solicitation.³⁰⁵

Establishment of Religion: Recent cases like *Santa Fe Independent School District v. Doe*³⁰⁶ continue *Lee v. Weisman*'s³⁰⁷ vigilant review of government "endorsements" of religion. The view of what counts as government "coercion" developed in cases like these has paved the way for decisions like the Ninth Circuit's recent invalidation of the Pledge of Allegiance.³⁰⁸

Equal Protection: Justice Ginsburg's opinion in the VMI case³⁰⁹ has us headed toward strict scrutiny of gender classifications. And *Romer v. Evans*³¹⁰ struck down—for the first time—state discrimination against homosexuals.

Crime and Punishment: The Court's recent criminal procedure decisions have expanded Fourth Amendment protections

300. 529 U.S. 803 (2000).

301. 521 U.S. 844 (1997).

302. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996); *see also Sable Communications, Inc., v. FCC*, 492 U.S. 115 (1989) (striking down restrictions on Dial-a-Porn).

303. 531 U.S. 533 (2001).

304. *Republican Party v. White*, 122 S. Ct. 2528 (2002).

305. *Watchtower Bible & Tract Soc'y, Inc. v. Village of Stratton*, 122 S. Ct. 2080 (2002).

306. 530 U.S. 290 (2000).

307. 505 U.S. 577 (1992).

308. *Newdow v. U.S. Congress*, 292 F.3d 597 (9th Cir. 2002).

309. *United States v. Virginia*, 518 U.S. 515 (1996).

310. 517 U.S. 620 (1996).

in a variety of ways.³¹¹ *Williams v. Taylor*³¹² accepted—for the first time that I know of in the Supreme Court—a *habeas corpus* petitioner's Sixth Amendment claim of ineffective assistance of counsel. And two decisions at the close of the 2001 Term effectively reversed hundreds of death sentences by holding, respectively, that aggravating factors leading to a capital sentence must be found by the jury³¹³ and that the mentally retarded may not be executed at all.³¹⁴ The former of those two decisions built upon the Court's 2000 decision in the *Apprendi* case, which cast a shadow over a variety of sentencing practices by holding that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."³¹⁵

Immigration: The Court's recent immigration decisions have been marked by extremely aggressive statutory construction directed toward preserving the rights of aliens. In *INS v. St. Cyr*,³¹⁶ the Court effectively negated legislative attempts to restrict federal court jurisdiction over immigration cases by holding that criminal aliens may challenge deportation via *habeas corpus*. *Zadvydas v. Davis*³¹⁷ held that federal immigration law "implicitly" limits the amount of time that an alien may be held pending removal from the United States. More importantly, the latter holding seems to undermine the century-old "plenary power" doctrine in immigration law by suggesting that the Constitution significantly constrains federal treatment of aliens.³¹⁸

Several things must be said about this listing. First, I make no claim to comprehensiveness—other cases could be

311. See, e.g., *Kyllo v. United States*, 533 U.S. 27 (2001) (holding that police use of thermal imaging technology to detect criminal activities inside a home without entering it amounted to a "search" under the Fourth Amendment).

312. 529 U.S. 362 (2000).

313. *Ring v. Arizona*, 122 S. Ct. 2428 (2002).

314. *Atkins v. Virginia*, 122 S. Ct. 2242 (2002). In another recent Eighth Amendment decision, the Court held that Alabama's "hitching post" disciplinary method amounted to cruel and unusual punishment. *Hope v. Pelzer*, 122 S. Ct. 2508 (2002).

315. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

316. 533 U.S. 289 (2001).

317. 533 U.S. 678 (2001).

318. See *id.* at 695 (stating that Congress's "plenary power" over immigration law "is subject to important constitutional limitations"); Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGRATION L. J. 338-39 (2002) (observing that *Zadvydas* and another 2001 case, *Nguyen v. INS*, 121 S. Ct. 2053 (2001), "point the way to the abandonment of plenary power").

cited, but only at the peril of trying the reader's patience. Moreover, one cannot sensibly evaluate how "conservative" the Court is by paying attention only to its activist decisions and not to those in which the Court refused to move the law rightward. There are, as Richard Fallon has observed, any number of "quiet fronts"³¹⁹ and dogs that didn't bark.³²⁰ My point in this section, however, is simply that even the Court's arguably "activist" decisions point in a variety of directions.

