2002

Do Liberals and Conservatives Differ in Judicial Activism?

Frank H. Easterbrook

DO LIBERALS AND CONSERVATIVES DIFFER IN JUDICIAL ACTIVISM?

THE HON. FRANK H. EASTERBROOK*

Everyone scorns judicial "activism," that notoriously slippery term. It began life as the antithesis of "judicial restraint," which also has been hard to pin down. But if "restraint" is good, then "activism" must be bad. When liberals are ascendant on the Supreme Court, conservatives praise restraint and denounce activism. This means that they want liberal Justices to follow yesterday's holdings rather than engage in independent analysis, which might lead to a different conclusion. When conservatives are ascendant on the Court, liberals praise restraint—by which they mean following all those activist liberal decisions from the previous cycle!—and denounce "conservative judicial activism."

The term "activism" thus used is empty, a mask for a substantive position. "Activism" remains, however, a term of opprobrium. Everyone wants to appropriate and apply the word so that his favored approach is sound and its opposite "activist." Then "activism" just means Judges Behaving Badly—and each person fills in a different definition of "badly." Many of the papers prepared for this symposium are aware of the problem, denounce any definition of "activism" that just equates to "wrong decisions, as I see them"—and then offer a definition of "activism" that equates, once again, to Judges Behaving Badly. Do liberals say that failing to adhere to precedent is "activist"? Well, conservatives can claim that *stare decisis* is itself activist![1] Do today's liberals (and yesterday's conservatives) say that refusing on constitutional grounds to enforce an Act of Congress is activist? Well, conservatives can

---

* Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, The Law School, The University of Chicago. This essay was prepared for *Conservative Judicial Activism*, a symposium sponsored by the Byron R. White Center for the Study of American Constitutional Law and The University of Colorado Law Review, October 19–20, 2001, and is I thank Kate Kraus for comments on an earlier draft.

1. *See* Michael Stokes Paulsen, Activist Judicial Restraint (2002) (unpublished manuscript prepared for this symposium).

claim that *failing* to invalidate an Act of Congress is activist![2] Whee!

This is all good fun—after all, several of the authors who engage in this sport first enter a plea for abolition of the word—but treating the old definitions of judicial restraint (such as adherence to precedent, and permitting the political branches to make policy when the Constitution is ambiguous) as the new definition of "activism" certainly has a deconstructionist flair. Jacques Derrida and Stanley Fish would be proud! But we should oppose Newspeak, even if the revisionist approach to language is coupled with a request that a word or phrase be taken out of circulation. It is better to debate directly what role *stare decisis* or the political question doctrine should play; the word "activism" adds nothing to the analysis with its old definition or a new-fangled one. Likewise we can debate whether, in a nation without a Judicial Review Clause, a judge ever is *required* to hold an Act of Congress unconstitutional. I do not view it as counter-textual to say that a court may on grounds of principle allow the political branches to have their way, even though the judge's preferred reading of the Constitution does not countenance a given statute.[3] But assessment of this jurisprudential proposition can't be advanced by asking whether it is, or is not, "activist."

A luncheon address at the end of a conference is too late to suggest what this understanding implies: That the conference should have been held under a different name, or perhaps not held at all. The sunk costs are too great. But it is not too late to ask whether some mileage yet can be got out of the older, more traditional, and less deconstructionist approaches.

Let me start at the beginning, with "judicial restraint." Everyone thinks that those who do *not* share his substantive views should be "restrained." It is a term of praise—for one's opponents, nemeses who sometimes vote correctly notwithstanding their perverse substantive views. This is why liberals think that conservatives are supposed to exercise judicial restraint, so that the John Harlans of the world spread the Gospel according to William Brennan,[4] and the Earl

2. *See* Randy E. Barnett, *Is The Rehnquist Court an "Activist" Court? The Commerce Clause Cases*, 74 U. COLO. L. REV. 1275, 1276 (2002).

3. *See generally* Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349 (1992).

4. *See* Henry J. Bourguignon, *The Second Mr. Justice Harlan: His Principles*

Warrens, if restrained, would have kowtowed to the Felix Frankfurters. But the problem is that even this view of "restraint" is muddled, for the putative opponent could vote "correctly" for many reasons, not all of which are principled.

