

meeting of the House-Senate Conference committee on the Hatch-Leahy juvenile crime bill. This is the last day before the August recess this year and last year on August 5, Chairman HATCH convened the conference for the limited purpose of opening statements. I am disappointed that the majority continues to refuse to reconvene the conference and that for a over a year this Congress has failed to respond to issues of youth violence, school violence and crime prevention.

It has been 15 months since the shooting at Columbine High School in Littleton, Colorado, where 14 students and a teacher lost their lives in that tragedy on April 20, 1999. It has been 14 months since the Senate passed the Hatch-Leahy juvenile justice bill by an overwhelming vote of 73-25. Our bipartisan bill includes modest yet effective gun safety provisions. It has been 13 months since the House of Representatives passed its own juvenile crime bill on June 17, 1999.

Sadly, it will be 12 months next week since the House and Senate juvenile justice conference met for the first—and only—time on August 5, 1999, less than 24 hours before the Congress adjourned for its long August recess.

Senate and House Democrats have been ready for months to reconvene the juvenile justice conference and work with Republicans to craft an effective juvenile justice conference report that includes reasonable gun safety provisions, but the majority refuses to act. Indeed, on October 20, 1999, all the House and Senate Democratic conferees wrote to Senator HATCH, the Chairman of the juvenile justice conference, and Congressman HYDE, the Chairman of the House Judiciary Committee, to reconvene the conference immediately. In April 2000, Congressman HYDE joined our call for the juvenile justice conference to meet as soon as possible in a letter to Senator HATCH, which was also signed by Congressman CONYERS.

A few months ago, the President even invited House and Senate members of the conference to the White House to urge us to proceed to the conference and to final enactment of legislation before the anniversary of the Columbine tragedy. But the majority has rejected his pleas for action as they have those of the American people. Apparently, the gun lobby objects to one provision in the bill, even though the bill passed overwhelmingly, and they will not let us proceed with the conference. This lobby was not elected to the Senate or to the House of Representatives, but apparently has enormous influence.

Every parent, teacher and student in this country is concerned about school violence over the last two years and worried about when the next shooting may occur. They only hope it does not happen at their school or involve their children.

Just last week, a 13-year old student put a gun to a fellow classmate at Se-

attle middle school. Although the student fired a shot in the school cafeteria, thankfully no one was hurt during this latest school shooting. Unfortunately, that cannot be said about the rash of recent incidents of school violence throughout the country. The growing list of schoolyard shootings by children in Arkansas, Washington, Oregon, Tennessee, California, Pennsylvania, Kentucky, Mississippi, Colorado, Georgia, Michigan, and Florida is simply unacceptable and intolerable.

We all recognize that there is no single cause and no single legislative solution that will cure the ill of youth violence in our schools or in our streets. But we have an opportunity before us to do our part. We should not let another school year begin without addressing some of the core issues of youth violence and school violence. We should seize this opportunity to act on balanced, effective juvenile justice legislation, and measures to keep guns out of the hands of children and away from criminals.

It is ironic that the Senate will be in recess next week on the anniversary of the first and only meeting of the juvenile justice conference. In fact, the Senate has been in recess more than in session since the one ceremonial meeting of the juvenile crime conference committee. It is beneath us. We ought to meet. We ought to get this done.

#### CONGRESS AND THE FEDERAL JUDICIARY

Mr. LEAHY. Mr. President, I want to turn now to another issue. This time last year, I rose to express concern about the final decisions of the Supreme Court's 1998 Term, in which it struck down on federalism grounds three important pieces of bipartisan legislation. Another Supreme Court Term has now ended, and this Term's victims include the Violence Against Women Act and, as applied to State employees, the Age Discrimination in Employment Act.

I see my distinguished friend from Delaware in the Chamber, and I know he has spoken extensively on this. I believe it bears repeating.

We have seen a growing trend of judicial second-guessing of congressional policy decisions, both in the Supreme Court and in some of the lower Federal courts. Most troubling to me is the encroachment of the Federal judiciary on the legitimate functions of the Federal legislative branch in matters that are perceived by the courts to impact the States.

We ought to all be concerned about this because it affects our constitutional system of checks and balances. We ought to ask ourselves how we can have a situation where an unelected group of Supreme Court Justices can over and over substitute their judgment for the judgment of the elected representatives of this country.