Second, I do not mean to suggest that any of the cases I have cited are wrongly decided or even that conservative justifications cannot be formulated for some of them. Traditional conservative respect for the rule of law, for example, supports the Court's effort in *Williams* to ensure meaningful representation for criminal defendants.³²¹ Moreover, some areas of constitutional law—such as free speech—have gotten so ideologically turned-around that it is very difficult to say what is "conservative" and "liberal" anymore.³²² The overwhelming majority of the decisions I have cited, however, should strike most observers as counter to an intuitive conception of "conservatism."

Third, I recognize that many of the conservative justices dissented from these rulings. One cannot construct a five-vote majority on today's Court, however, without attracting at least one "conservative" vote. And many of the decisions cited above are either not 5-4 or not split along customary ideological lines.³²³ In any event, since most accusations of "conservative

319. See Fallon, *Conservative Paths*, *supra* note 57, at 469–74.

320. See, e.g., *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001) (declining opportunity to breathe new life into the nondelegation doctrine); *Reno v. Condon*, 528 U.S. 141 (2000) (rejecting federalism-based challenge to Driver's Privacy Protection Act); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 291 (1997) (O'Connor, J., concurring in part, joined by Scalia & Thomas, JJ.) (rejecting efforts to dramatically narrow the scope of injunctive relief against state governments under *Ex parte Young*).

321. See *supra* note 312 and accompanying text. This is not to suggest that "the rule of law" is a *solely* conservative value, but rather to emphasize my prior point that conservatism and liberalism are not opposites. See *supra* note 205 and accompanying text.

322. See Volokh, *supra* note 199, at 1198 ("[W]e can no longer assume that the Left generally sides with speakers and the Right with the government. . . . Many of the strongest libertarian voices in favor of free speech rights and against government power now come from conservatives at least as much as from liberals.").

323. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996) (Justices O'Connor and Kennedy joining liberals); *United States v. Virginia*, 518 U.S. 515 (1996) (Justices O'Connor, Kennedy, and Chief Justice Rehnquist joining liberals); *Reno v. ACLU*, 521 U.S. 844 (1997) (only partial dissent from Justices O'Connor and Rehnquist);

judicial activism" are directed at "the Rehnquist Court," the decisions cited above are surely relevant in assessing that Court's overall record.

The key point is that there are a *lot* of instances in which the Rehnquist Court's activism points in politically liberal directions. To be sure, there are also plenty of cases that point in more politically conservative directions. Since I have made no comprehensive survey of the Court's "activist" decisions—and since I have my doubts about whether such a survey *could* be made, given the many meanings of "activism"—I cannot say whether one tendency substantially outweighs the other. What *is* clear, however, is that no fair-minded assessment of the Court can proceed without taking the many politically liberal decisions into account. It hardly speaks well for the legal academy that liberal academics can consistently chide the Court for right-wing activism without even *mentioning* these decisions.³²⁴

Many of the decisions I have cited *can* be described as conservative in the Burkean sense that I have discussed in Section B. The Court has not been afraid to assert its own role as a co-equal branch of government with its own unique institutional strengths as an expositor of constitutional values. It has, by and large, proceeded incrementally—avoiding sweeping rulings and leaving a great deal undecided.³²⁵ And it has generally respected precedent—even when that precedent points in politically liberal directions.³²⁶ Even here, of course, the record is

Kyllo v. United States, 533 U.S. 27 (2001) (Justices Scalia and Thomas join liberals to uphold Fourth Amendment claim, Justice Stevens dissents); *see also* Texas v. Johnson, 491 U.S. 397 (1989) (Justices Scalia and Kennedy join liberals in striking down flag desecration law, Justice Stevens dissents).

324. *See, e.g.*, Kramer, *The Supreme Court*, *supra* note 3; Kramer, *No Surprise*, *supra* note 3. These critics also tend to ignore a potentially even more pervasive phenomenon—the willingness of the liberal justices to advocate positions in dissent that fit one or more definitions of activism. For instance, the liberal dissenters in the federalism cases generally portray themselves as paragons of judicial restraint, *see, e.g.*, Ann Althouse, *Enforcing Federalism After United States v. Lopez*, 38 Ariz. L. Rev. 793, 805 (1996) (noting "Justice Souter made judicial restraint the centerpiece of his analysis" in *Lopez*), despite their remarkable announcement that they do not consider themselves bound by precedent in these cases. *See supra* note 99. It is hard to avoid the impression that most critics of the Rehnquist Court majority are motivated not by opposition to activism *per se*, but by hostility to the particular results reached in the cases that they choose to highlight.