Adherence to *stare decisis* is one. Respect for democracy (coupled with the absence of any clause in the Constitution expressly authorizing judges to have the last word on constitutional meaning, plus the ambiguity of many clauses) is another. Intellectual modesty (often deserved) is a third, and timidity a fourth. Yet a fifth reason is fear that "activist" decisions will breed litigation, which the judge does not want to shoulder; laziness as a reason to deny justified claims of right is a shameful reason for decision, yet it produces "restraint." Still a sixth is Wexler's conservation-of-judicial-capital approach, shared with Bickel and others, in which judge picks favored rights and throws other litigants to the winds in order to fortify the Court's status.[5] A person who values only the outcome may praise any of these judges as "restrained," but the reasons have very different qualities—and perhaps none of them is praiseworthy. I think that at least the second should play a powerful role in adjudication, but this is an unpopular view—unpopular, that is, with anyone who thinks that five Justices will rally to his substantive banner.

If the meaning of restraint is so debatable, and likewise the question whether restraint so motivated is admirable, then it is predictably impossible to achieve consensus on the meaning of its opposite, activism. The only consensus seems to be that activism is bad. Yet if restraint is not always praiseworthy, why should activism be a word of opprobrium only? I think it best to find a neutral definition of the word. Then we can ask which Justices *are* "activist" (and when), and only after that evaluate whether they have behaved well or poorly.

So even at the very end of the conference, I have the gall to offer yet *another* definition of activism. It is a definition reflecting my view—which I will state but not here attempt to

---

of Judicial Decision Making, 1979 SUP. CT. REV. 251.

5. A view simultaneously cruel and false—for if the Court's decisions please several intense minorities it may build a coalition that makes it politically invulnerable. Although Bickel favored the approach, *see* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962), he recognized some of its vices, such as the unprincipled summary disposition of *Naim v. Naim*, 350 U.S. 985 (1956). *Id.* at 174 n.103.

justify—that unless the application of the Constitution or statute is so clear that it has the traditional qualities of *law* rather than political or moral philosophy, a judge should let democracy prevail. This means implementing Acts of Congress and decisions of the Executive Branch rather than defeating them. My concern is with national rather than state legislation, for the Supremacy Clause subjects state laws to judicial review more directly than any clause creates review of federal laws. And it is more presumptuous for tenured federal officials to upset decisions of the political branches of the national government, than it is for the national government (of which judges are just agents) to impose its will on the states.[6]

There are three major ways for courts to enhance the power of the tenured judiciary at the expense of the branches that represent today's electorate. The most obvious is to declare a law unconstitutional, and on that ground to prevent its enforcement.[7] A related and only slightly less obvious way is to invoke the canon of constitutional doubt—to say that the law raises tough constitutional questions and will be construed so that they are not presented. (I will come back to this canon.) A third way is to construe the statute to do something other than what it says—something perhaps more congenial to the judge's view of wise policy. Professors of law sometimes disregard this possibility, perhaps because they are fixated on the Constitution and perhaps because they believe that Congress can "correct" any judicial "error." But legislatures do not "correct" judicial decisions, as if they were grading the judges' papers. Legislatures enact new laws, reflecting today's political coalition rather than the one that enacted the original statute.[8] It is the original law, not the one that could be passed tomorrow, that is the right benchmark.[9]

Anyway, even if "they can amend" were the right standard, it may be difficult or impossible to do this, if the original law

---

6. Some of these ideas are spelled out more fully in *Abstraction and Authority*, *see supra* note 3, and my contribution to this Law School's first Rothgerber Conference, *What's So Special About Judges?*, 61 U. COLO. L. REV. 773 (1990).

7. This is the sole example of "activism" given by Judge Richard A. Posner in his FEDERAL COURTS: CRISIS AND REFORM ch. 7 (1985). Although I offer two additional examples, my debt to his approach should be plain.

8. *See, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244 (1994); Rivers v. Roadway Express, Inc., 511 U.S. 298, 304–09 (1994).