It is not a question of how we feel about an individual case. Sometimes I

vote for these bills and sometimes I vote against them. But when we have held hearings, when we have determined that there is a need for Federal legislation, when we have gone forward, and then in an almost cavalier and, in some cases, disdainful fashion, the Supreme Court knocks it all down, something is wrong. It is time for us to join together in taking stock of the relationship between Congress and the courts.

According to a recent article by Stuart Taylor, the Rehnquist Court has struck down about two dozen congressional enactments in the last five terms. That is about five per year—a stunning pace. To put that in perspective, consider that the Supreme Court struck down a total of 128 Federal statutes during its first 200 years. That is less than one per year, and it includes the years of the so-called "activist" Warren Court.

Justice Scalia recently admitted that the Rehnquist Court is "striking down as many Federal statutes from year to year as the Warren Court at its peak." In fact, the Rehnquist Court, with its seven Republican-appointed Justices, is striking down Federal statutes almost as fast as this Republican Congress can enact them. These cases evidence a breakdown of respect between the judiciary and legislative branches, and raise serious concerns about whether the Court has embarked on a program of judicial activism under the rubric of protecting State sovereignty.

Let me start where I left off a year ago, with the trio of 5-4 decisions that ended the Court's last Term. In the Florida Prepaid case, the Court held that the States could no longer be held liable for infringing a Federal patent. In the College Savings Bank case, the Court held that the States could no longer be held liable for violating the Federal law against false advertising. And in *Alden v. Maine*, the Court held that the States could no longer be held liable for violating the Federally-protected right of their employees to get paid for overtime work.

These decisions were sweeping in their breadth. They allowed special immunities not just to essential organs of State government, but also to a wide-range of State-funded or State-controlled entities and commercial ventures. They tilted the playing field by leaving institutions like the University of California entitled to benefit from Federal intellectual property laws, but immune from enforcement if they violate those same laws. They were also startling in their reasoning, casting aside the text of the Constitution, inferring broad immunities from abstract generalizations about federalism, and second-guessing Congress' reasoned judgment about the need for national remedial legislation.

When I discussed these decisions last year, I warned that they could endanger a wide range of other Federally-protected rights, including rights to a minimum wage, rights against certain

forms of discrimination, and whatever rights we might one day provide to health coverage. This year's crop of 5-to-4 decisions continued the trend toward restricting individual rights and diminishing the authority of Congress to act on behalf of all Americans in favor of protecting State prerogatives.

The predictions I made last year have unfortunately come to pass with this year's Supreme Court decisions. In *Kimel v. Florida Board of Regents*, the Court held that State employees are not protected by the Federal law banning age discrimination, notwithstanding Congress' clearly expressed intent. Five members of the Court decided that age discrimination protections applied to the States were unnecessary. The Congress and the American people had it wrong when we concluded that age discrimination by State employers was a problem that needed a solution. None of those five Justices sat in on the hearings that Congress held 30 years ago, they did not hear the victims of age discrimination describe their experiences, but they nonetheless decided they knew better than Congress did. Justice Thomas wrote separately to say that he was prepared to go even further and make it even harder for Congress to apply anti-discrimination laws to the States.

The *Kimel* decision could spell trouble for all sorts of Federal laws, including other laws prohibiting discrimination in the workplace and regulating wages and hours and health and safety standards. The Supreme Court majority has now told us, after the fact, that we in Congress have to "build a record," like an administrative agency, before they will allow us to protect State employees from discrimination, but it has not made it entirely clear just how many victims of discrimination have to come before us and testify before it will allow us to give them legislative protection.

The signs, however, are ominous: the week after it decided *Kimel*, the Court vacated two lower court decisions holding that States must abide by the Equal Pay Act, calling into question the ability of Congress to offer State employees protection from sex discrimination. Next Term, in *University of Alabama v. Garrett*, the Court will decide whether States can be held liable for discriminating against employees with disabilities. That plaintiff in *Garrett* is a State employee—a nurse at the University of Alabama—who was diagnosed with breast cancer, and was demoted after taking sick leave to undergo surgery and chemotherapy.

The second blow this Term to congressional authority was *United States v. Morrison*, which struck down a portion of the Violence Against Women Act that provides a Federal remedy for victims of sexual assault and violence. The Violence Against Women Act had been our measured response to the horrifying effects of violence on women's lives nationwide, not only on their physical well-being but also on their

ability to carry on their lives and their jobs as they are driven into hiding by stalking and prevented from going out at night in some areas by fear of rape. After hearing a mountain of evidence detailing the impact of violence on women's lives and interstate commerce, I was proud to work with Senator BIDEN, Senator HATCH, Senator KENNEDY and others in an overwhelming bipartisan consensus in 1994 to enact VAWA.