325. *See generally* Sunstein, *Foreword*, *supra* note 39.

326. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833 (1992); Dickerson v. United States, 530 U.S. 428 (2000); Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 291 (1997) (O'Connor, J., concurring in part). Even in cases in which the conser-

hardly uniform. A Burkean appreciation for the advantages of judicial decision making sometimes appears alongside a decidedly un-Burkean method—maximalist rulings,³²⁷ willingness to overturn prior cases,³²⁸ and the like. But the overall record is one a Burkean can live with.

This, of course, is not *politically* conservative activism. That is why political conservatives have not risen to defend the Court against its liberal critics. To the contrary: My colleague Lino Graglia, for example, has given up on the prospect of achieving “a ‘conservative’ Supreme Court” through presidential appointments. “Not only has the present Court not rescinded prior liberal victories,” he laments, “but it has continued to hand down major positive liberal victories, as in its recent decisions on term limits, the Virginia Military Institute, special rights for homosexuals, and the restriction of pornography on the Internet.”³²⁹ Likewise, Justice Scalia—no Burkean—has protested that “[d]ay by day, case by case, [the Court] is busy designing a Constitution for a country I do not recognize.”³³⁰ One is tempted to say that if the Court’s center has infuriated *both* Justice Scalia and liberal legal academia, it must be doing something right.

vative majority has changed the direction of prior law, it has often been careful to leave the holdings of prior cases undisturbed. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549 (1995) (adhering to post-1937 cases generously construing the scope of the Commerce Clause); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (holding Age Discrimination in Employment Act inapplicable to state judges but declining to overrule *Garcia*).

327. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 531 (1996) (reaching out to tighten the standard of review for gender discrimination when the challenged policy would almost surely not have survived under the traditional doctrine).

328. *See, e.g.*, *Payne v. Tennessee*, 501 U.S. 808 (1991).

329. Lino Graglia, *Order in the Court*, NAT’L REV., Nov. 24, 1997, at 48. He notes somewhat wistfully that “[e]ven better would be an amendment simply abolishing judicial review.” *Id.* For an only somewhat less pessimistic conservative assessment of the Court, see Steven G. Calabresi, *Out of Order*, POL’Y REV., Sept.–Oct. 1996, at 14, 15 (stating that the Court “is (at best) one vote away from being an engine of radical left-wing social change,” and complaining about the “lightweight Republican justices imposed on Presidents Reagan and Bush by a Democratic Senate (and by liberal Republicans)”).

330. *Board of City Comm’rs v. Umbehr*, 518 U.S. 668, 711 (1996) (Scalia, J., dissenting).

CONCLUSION

Most of us, I suspect, harbor an intuitive definition of both "judicial activism" and "conservatism." We are confident, as I have said, that we know them when we see them. But that confidence disappears fairly quickly when one starts to push on the definitions. Both "activism" and "conservatism" describe a wide variety of behaviors and positions that may, in any given case, point in different directions. Most cases worth asking about in a confirmation hearing or arguing about in a law review article can be described as either activist or restrained, conservative or not, depending on which of several plausible definitions one adopts.

That does not mean that terms like "activist" or "conservative" are too indeterminate to be useful, so that we should quit worrying about the issues they raise and instead focus simply on whether we think decisions are right or wrong on the merits. Issues of ideology and institutional role are too important to simply put aside out of frustration. Instead, we need to appreciate the complexity of these issues and to be as specific as we can when we discuss them. We can much more constructively debate the authority of precedent, for example, than the vices of "activism" writ large. And we can much more intelligently assess the merits of "conservatism" if we distinguish between conservative attitudes toward political results, toward institutional allocations of power, and toward the process of social and legal change.

It may be tempting to dismiss much of what I have said here as semantic gamesmanship. As lawyers, however, we are trained to use language with care. I hope to have shown that by being more precise about both "conservatism" and "judicial activism," we can recover meanings that helpfully advance our present constitutional debates. At the least, in debating "conservative judicial activism," we should be careful to say what we mean.