9. *See, e.g.*, W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 100–01 and n.7 (1991).

was a complex compromise. Suppose Congress had to deal with 50 issues in order to assemble a coalition that could enact any legislation—a commonplace in environmental or civil rights law, and quite common across the board: just look at any session's Budget Reconciliation Act. If the judge interprets a single provision of this package to function more like the judge's own preferences for sound policy, it will be impossible to overturn until the next omnibus compromise, which may be many years away, and could be impossible to overturn, period. These facts are well known to practitioners of public choice and positive political theory.[10]

One great benefit of this understanding of activism as pro-judge decision making is that it is value-free. If the Constitution *requires* this allocation of authority in a given case, then activism is good. The Constitution, after all, places limits on democratic control, and these limits must be respected. In one respect, though, my definition of activism includes a strategy that I think wholly illegitimate: the canon of construing statutes to avoid constitutional doubt. Because the many hundreds of constitutional decisions over the years represent coalitions of Justices with very different approaches to constitutional law, doubt is everywhere; a large stock of precedents containing incompatible decisions enables almost anything to be "proved" in a semi-logical manner, which greatly increases the domain of constitutional doubts. Thus this canon acts as a roving commission to rewrite statutes to taste. Because doubt is pervasive, Justices can seize on that uncertainty to disregard the actual legislative resolution—yet without finding the law unconstitutional.[11] Judge Friendly astutely observed that this is a *very* different canon from the

10. *See, e.g.*, MAXWELL L. STEARNS, PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY (1997); Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989); Pablo T. Spiller & Emerson H. Tiller, *Invitations to Override: Congressional Reversals of Supreme Court Decisions*, 16 INT'L REV. L. & ECON. 503 (1996); Pablo T. Spiller & Emerson H. Tiller, *Strategic Instruments: Legal Structure and Political Games in Administrative Law*, 15 J.L. ECON. & ORG. 349 (1999); and all of the articles in the symposium volume, *Constitutional Law and Economics*, 12 INT'L REV. L. & ECON. 123–296 (1992).

11. Indeed, invocation of the canon to rewrite one statute often is followed, years later, by a decision that the original law or something like it was constitutional after all. *See* Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1960–61 (1997).

one calling on judges to construe statutes to make them constitutional if possible, and that it is unlikely to represent an interpretive principle that the legislature would choose.[12] What is more, as Professor Kelley observes, this canon often is used to wrench the power of execution away from the President.[13] So the constitutional-doubt canon is simultaneously unfaithful to the statutory text and an affront to *both* of the political branches. I view it as a misuse of judicial power—though it turns out to be a canon to which all nine sitting Justices are addicted.[14]

A second benefit of my definition is that it enables us to go out and count activist decisions—to count them in a fashion on which liberals and conservatives should agree. Professor Young recognizes this benefit of Judge Posner's definition of activism (though his is limited to declarations of unconstitutionality) but believes that there is a corresponding flaw: Sometimes laws are declared unconstitutional because of *stare decisis*, a doctrine of restraint.[15] Young gives *Dickerson v. United States*[16] as an example. Seven Justices voted to hold 18 U.S.C. §3501 unconstitutional on the ground that the statute conflicts with

---

12.

> It does not seem in any obvious, as a matter of interpretation, that the legislature would prefer a narrow construction which does not raise constitutional doubts to a broader one which does raise them. For there is always the chance, usually a good one, that the doubts will be settled favorably, and if they are not, the conceded rule of construing to avoid unconstitutionality will come into operation and save the day. People in such a heads-I-win, tails-you-lose position do not readily sacrifice it; the idea that Congress must use strong language to show that it wanted the Supreme Court even to consider the constitutional question—very likely just what Congress thinks the Justices are paid to do—seems rather fanciful.

HENRY J. FRIENDLY, BENCHMARKS 210 (1967).

13. *See* William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831 (2001). Occasionally, however, the President's lawyer himself advocates use of this canon. *See id.* at 882 n.295 (collecting cases), and the two additional cases cited immediately below. On a few occasions the canon has been invoked in a case dealing directly with judicial authority. *INS v. St. Cyr*, in the Appendix, is one of these rarities.

14. Not to mention the Solicitor General. In the Clinton Administration, see the brief in *Miller v. French* (cited in the Appendix, where the canon was invoked, unsuccessfully, in an effort to transfer power from states to the federal courts); and in the Bush Administration, see the brief in *Raygor v. University of Minnesota*, now pending.

