

# PROGRESSIVE AND CONSERVATIVE CONSTITUTIONALISM AS THE UNITED STATES ENTERS THE 21<sup>ST</sup> CENTURY

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## I

### INTRODUCTION

We are at a time of the triumph of conservative judicial ideology. Thirty-two years ago, when William Rehnquist joined the Supreme Court, he was perceived as the far right on the Court. Now, virtually every view that he expressed has come to be the majority position. The Court has significantly limited federal power under the Commerce Clause and section five of the Fourteenth Amendment,<sup>1</sup> tremendously expanded the scope of state sovereign immunity,<sup>2</sup> ordered the end of school desegregation orders,<sup>3</sup> limited access to the courthouse for civil rights plaintiffs,<sup>4</sup> and significantly relaxed restrictions on government aid to religion.<sup>5</sup>

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1. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598 (2000) (holding that the civil damages provision of the Violence Against Women Act, which allows suit by victims of gender-motivated violence, exceeds the scope of Congress's Commerce Clause authority and power under section five of the Fourteenth Amendment); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that the religious Freedom Restoration Act is unconstitutional as applied to state and local governments; Congress pursuant to section five of the Fourteenth Amendment cannot expand rights or create new rights; Congress may act to prevent or remedy violations of rights, and such laws must be "proportionate" and "congruent" to solving widespread and persistent constitutional violations); *United States v. Lopez*, 514 U.S. 549 (1995) (holding that the Gun Free School Zone Act, which prohibits possession of a firearm within 1,000 feet of a school, exceeds the scope of Congress's powers under the Commerce Clause).

2. *See, e.g.*, *Federal Mar. Comm'n v. South Carolina State Port Auth.*, 535 U.S. 743 (2002) (holding that state governments cannot be "sued" in federal agency proceedings that are adjudicatory in nature); *Alden v. Maine*, 527 U.S. 706 (1999) (holding that state governments cannot be sued in state court, even on federal claims, without their consent).

3. *See, e.g.*, *Oklahoma City v. Dowell*, 498 U.S. 237 (1991) (holding that desegregation orders must be ended when a school system achieves "unitary status"); Tresa Baldas, *Saying Goodbye to Desegregation Plans*, 6/16/03 NLJ 4 (col. 1) (describing the effects of the Supreme Court's decisions in causing resegregation of schools).

4. *See Alexander v. Sandoval*, 532 U.S. 275 (2001) (concluding citizens have no private right of action to enforce Title VI regulations preventing recipients of federal funds from engaging in practices with a racially discriminatory impact).

5. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (holding a program that allows vouchers to be used for parochial and secular private schools, but not public schools, is constitutional even though 96 percent of parents used their vouchers for parochial schools).

Having taught constitutional law for the last twenty-three years, I have a sense of a major overall shift to the right in constitutional law. In 1980, when I taught my first constitutional law class, the Court had liberals such as William Brennan and Thurgood Marshall. William Rehnquist, without question, was the most conservative member of the Court. Today, there are no liberals in the mold of Brennan or Marshall; there are Justices, such as Antonin Scalia and Clarence Thomas, who are further to the right than Rehnquist and perhaps any other Justices in U.S. history.

Yet, the popular perception, and maybe even the perception among some academics, is that the Supreme Court has not moved all that far to the right. What explains the failure to recognize how much conservatives have triumphed in constitutional law? In part, the incremental nature of constitutional law explains why the overall conservatism has not been recognized. Constitutional law, of course, develops case-by-case, not all at once. No single decision changes the nature of constitutional law. Also, the conservative position has not triumphed in some of the most politically visible and controversial areas; the Court has not ended the constitutional right to abortion, affirmative action, or the restrictions on school prayers. It is easy for people to generalize from these examples, failing to recognize all of the other areas where conservative views have won out on the Supreme Court. Additionally, political rhetoric about the judiciary has not caught up to the current reality; conservatives continue to rail against judicial activism,<sup>6</sup> even at a time when the activism on the Supreme Court—overturning laws, overruling precedents—is all in a conservative direction.<sup>7</sup> Finally, many of the Rehnquist Court's most dramatic changes have been procedural in nature, such as in restricting habeas corpus,<sup>8</sup> limiting access to the courts,<sup>9</sup> and expanding sovereign immunity.<sup>10</sup> These do not capture public attention in a way likely to change overall perceptions of the Court.

This essay makes three main points. First, there are major differences between progressive and conservative judicial philosophies.<sup>11</sup> Second, the differences stem from ideology and are not a product of varying methods of judicial interpretation; the differences in methodologies between conservatives and progressives are driven by the desired results each contingent wants to reach. Third, the challenge for progressive academics is to figure out how to respond to the reality of a conservative Supreme Court for the foreseeable future.

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6. Neil A. Lewis, *Conservatives Furious Over Court's Direction*, N.Y. TIMES, June 27, 2003, at A19.