But the five-Justice majority was unimpressed with the evidence, and with the common-sense point that violence affects women's lives, including their participation in commerce. Relying once again on abstract notions of federalism, the Court decided that violence against women does not affect interstate commerce enough, or rather, it affects interstate commerce, but in the wrong sort of way, so Congress has no business protecting American women from violence. One Justice said he would cut even more into Congress' power, saying we had very little business doing much of what we had done throughout the 20th century. Frankly, I do not want to see us turn back, in the 21st century, to a 19th century view.

What made this latest "federalism" decision all the more remarkable is that the vast majority of the States, whose rights the Court's "federalism" decision are supposed to protect, had urged the Court to uphold the VAWA Federal remedy.

The *Kimel* and *Morrison* decisions are troubling, both for what they do to the rights of ordinary Americans, and for what they say about the relationship between Congress and the present majority of the Supreme Court. State's rights and individual rights are both essential to our constitutional scheme, and the Court has a constitutional duty to prevent the Congress from encroaching on them. I have spoken before about the need to restrain the congressional impulse to federalize more local crimes. There are significant policy downsides to such federalization, however, that do not apply in other areas, where each American, no matter what State he or she lives in, should have the same rights and protections.

The legislative judgments we make that are reflected in the laws we pass deserve more respect than the Rehnquist Court has shown. It is troubling when five unelected Justices repeatedly second-guess our collective judgments as to whether discrimination and violence against women and other major social problems are serious enough, or affect commerce in the right sort of way, to merit a legislative response.

It is even more troubling when a Justice steps out of his judicial role, and beyond the judgment calls inherent in individual cases, to express a generalized disdain for the legislative branch. Yet, that is precisely what Justice Scalia did in a recent speech, in which he suggested that the oath to uphold

the Constitution that each of us takes counts for nothing, and that Acts of Congress should be stripped of their traditional presumption of constitutionality. Justice Scalia is as free as the next citizen to express his mind, but that sort of open disrespect for Congress coming from a sitting Supreme Court Justice bodes ill for democracy, and for the delicate balance of power between the Congress, the President and the courts on which our Constitution rests.

I am also fearful that Justice Scalia's remarks are becoming a rallying cry for Federal judges around the country who are hostile to Congress and to some of our efforts to protect ordinary people from discrimination, from violence, from invasions of privacy and violations of civil liberties, and from environmental and other health hazards. The Federal appeals court in Richmond, Virginia—the Fourth Circuit—has the dubious honor of leading this charge with radical new legal theories that cut back on Federal power and individual rights.

In January, the Supreme Court unanimously reversed a Fourth Circuit decision invalidating a Federal law that prohibits States from disclosing personal information from motor vehicle records. The Fourth Circuit had held that this common-sense privacy law violated abstract notions of federalism. As we have seen, it takes a lot to outdo the present Supreme Court in raising abstract federalism principles over individual rights.

Also in January, the Supreme Court overwhelmingly rejected the Fourth Circuit's reasoning in a case involving citizen "standing" in Federal court to sue polluters who violate our environmental laws. The Fourth Circuit decision had sharply limited the ability of citizens to sue polluters and win civil penalties. The Supreme Court reversed that decision by a 7-2 vote, with Justice Scalia and Justice Thomas dissenting.

The Fourth Circuit is even more consistently hostile to civil rights in matters of criminal law and civil liberties. In death penalty cases, for example, it seems to have embraced a doctrine of State infallibility. An article in the *American Lawyer* last month reported that:

While condemned inmates' rates of at least partial success in Federal habeas corpus actions run at close to 40 percent nationally, the rate in the 4th Circuit since October 1995 has been a cool 0 percent, with more than 80 consecutive convictions having been upheld.

In May, a unanimous Supreme Court, a Court that itself espouses the general belief that the rights of capital defendants are best protected by the State justice system that seeks to execute them, overturned two Fourth Circuit decisions that denied habeas corpus relief to death row inmates who had been sentenced to death on the basis of grossly unfair procedures.