15. *See* Ernest A. Young, *Judicial Activism and Conservative Politics*, 74 U. COLO. L. REV. 1139, 1179 (2002).

16. 530 U.S. 428 (2000).

a third of the argument docket. As for the difference between conservatives and liberals: there isn't any. At least none that I could detect.

	Unconstitutional	Avoidance	Other Statutory	Total
Rehnquist	9	3	10	23
Stevens	16	5	7	28
O'Connor	11	4	11	26
Scalia	12	4	12	30
Kennedy	15	5	10	30
Souter	16	3	7	26
Thomas	14	4	12	30
Ginsburg	16	4	6	26
Breyer	12	5	7	24

Chief Justice Rehnquist cast the fewest activist votes, at 23, and threeJustices were tied for the most at 30 (Scalia, Kennedy, and Thomas). That's a remarkably small range. (The other five: Stevens 28; O'Connor 26; Souter 26; Ginsburg 26; Breyer 24.)

There is greater variation by *kind* of activist vote. Justices Stevens, Souter, and Ginsburg displayed the greatest constitutional activism, each casting 16 votes to hold a federal statute unconstitutional. Chief Justice Rehnquist is at the other end of the scale, with 9 activist constitutional votes (including *Dickerson*). On statutory issues, Justices Scalia and Thomas each cast 12 anti-Executive-branch votes, while three Justices (Stevens, Souter, and Breyer) cast only 7, and Justice Ginsburg cast only 6. This shows a clear liberal/conservative difference; conservatives are more likely to reject statutory interpretations advanced by a Democratic president—though even here the difference is not great. There is no significant difference with respect to using the constitutional-doubt canon. The minimum is 3 (Rehnquist and Souter), and the maximum 5 (Stevens, Kennedy, and Breyer), with the others coming in at 4 apiece.

By my standard, *all nine are activist.* That all nine subscribe to in principle, and use in practice, the noxious canon of constitutional doubt is proof enough of this. Each of the nine declared more federal statutes unconstitutional in each Term I examined than John Marshall did in a 34-year career. And

there does not appear to be any significant difference on the "activism" scale between liberals and conservatives.

Perhaps my findings show that even an objective definition of activism does not capture much of value. But if that is the conclusion, then I will be happy to close this conference with a plea for the word's abolition.

APPENDIX

Kimel v. Florida Board of Regents, 528 U.S. 62, 120 S. Ct. 631 (2000). (Rehnquist, O'Connor, Scalia, Kennedy, Thomas) (Congress lacks power under §5 of the 14th Amendment to authorize ADEA litigation in federal court.)

Reno v. Bossier Parish School Board, 528 U.S. 320, 120 S. Ct. 866 (2000). (Rehnquist, O'Connor, Scalia, Kennedy, Thomas) (rejects Department of Justice view of its powers under the Voting Rights Act and holds that plan may be pre-cleared when enacted with discriminatory but not retrogressive purpose. VRA is very hard to amend.)

Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 120 S. Ct. 897 (2000). (Scalia, Kennedy, Thomas) (Dissenting Justices would hold state contribution limits unconstitutional under 1st Amendment, with clear implications for FECA.)

Shalala v. Illinois Council on Long Term Care, Inc., 529 U.S. 1, 120 S. Ct. 1084 (2000). (Stevens, Scalia, Kennedy, Thomas) (Dissenting Justices would read Medicare Act in a way that facilitates judicial review of regulations; these Justices invoke canon of constitutional doubt. It's unclear how hard amendment would be)

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 120 S. Ct. 1291 (2000). (Rehnquist, O'Connor, Scalia, Kennedy, Thomas) (rejects FDA view that it has statutory authority to regulate tobacco products; this statute is almost impossible to amend)

Garner v. Jones, 529 U.S. 244, 120 S. Ct. 1362 (2000). (Stevens, Souter, Ginsburg) (dissenting justices would hold that change in timing of state parole hearings violates the Ex Post Facto clause, with clear implications for federal law and regulations)