7. See, e.g., Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001).

8. See, e.g., *McCleskey v. Zant*, 499 U.S. 469 (1990); *Teague v. Lane*, 489 U.S. 288 (1989).

9. See, e.g., *Alexander*, 532 U.S. 275.

10. See, e.g., *Alden v. Maine*, 527 U.S. 706 (1999).

11. Throughout this paper, I use the word "progressive" because it is part of the title of this symposium. I regard it as synonymous with "liberal" and attach no significance to the choice of the word "progressive" over the term "liberal."

## II

THE DIFFERENCES BETWEEN CONSERVATIVE  
AND PROGRESSIVE CONSTITUTIONALISM

Six major differences exist between progressives and conservatives in their views about Supreme Court decisionmaking. These, of course, are not exhaustive of all the differences that exist, but they do capture many of the most important issues facing the Supreme Court today.

First, conservatives seek to narrow the reach of federal power and protect “states’ rights.” For example, conservatives want to limit the scope of Congress’s powers under the Commerce Clause and section five of the Fourteenth Amendment and use the Tenth Amendment as a limit on federal power. Progressives seek to retain the broad definitions of congressional power that prevailed from 1937 until the Rehnquist Court in the mid-1990s. Notably, the Court’s recent decisions limiting the scope of Congress’s Commerce Clause power—*United States v. Lopez*<sup>12</sup> and *United States v. Morrison*<sup>13</sup>—were 5-4 decisions, with the Court divided along ideological lines. Chief Justice Rehnquist wrote for the Court in both cases to limit Congress’s power to act under the Commerce Clause. The dissents were by Justices Stevens, Souter, Ginsburg, and Breyer, who urged adherence to the broad definition of federal power that had been followed since the mid-1930s.

The Court’s major decision limiting the scope of Congress’s power under section five of the Fourteenth Amendment, *City of Boerne v. Flores*, was by a 6-3 margin.<sup>14</sup> But subsequent cases applying it to find particular laws outside the scope of the section five power were 5-4 decisions split along ideological lines.<sup>15</sup> Likewise, the Court’s revival of the Tenth Amendment as a limit on federal power was by a 6-3 decision,<sup>16</sup> but its application in *Printz v. United States* to in-

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12. 514 U.S. 549 (1995).

13. 529 U.S. 598 (2000).

14. 521 U.S. 507 (1997).

15. *See, e.g.*, *Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001) (holding that state governments cannot be sued for violating Title I of the Americans with Disabilities Act, which prohibits employment discrimination against the disabled, because the law does not fit within the scope of Congress’s powers under section five of the Fourteenth Amendment); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (holding that state governments cannot be sued for violating the Age Discrimination in Employment Act because the law does not fit within the scope of Congress’s powers under section five of the Fourteenth Amendment); *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (holding that federal law authorizing suits against states for patent violations was unconstitutional as not valid under section five of the Fourteenth Amendment and that Eleventh Amendment bars such suits). *But see* *Nevada Dept. of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (holding that the Family and Medical Leave Act provision requiring employers to provide employees unpaid leave to care for family members is a valid enactment pursuant to section five of the Fourteenth Amendment and thus a basis for suit against a state government).

16. *New York v. United States*, 505 U.S. 144 (1992) (holding that the Low Level Radioactive Waste Disposal Act is unconstitutional in its requirement that states clean up their nuclear wastes; Congress seeking to compel state legislative or regulatory action violates the Tenth Amendment).

validate the Brady Handgun Control Act was 5-4, again split along ideological lines.<sup>17</sup>

This divide between progressives and conservatives is not new. Throughout U.S. history, conservatives have invoked federalism to limit federal power, such as in the use of “states’ rights” to oppose abolition of slavery, New Deal programs, desegregation, and federal civil rights laws.

Second, conservatives seek to restrict access to the courts, especially in cases involving civil rights, while progressives seek to ensure the availability of judicial remedies. For example, in recent years, in a series of 5-4 decisions, the Supreme Court has expanded the scope of state sovereign immunity.<sup>18</sup> The more liberal members of the Court have vehemently objected to the majority’s limitation of the ability of injured individuals to sue state governments for redress.

There are many other examples of recent cases, divided 5-4 along ideological lines, in which the majority has restricted access to the courts. In *Alexander v. Sandoval*, the Court ruled that there is no private right of action to enforce the regulations to Title VI of the 1964 Civil Rights Act, which prohibits recipients of federal funds from engaging in practices which have a racially discriminatory impact.<sup>19</sup> In *Circuit City v. Adams*, the Court declared that the Federal Arbitration Act requires arbitration of state law discrimination claims when contractual provisions call for arbitration of employment related disputes.<sup>20</sup> In *Booth v. Churner*, the Court said that the Prison Litigation Reform Act requires that a prisoner seeking money damages exhaust prison administrative remedies, even if the prison cannot provide such a remedy, as long as it can offer the prisoner something of value.<sup>21</sup> In *Saucier v. Katz*, the Court held that a police officer can be deemed protected by qualified immunity, even when a jury finds that the officer used excessive force.<sup>22</sup>

Significantly, in *Buckhannon Board v. West Virginia Department of Health and Human Resources*, the Court made it much more difficult for successful

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17. 521 U.S. 898 (1997) (holding that the Brady Handgun Control Act, which requires state and local law enforcement personnel to conduct background checks before issuing permits, violates the Tenth Amendment because Congress is compelling state and local governments to carry out a federal mandate).