Just last month, the Fourth Circuit lost its bid to overturn the Supreme

Court's landmark decision in *Miranda v. Arizona*. The Fourth Circuit's notion that it had the right to overturn a longstanding Supreme Court precedent was unorthodox, to say the least. By a 7-2 vote, in which Justices Scalia and Thomas dissented again, the Court reaffirmed the 34-year-old precedent that requires the police to inform suspects of their right to remain silent.

What we are seeing in the Fourth Circuit is unparalleled, but not unrivaled. Other Federal courts across the country are also embracing Justice Scalia's "no-deference" philosophy and busily redefining the relationship of the judiciary to the other branches of government. The D.C. Circuit departed from a half century of Supreme Court separation-of-powers jurisprudence to strike down air quality standards established by the EPA under the Clean Air Act, a crucial statute passed during the Nixon administration that has improved the air we breathe for the last three decades. Meanwhile, in a striking throw-back to the *Lochner* era of economic libertarian "natural law" theory, the Federal Circuit has adopted an unusually expansive reading of the Takings Clause that threatens to undermine basic environmental protections that Congress has established. Likewise, Federal district courts in Texas have recently rendered radical decisions, limiting the Federal Government's authority to enforce basic food safety standards.

Republican detractors of the Ninth Circuit often refer to that court's high reversal rate in the Supreme Court. But about half of the Ninth Circuit decisions that the Supreme Court reversed this year were written by Reagan and Bush appointees. Moreover, set against the reversal record of other circuits, the Ninth Circuit, which has the largest caseload of all the Federal appeals courts, looks about average. Courts with half or a third of the caseload of the Ninth Circuit have more than their share of reversals. The Fourth Circuit was reversed five times this year, as was the Fifth Circuit. The overwhelmingly Republican-appointed judges of the Seventh Circuit were reversed in five out of seven cases this year.

I have spoken at some length about this growing trend of judicial decisions second-guessing the congressional judgments embodied in laws that apply to the States because I am deeply concerned about what they mean for the relationship between the judicial and the legislative branches and for our democracy. When a Supreme Court Justice, one held up by some of my Republican friends as a paragon of judicial restraint, declares that no deference, no respect, is owed to the democratic decisions of Congress, Americans should be concerned.

We here in the Senate have a responsibility to safeguard democratic values. That does not mean that we should be strident, or disrespectful; we should always cherish judicial independence

even when we dislike the results. We should, however, defend vigorously our democratic role as the peoples' elected representatives. When we see bipartisan policies, supported by a vast majority of the American people, being overturned time and time again on the basis of abstract notions of federalism, it is our right, and our duty, to voice our concerns. And when the rights of ordinary Americans are defeated by technicalities in the courts and by abstract notions of "State's rights" that the States themselves do not support, it is our responsibility to work together to find new ways to protect them.

I have tried to do that. A year ago, I voiced my concerns about the Supreme Court's 1999 State sovereign immunity decisions, as did some of my colleagues, including Senator BIDEN and Senator SPECTER. I warned then of their potential impacts on the civil rights of American workers. As we have seen, my fears became a disturbing reality in the *Kimel* case. I have also tried to begin work on restoring the integrity of our national intellectual property system, in the Intellectual Property Protection Restoration Act, S. 1835, a bill I introduced last October. That bill would restore intellectual property protections while meeting all the Court's constitutional objections, however questionable they are. I am delighted that a subcommittee of the House Judiciary Committee held a hearing today to explore ways to undo the damage done to our intellectual property system by the Court's 1999 decisions. I hope that the Senate Judiciary Committee will consider and act on this important issue, which it has ignored all year.

These are issues we should all be working on together. Republicans and Democrats can agree on the importance of protecting civil rights, intellectual property rights, privacy and other rights of ordinary Americans that recent doctrinaire judicial decisions have impaired. We can also agree on the importance of protecting Congress as an institution from repeated judicial second-guessing of policy judgments on matters that affect the States.

It is important for Congress, as an institution, to focus on making our relationship with the Federal judiciary a more constructive and mutually respectful one. Here in the Senate, where the Constitution requires us to give our "advice and consent" on judicial nominations, we have a special responsibility in this regard, a responsibility to protect both democratic values and judicial independence. The disgraceful manner in which the Senate has treated judicial nominees does not help and may be a factor in the current breakdown of respect between the legislative and judicial branches.