Bond v. United States, 529 U.S. 334, 120 S. Ct. 1462 (2000). (Rehnquist, Stevens, O'Connor, Kennedy, Souter, Thomas, Ginsburg) (physical manipulation of a carry-on bag is a search and violates 4th Amendment unless justified) (this

rejects a federal procedure, but no specific regulation or statute)

Norfolk Southern Ry. v. Shanklin, 529 U.S. 344, 120 S. Ct. 1467 (2000). (Rehnquist, O'Connor, Scalia, Kennedy, Souter, Thomas, Breyer) (grant of federal funds for railroad improvement preempts state tort law) (rejects federal government's construction of a federal statute; could be thought outside my criteria because it does not constrain the national government, but amendment will be hard for public choice reasons)

Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495 (2000). (Stevens, Souter, Ginsburg, Breyer) (these four Justices would have construed a part of the AEDPA to authorize greater federal review of state judgments, in a way that given historical stickiness of §2254 and the nature of the package would have been almost impossible to amend)

Carmell v. Texas, 529 U.S. 513, 120 S. Ct. 1620 (2000). (Stevens, Scalia, Souter, Thomas, Breyer) (change in law of evidence violates Ex Post Facto clause; U.S. effect hard to pin down, but Solicitor General participated in support of state)

Christensen v. Harris County, 529 U.S. 576, 120 S. Ct. 1655 (2000). (Rehnquist, O'Connor, Scalia, Kennedy, Souter, Thomas) (section of FLSA requiring public employer to honor reasonable request for use of compensatory time does not prohibit employer from forcing employees to use accrued time; rejects Department of Labor view of statute it administers, and amendment of FLSA has been difficult in past)

United States v. Morrison, 529 U.S. 598, 120 S. Ct. 1740 (2000). (Rehnquist, O'Connor, Scalia, Kennedy, Thomas) (Commerce Clause does not provide authority for 42 U.S.C. §13981, part of the Violence Against Women Act of 1994)

Vermont Agency of Natural Resources v. United States ex rel Stevens, 529 U.S. 765, 120 S. Ct. 1858 (2000). (Rehnquist, O'Connor, Scalia, Kennedy, Thomas, Ginsburg, Breyer) (qui tam provisions in False Claims Act do not authorize suits against states) (invokes doctrine of constitutional doubt; also may be hard to amend)

United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 120 S. Ct. 1878 (2000). (Rehnquist, Stevens, Kennedy, Thomas, Ginsburg) (signal-bleed provisions of Telecommunications Act violate 1st Amendment)

Jones v. United States, 529 U.S. 848, 120 S. Ct. 1904 (2000). (Rehnquist, Stevens, O'Connor, Scalia, Kennedy,

Souter, Thomas, Ginsburg, Breyer) (interpreting 18 U.S.C. §844(i) as inapplicable to arson of private residence, in order to avoid constitutional question) (not clear whether this rule was essential to holding, but it was invoked expressly)

United States v. Hubbell, 530 U.S. 27, 120 S. Ct. 2037 (2000). (Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer) (Self- Incrimination clause means that grant of immunity for document production covers act of production)

Sims v. Apfel, 530 U.S. 103, 120 S. Ct. 2080 (2000). (Stevens, O'Connor, Souter, Thomas, Ginsburg) (failure to exhaust issues before Appeals Council in Social Security disability appeal does not block judicial review) (rejects U.S. view of statute it administers, but not clear how hard amendment would be)

Miller v. French, 530 U.S. 327, 120 S. Ct. 2246 (2000). (Rehnquist, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg) (rejects U.S. view that the institutional-reform provisions in the PLRA are subject to equitable modification by court; this will prove very hard to amend because it is part of a much larger package—thus it is "activist" even though the majority is certainly correct on merits. But Stevens & Breyer, dissenting on this issue, invoke the constitutional-doubt canon and hence are more activist, and they get the credit for this case.)