Too often, judicial nominees have been put through a litmus test by my Republican colleagues to determine whether they will engage in "liberal ju-

dicial activism." In fact, I cannot remember a recent judicial nomination hearing in which one of my Republican friends has not made a speech about "liberal activist judges." Strangely, however, hardly a mention is made of traditional judicial activism—striking down democratically-adopted laws with which one happens to disagree based on abstract principles with no basis in the Constitution, as the Supreme Court did in the age discrimination case, or overturning the longstanding precedent of a higher court, as the Fourth Circuit did in the *Miranda* case. Nor do my colleagues seem troubled by Justice Scalia's disdain for Congress. But I know that my Republican friends are very concerned about "liberal judicial activism." The terms of this test change depending on the circumstances.

From what I can gather, the easiest way to spot "liberal judicial activists" is by the company they keep. You might call it the "activist by association" principle. Over the last few years, several outstanding judicial nominees have come under attack simply because, as young lawyers out of law school, they clerked for Supreme Court Justice William Brennan. These nominees were tarred as potential activists not because of anything they had done, but because of their one-year association with a distinguished and respected member of the United States Supreme Court. This test is applied only to delay or oppose nominees—clerking for a conservative justice like Chief Justice Rehnquist has not helped Allen Snyder, a nominee to a vacancy on the D.C. Circuit who has been held up in Committee for months. Maybe someone should send a warning to the students at the Nation's top law schools that the Senate has become so partisan that clerking for the Supreme Court can damage your career.

Other nominees were challenged because of their association with legal organizations such as the American Civil Liberties Union and the Woman's Legal Defense Fund or for contributing time to pro bono activities. Maybe we should publish a list of groups you cannot associate with, and of rights and liberties you cannot work to protect in your private life, if you want to be a Federal judge.

How else can we tell if a nominee will be a "liberal judicial activist"? In the case of Margaret Morrow, it was unfounded allegations that she was skeptical toward California voter initiatives. With respect to Marsha Berzon we were told that she would be an activist judge because she had been an "aggressive" advocate for her client, the AFL-CIO. Maybe we should advise lawyers in private practice who would like to be judges to be less vigorous in pursuing their clients' interests. Of course, since their confirmations neither of these nominees has been cited to be anything other than an outstanding judge.

Then there is the old-fashioned litmus test. As a member of the Missouri

Supreme Court, Justice White had committed the heresy of voting to reverse death sentences in some cases for serious legal error. No matter that Justice White voted to uphold the imposition of the death penalty 41 times. No matter that other members of the Missouri Supreme Court, including members of the Court appointed by Republican governors, had similar voting records and more often than not agreed with Justice White, both when he voted to uphold the death penalty and when he joined with a majority of that Court to reverse and remand such cases for resentencing or a new trial. Maybe someone should have advised Justice White to follow the Fourth Circuit model and bat a thousand for the State in death penalty cases, regardless of the evidence.

Another litmus test that has been dressed up as a sign of "liberal judicial activism": The nominee's willingness to enforce *Roe v. Wade*, the Supreme Court's landmark abortion decision. I confess to some confusion as to how a nominee for a lower Federal court could be faulted for promising to adhere to established Supreme Court precedent. Whether you agree with *Roe* or not, it is, after all, the law of the land. But maybe someone should advise lower court judges to follow the lead of the Fourth Circuit in the *Miranda* case and disregard Supreme Court precedent.

We need to get away from rhetoric and litmus tests, and focus on rebuilding a constructive relationship between Congress and the courts. We need balance and moderation that respects the democratic will and the weight of precedent. We do not need partisan delays by anonymous Senators because a nominee clerked for Justice Brennan or contributed to the legal services organization. We do not need our Federal courts further packed for ideological purity. We do not need nominees put on hold for years, as this Republican Senate has done, while we screen them for their Republican sympathies and associations.

Mr. President, I ask unanimous consent to have printed in the RECORD three recent articles about the Supreme Court's jurisprudential counter-revolution, by Professor Larry Kramer of the New York University School of Law; Professor David Cole of Georgetown University Law Center; and John Echeverria, Director of Environmental Policy Project at Georgetown University Law Center.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From the Washington Post, May 23, 2000]

#### THE ARROGANCE OF THE COURT

(By Larry Kramer)

In 1994, after four years of very public debate, including testimony from hundreds of experts in dozens of hearings, Congress enacted the Violence Against Women Act. This month, a bare 5 to 4 majority of the Supreme Court brushed all that aside and struck the law down. Why? Not because Congress can-

not regulate intrastate matters that "affect" interstate commerce. On the contrary, the majority agreed that this is permitted by the Constitution, reaffirming a long-standing point of law. But, the court said, whether the effects are "substantial" enough to warrant federal regulation "is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court." And the majority just was not persuaded.

This is an astonishing ruling from a court that professes to care about democratic majorities and respect the political process. The justices did much more in this decision than sweep the act off the books. Under a pretense of interpreting the Constitution, they declared that they have the final say about the expediency of an important, and potentially very large, class of federal laws: not just laws under the Commerce Power, which constitute the bulk of modern federal legislation, but many other laws as well. For the limits of all Congress's powers turn eventually on judgments about the need for federal action.

This is radical stuff. Previous courts have exercised aggressive judicial review, but never like this. Nothing in the Constitution's language or history supports letting the Supreme Court strike down laws just because it disagrees with Congress's assessment of how much they are needed. Except for a brief period in the 1930s when an earlier court tried to stop FDR's New Deal and was decisively repudiated, the court's role has always ended once it was clear that legislation was rationally related to the exercise of a constitutional power. As Alexander Hamilton observed back in 1792, rejecting the very same argument as that made by the court today, "the degree in which a measure is necessary can never be a test of the legal right to adopt it."

The Founding generation understood, in a way our generation seems to have forgotten, that judicial review must be contained or we lose the essence of self-government. They saw that, while courts have a vital role to play in protecting individuals and minorities from laws that trample their rights, Congress's decisions respecting the need to exercise its legislative power must otherwise be left to voters and elections. They foresaw that questions would arise over the limits of federal authority vis-a-vis the states. But, they said (over and over again), those battles must be waged in the political arena. And so they have been, until now.

What kind of government is it when five justices of the Supreme Court, appointed for life by presidents whose mandates expired long ago, can cavalierly override the decision of a democratically elected legislature not on the ground that it acted irrationally but because they do not like its reasoning? By what right do these judges claim the authority to second-guess what Justice Souter in dissent accurately described as a "mountain of data" based on nothing more than their contrary intuitions?

This is important. We have become way too complacent about letting the Supreme Court run our lives, and the current court has exploited this apathy to extend its authority to unheard of lengths. Everyone in the country should be incensed by this decision; not because the Violence Against Women Act was so wonderful or so necessary, but because deciding that it is not—and make no mistake, that is all the majority did—is none of the Supreme Court's business. Yet liberals will sit awkwardly by because they liked the judicial activism we got from the Warren court, though that court could not touch this one for activism. And, of course, conservatives will gleefully hold their tongues because they never much liked this law in the first place, and because they

adore the court's new federalism (not to mention the chance to see liberals hoist by their own petard). In the meantime, only democratic government suffers. Ironies this thick would be comical were the stakes not so high.

The majority opinion is animated by a sense that the Framers of our Constitution never imagined the federal government enacting laws such as the violence act. I am sure they are right; the Framers would be astounded at the changes in society that have brought us to this juncture. But nowhere near as flabbergasted as they would be at the presumptuousness of five judges in casting aside the considered judgment of the national legislature for no better reasons than these—or at the complacency of the citizenry in the face of such outrageous conduct.

[From The Nation, June 12, 2000]

#### PAPER FEDERALISTS

(By David Cole)

When conservatives attack Supreme Court decisions (admittedly an increasingly rare event these days), they inevitably charge "judicial activism." *Miranda* warnings, the right to abortion, the exclusionary rule—all are condemned for having been created by judges out of whole cloth, based on "interpretations" of the Constitution that are so unconstrained as to be entirely political.

When it comes to "states' rights," however, conservatives sing a different tune. In the past few years, the conservative majority on the Supreme Court has launched a virtual revolution in constitutional jurisprudence, invalidating a host of federal laws on the ground that they violate the autonomy not of human beings but of states. The Court has revived the commerce clause as a limitation on federal power after some fifty-odd years of desuetude. It has found implicit in the Constitution a concept of "state sovereign immunity" that jeopardizes Congress's ability to require states to follow federal law. And it has divined from the "spirit" of the inscrutable Tenth Amendment a principle of state autonomy with little textual or historical basis. In doing these things, the Court's most conservative Justices—Rehnquist, Scalia, Kennedy, O'Connor and Thomas—have engaged in the very sort of open-ended, freewheeling constitutional interpretation that they excoriate liberals for indulging in on issues of individual rights.