Dickerson v. United States, 530 U.S. 428, 120 S. Ct. 2326 (2000). (Rehnquist, Stevens, O'Connor, Kennedy, Souter, Ginsburg, Breyer) (18 U.S.C. §3501 is unconstitutional because it contradicts Miranda v. Arizona)

Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000). (Stevens, Scalia, Souter, Thomas, Ginsburg) (Due Process clause requires certain sentencing factors to be determined by jury beyond a reasonable doubt) (this state case has had a powerful effect on many federal criminal statutes and the Sentencing Guidelines)

Hill v. Colorado, 530 U.S. 703, 120 S. Ct. 2480 (2000). (Scalia, Kennedy, Thomas) (dissenting justices would have held a state buffer-zone law concerning abortion clinics unconstitutional under 1st Amendment) (effect on federal laws uncertain, but Solicitor General filed brief in support of state)

Mitchell v. Helms, 530 U.S. 793, 120 S. Ct. 2530 (2000). (Stevens, Souter, Ginsburg) (dissenting Justices would have held Ch. 2 of Title I of Elementary and Secondary Education

Act of 1965 unconstitutional under Establishment Clause of 1st Amendment)

Stenberg v. Carhart, 530 U.S. 914, 120 S. Ct. 2597 (2000). (Stevens, O'Connor, Souter, Ginsburg, Breyer) (partial-birth abortion laws held to violate Due Process clause; direct application to federal law passed by Congress but vetoed by Pres. Clinton, and sure to have been passed again if case had come out the other way)

Indianapolis v. Edmond, 531 U.S. 32, 121 S. Ct. 447 (2000). (Stevens, O'Connor, Kennedy, Souter, Ginsburg, Breyer) (auto checkpoints for drugs violate 4th Amendment)

Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159, 121 S. Ct. 675 (2001). (Rehnquist, O'Connor, Scalia, Kennedy, Thomas) (Corps' definition of "navigable waters" held not authorized by Clean Water Act; invocation of the constitutional-doubt rule combined with a clear-statement rule; also will prove very hard to amend)

Illinois v. McArthur, 531 U.S. 326, 121 S. Ct. 946 (2001). (Stevens) (dissenting Justice would have held that it violates 4th Amendment to prevent a person from entering a house while a warrant is being obtained)

Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356, 121 S. Ct. 955 (2001). (Rehnquist, O'Connor, Scalia, Kennedy, Thomas) (Congress lacks power under §5 of the 14th Amendment to authorize ADA litigation in federal court)

Central Green Co. v. United States, 531 U.S. 435, 121 S. Ct. 1005 (2001). (Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer) (defines "flood waters" for purposes of FTCA exemption adversely to US position; difficulty of amendment unclear)

Legal Services Corp. v. Velazquez, 531 U.S. 533, 121 S. Ct. 1043 (2001). (Stevens, Kennedy, Souter, Ginsburg, Breyer) (statute blocking LSC from underwriting challenges to welfare laws violates 1st Amendment)

Department of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 121 S. Ct. 1060 (2001). (Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer) (rejects US interpretation of the inter-agency memorandum exception to the FOIA; amendment likely to be difficult)

Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 121 S. Ct. 1302 (2001). (Rehnquist, O'Connor, Scalia, Kennedy, Thomas)

(interprets Federal Arbitration Act to apply to employment contracts, other than those in transportation industries; this rejects Solicitor General and NLRB interpretation and may prove hard to amend)

Egelhoff v. Egelhoff, 532 U.S. 141, 121 S. Ct. 1322 (2001). (Stevens, Breyer) (dissenting Justices would have rejected Solicitor General and Department of Labor view of the related-to preemption clause in ERISA; difficulty of amendment unclear)

Texas v. Cobb, 532 U.S. 162, 121 S. Ct. 1335 (2001). (Stevens, Souter, Ginsburg, Breyer) (dissenting Justices would have held that invocation of right to counsel on one crime bars questioning on all related acts, even though they would not be the "same offense" for double jeopardy purposes)

Alexander v. Sandoval, 532 U.S. 275, 121 S. Ct. 1511 (2001). (Rehnquist, O'Connor, Scalia, Kennedy, Thomas) (Title VI does not authorize a private right of action on a disparate-impact theory; rejects Department of Justice interpretation of both statute and regulations and will be hard to amend)

Atwater v. Lago Vista, 532 U.S. 318, 121 S. Ct. 1536 (2001). (Stevens, O'Connor, Ginsburg, Breyer) (dissenting Justices would have held that 4th Amendment bars arrest for a fine-only offense)