This Court's activism on federalism begins with the commerce clause, which for most of our history has been the leading barometer of judicial attitudes toward the balance between state and federal power. In the early part of the twentieth century the Court frequently invoked the clause to strike down labor laws regulating minimum wages, maximum hours and working conditions. The Court reasoned that Congress could regulate only "commerce," not manufacturing or production, although its actual animating principle was a commitment to laissez-faire capitalism.

During the New Deal, the Court abandoned this approach and acknowledged that in our increasingly national economy, the terms of production—such as wages, hours and working conditions—obviously affect interstate commerce. It ultimately interpreted the commerce clause to permit Congress to regulate any local activity that, aggregated nationally, might substantially affect interstate trade, a reading that largely took the judiciary out of the job of restraining Congress and relied on the political process to do so.

That's where things stood until 1995, when the Court struck down a federal law prohibiting the possession of guns near schools.

Then, on May 15, the Court invalidated the Violence Against Women Act, a federal law enabling victims of gender-motivated violence to sue their attackers. In both cases the Court held that Congress may not regulate local "noneconomic" activity. Neither gun possession nor gender-motivated violence is "economic" activity and must be left to the states to regulate. Congress's findings that violence against women reduces their ability to participate in the work force was insufficient to justify federal regulation. But if Congress has the power to regulate conduct where it "affects" interstate commerce, why should it matter whether the conduct itself is labeled "economic" or "noneconomic"? The Court seems to have created a distinction every bit as artificial as the long-rejected line between production and commerce.

The Court's activism is even more pronounced in its treatment of "state sovereign immunity," the doctrine that the sovereign—in this case a state—may not be sued. The Eleventh Amendment to the Constitution does recognize a very limited immunity that protects states from being sued by citizens of other states in federal court, at least for cases not based on federal law violations. But today's Court has ignored the explicit language of the amendment to create an expansive immunity that blocks virtually all private suits against states, in state or federal court, under state or federal law. As a result, state employees cannot sue their employer—anywhere—for blatant violations of federal laws, such as the Fair Labor Standards Act. The only exception to this state immunity is where Congress has authorized suits under the Fourteenth Amendment, but the Court has also sharply limited Congress' power to regulate states under that amendment.

A third arena for the states' rights revival is the Tenth Amendment. That provision has literally no substantive meaning. It states only that all powers not assigned to the federal government are reserved to the states or the people. The Court once dismissed it as "a truism." But in recent years, the conservative majority has found in its "spirit" the authority to strike down federal statutes for requiring state officers to carry out even very minimal tasks in furtherance of a federal program, such as the Brady Bill's requirement that local sheriffs conduct brief background checks on would-be gun purchasers.

So why do states' rights issues drive conservative Justices to abandon their cherished principle of judicial restraint? There is undeniably a conservative cast to federalism in the United States. States' rights have nearly always been invoked in support of rightwing causes, from slavery to segregation to welfare devolution. But no one would seriously suggest that today's Court is using federalism as a cover to protect those who carry guns near schools or rape women.

What really drives the conservative Justices toward states' rights is their antipathy to individual rights. "States' rights" is itself something of an oxymoron; rights generally describe legal claims that people assert against government, not claims of governments. Protecting states' rights nearly always directly reduces protection for individual rights. The Court's sovereign immunity decisions bar individuals from suing states for violating their federal rights. And its commerce clause and Fourteenth Amendment decisions have reduced Congress's ability to create federal statutory rights for individuals in the first place.

The link between protecting the "rights" of states and disregarding those of individuals is illustrated even more clearly in the Rehnquist Court's treatment of habeas cor-

pus and federal injunctions. The Court has consistently cited deference to the states to justify shrinking the rights of state prisoners to go to federal court for review of their constitutional claims. And it has grandly invoked "Our Federalism" to limit the ability of federal courts to oversee and enjoin police abuse against minorities.

Paradoxically, then, this Court is most activist in restricting its own power. The conservative Justices eagerly engage in open-ended constitutional interpretation when the result forecloses an avenue for rights protection but assail their liberal counterparts for doing so when the result is to recognize an individual right. As a result, states receive far more solicitude than individuals. But the opposite should be the case: The Court's highest calling is not the protection of regimes but of individuals who cannot obtain protection from the political process.