Daniels v. United States, 532 U.S. 374, 121 S. Ct. 1578 (2001). (Stevens, Souter, Ginsburg, Breyer) (dissenting Justices would have held that 28 U.S.C. § 2255 and Constitution allow indirect collateral attack on prior conviction used for recidivist enhancement)

Bartnicki v. Vopper, 532 U.S. 514, 121 S. Ct. 1753 (2001). (Stevens, O'Connor, Kennedy, Souter, Ginsburg, Breyer) (anti-dissemination provisions in federal wiretap statutes violate 1st Amendment to the extent the public may be interested in the communications' contents)

United States v. Hatter, 532 U.S. 557, 121 S. Ct. 1782 (2001). (Rehnquist, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer) (application of Social Security taxes to judges already in office violates Article III; Scalia & Thomas also would have held application of Medicare tax to judges unconstitutional). (This is the only case with recusals; Stevens and O'Connor did not participate; and since all seven sitting Justices cast activist votes, extrapolation means. . .)

Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 121

S. Ct. 1835 (2001). (Rehnquist, O'Connor, Scalia, Kennedy, Thomas) (only a judgment or an explicit settlement altering legal relations makes the plaintiff a "prevailing party" for purposes of statutes shifting attorneys' fees; difficulty of amendment unclear)

NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 121 S. Ct. 1861 (2001). (Rehnquist, O'Connor, Scalia, Kennedy, Thomas) (Court rejects Labor Board's interpretation of "supervisor" under the NLRA)

PGA Tour, Inc. v. Martin, 532 U.S. 661, 121 S. Ct. 1879 (2001). (Scalia, Thomas) (dissenting Justices would have rejected EEOC's interpretation of the public-accommodation and reasonable-accommodation provisions in the Americans With Disabilities Act as applied to professional sports)

Kyllo v. United States, 533 U.S. 27, 121 S. Ct. 2038 (2001). (Scalia, Souter, Thomas, Ginsburg, Breyer) (detection with thermal imager of heat emanating from home is a "search" under 4th Amendment that must be supported by probable cause and a warrant)

Tuan Anh Nguyen v. INS, 533 U.S. 53, 121 S. Ct. 2053 (2001). (O'Connor, Souter, Ginsburg, Breyer) (dissenting Justices would have held unconstitutional portions of the immigration laws governing citizenship of children born abroad when only father is a U.S. national)

INS v. St. Cyr, 533 U.S. 289, 121 S. Ct. 2271 (2001). (Stevens, Kennedy, Souter, Ginsburg, Breyer) (invoking the constitutional-doubt rule, the majority holds that amendments to the immigration laws neither block review by district courts of deportation orders nor bar discretionary relief for aliens who pleaded guilty to certain crimes before the amendments)

United States v. United Foods, Inc., 533 U.S. 405, 121 S. Ct. 2334 (2001). (Rehnquist, Stevens, Scalia, Kennedy, Souter, Thomas) (mandatory contributions from agricultural producers to certain funds used for advertising violate 1st Amendment)

FEC v. Colorado Republican Federal Campaign Committee, 533 U.S. 431, 121 S. Ct. 2351 (2001). (Rehnquist, Scalia, Kennedy, Thomas) (dissenting Justices would have held that FECA's limits on coordination of candidate and party expenditures, designed to enforce contribution limits, violate the 1st Amendment)

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 121 S. Ct. 2404 (2001). (parts of this decision may fit some of my categories, but it nominally applies only to state regulations,

and the split among the Justices is such a mess that I have elected not to count it)

Tyler v. Cain, 533 U.S. 656, 121 S. Ct. 2478 (2001). (Stevens, Souter, Ginsburg, Breyer) (dissenting Justices reject interpretation of the AEDPA advanced by the Solicitor General and would hold that a decision has been "made retroactive" if it logically should be retroactive; this would have been very hard to amend)

Zadvydas v. Davis, 533 U.S. 678, 121 S. Ct. 2491 (2001). (Stevens, O'Connor, Souter, Ginsburg, Breyer) (invoking the constitutional-doubt rule, the majority holds that deportable aliens who cannot be returned to their countries must be released on parole within six months)