#### IT'S CONSERVATIVES NOW WHO ARE JUDICIAL ACTIVISTS: WHY ENVIRONMENTALISTS SHOULD BE ALARMED

(By John Echeverria)

Recent federal court decisions concerning our environmental laws cry out for a giant reality check on the recently renewed political debate about whether federal judges should be "strict constructionists" when it comes to deciding issues of constitutional law.

Governor George W. Bush last month revived a familiar GOP mantra when he declared that he would only appoint "strict constructionists" as opposed to "judicial activists" to the federal bench. This stance echoes similar statements by Bob Dole, the GOP standard bearer three years ago, as well as by paterfamilias George Bush I and the modern GOP's founding father, Ronald Reagan.

Governor Bush's political declaration has a kind of through-the-looking-glass quality all too familiar in modern American political life. While Bush and others on the political right decry judicial activism, in some arenas of constitutional law, particularly those affecting our environmental laws, it is GOP-appointed judges who are actually the most activist.

On the other hand, out of a habit of supporting an expansive approach to constitutional interpretation, which apparently served their ideological interests in the past befuddled democratic forces rise to the bait of defending the judiciary against charges of "judicial activism" even as their environmental protection gains, achieved through hard-fought battles in the political arena, are being taken away by GOP-appointed judicial activists.

Sensible conversation about the virtues and limitations of a "strict constructionist" approach to judicial interpretation calls in the first instances for an accurate understanding of how the federal bench is actually deciding real cases today.

In simplistic terms, a judge is said to be a "strict constructionist" if she resolves constitutional cases solely on the basis of the language and original understanding of the constitutional text. On the other hand, a judge who looks to other sources for interpretive assistance, such as some particular social or economic philosophy, is said to engage in judicial activism.

Governor Bush left undefined the specific rulings he thinks reflects judicial activism. But similar GOP pronouncements in the past honed in on the U.S. Supreme Court's expansion of the constitutional rights of the criminally accused under the leadership of Chief Justice Earl Warren in the 1950's and 60's.

Another favorite target has been the Court's decision in *Roe v. Wade*, which inter-

preted the Constitution to create a zone of privacy granting women the constitutional right to decide whether or not to terminate a pregnancy without state interference.

Whether or not these (now somewhat dated) judicial innovations can fairly be characterized as the product of an activist judiciary, it is undeniably true that the charge of judicial activism can, with at least equal fairness, be lodged against more recent judicial decisions that serve a so-called "conservative" philosophy.

This is particularly true in cases involving constitutional challenges to the authority of government to adopt and enforce environmental regulations. Consider the following examples.

Over the last decade, the U.S. Supreme Court has issued an unbroken string of decisions expanding public liability under the takings clause of the Fifth Amendment for environmental and land-use regulations that impinge on private property interests, undermining the ability of the government to adopt new environmental protection standards.

The takings clause states that "private property [shall not] be taken for public use, without just compensation." According to leading scholars on all sides of the ideological spectrum, the available historical evidence unequivocally shows that the drafters of the Bill of Rights intended the clause to apply only to direct appropriations of private property, and never intended the clause to apply to regulations under any circumstances.

In its recent decisions, however, the Court has established the takings clause as a significant new constraint on environmental regulatory authority. From the standpoint of a principled strict constructionist, this direction in judicial thinking would be simply indefensible.

The same is true of recent Supreme Court decisions limiting citizens' right to sue to enforce federal health and environmental laws.

There is a general academic consensus that the drafters of the Constitution intended Congress to have broad power to grant private citizens the right to bring suits in their own names to enforce federal laws. Nevertheless, over the last decade the U.S. Supreme Court, led by Justice Antonin Scalia, has erected new barriers which citizens must cross to establish their right to bring suit to enforce environmental laws.

The Court's recent decisions for example, have severely undermined the Clean Water Act and the Endangered Species Act, and more particularly the role Congress intended for citizens in enforcing those laws, a result which principled advocate of a non-activist judiciary should supposedly abhor.

Conservatives living in glass houses might start a move toward a more sensible debate by refraining from hurling rocks in the direction of the federal judiciary. Or perhaps liberals may wish to rethink a strategy based on warding off rocks tossed by others, and may wish to consider hurling a few of their own.

Mr. LEAHY. Mr. President, I see my good friend from Utah on the floor. I yield the floor.

The PRESIDING OFFICER. The Senator from Utah.

Mr. BENNETT. Mr. President, I thank the Senator from Vermont. I am looking forward to sharing some ice cream with him a little later today in response to his gracious invitation. I appreciate his courtesy.