18. See, e.g., *Federal Mar. Comm’n v. South Carolina State Port Auth.*, 535 U.S. 743 (2002) (holding that state governments cannot be “sued” in federal agency proceedings that are adjudicatory in nature); *Alden*, 527 U.S. 706 (holding that state governments cannot be sued in state court, even on federal claims, without their consent); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1999) (holding that Congress may authorize suits against states and abrogate the Eleventh Amendment only pursuant to Congress’s power under section five of the Fourteenth Amendment and not pursuant to other congressional powers).

19. 532 U.S. at 275.

20. 532 U.S. 105 (2001).

21. 532 U.S. 731 (2001) (holding that the Prison Litigation Reform Act requirement for exhaustion of administrative remedies applies when the prisoner is seeking monetary relief and when the grievance procedure does not permit recovery of money, as long as the grievance process can provide some responsive action).

22. 533 U.S. 194 (2001) (holding that in a civil rights case alleging constitutionally excessive force, the tests for qualified immunity and reasonableness are distinct; a finding of excessive force does not preclude a finding of qualified immunity).

plaintiffs to recover attorneys' fees.<sup>23</sup> The Court said a plaintiff is not deemed to "prevail" just because his or her lawsuit is the "catalyst" for the government to change its policy.<sup>24</sup> Attorneys' fees are to be awarded only when a judicial action—a judgment or consent decree—favors the plaintiff.<sup>25</sup>

Again, this divide between liberals and conservatives is not surprising. Progressives long have been advocates for and conservatives have opposed civil rights. These attitudes are very much reflected in these recent decisions concerning the availability of the courts to civil rights litigants.

Third, conservatives have sought to expand government aid to religion, while progressives have attempted to maintain a wall separating church and state. Conservatives on the Court, such as Chief Justice Rehnquist and Justices Scalia and Thomas, advocate accommodating religion in government, allowing prayer in schools and permitting government assistance to parochial schools. Liberals traditionally oppose such efforts and seek to have a secular government with strict limits on government support for religion.

Most recently, this dichotomy was evident in the Supreme Court's decision upholding a state program that allowed vouchers to be used in parochial schools. In *Zelman v. Simmons-Harris*, the Court held a program allowing vouchers to be used for parochial and secular private schools, but not public schools, is constitutional even though 96 percent of parents used their vouchers for parochial schools.<sup>26</sup> The Court split 5-4, along familiar ideological lines, with Justices Rehnquist, O'Connor, Scalia, Kennedy, and Thomas in the majority; Justices Stevens, Souter, Ginsburg, and Breyer dissented.

Fourth, conservatives seek to limit the scope of individual rights, whereas progressives seek to maintain and expand personal freedoms under the Constitution. This is true for rights enumerated in the Constitution, as well as for non-textual rights. For example, one of the most dramatic restrictions on individual rights during the Rehnquist Court has been *Employment Division v. Smith*, in which the Court significantly limited the scope of the Free Exercise Clause of the First Amendment and held that the Free Exercise Clause cannot be used to challenge a neutral law of general applicability, no matter how much it burdens religion.<sup>27</sup> Of course, the most dramatic example of different liberal and conservative views as to rights is abortion, with conservatives seeking to end constitutional protection for abortion rights and progressives trying to maintain them.

Fifth, conservatives and liberals differ substantially as to the appropriate scope of criminal defendants' rights. Conservatives emphasize security over the protecting the rights of suspected criminals; progressives stress safeguarding criminal defendants from state power. This, too, is not new. In 1968, presidential candidate Richard Nixon campaigned against the Warren Court's criminal

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23. 532 U.S. 598 (2001).

24. *Id.* at 605.

25. *Id.* at 606.

26. 536 U.S. 639 (2002).

27. 494 U.S. 872, 878-79 (1990).

procedure decisions. For decades, conservatives have sided with the government in restricting the rights of criminal defendants.

For example, in *McKune v. Lile*<sup>28</sup> the Court ruled 5-4 that prison officials did not violate the Fifth Amendment when they revoked certain privileges of an inmate who refused to disclose his sexual history during a sex-treatment offender program. Most recently, in two 5-4 decisions, the Court held that it is not cruel and unusual punishment for the government to impose life sentences on shoplifters under California's three strikes law.<sup>29</sup>

Sixth, conservatives seek to eliminate affirmative action as discrimination. Progressives seek to use affirmative action to ensure diversity and remedy a long legacy of racial discrimination. Few issues so clearly divide the difference between liberals and conservatives as does affirmative action. For instance, the Court's recent decision upholding the University of Michigan Law School's affirmative action program was split 5-4, and the opinions reflected deep ideological divisions within the Court.<sup>30</sup>

Finally, one area which does not follow the traditional conservative/progressive division is freedom of speech. Traditionally, progressives have been regarded as more speech protective, and conservatives have been thought to be more willing to uphold government regulation of speech. Recently, however, it is often conservatives who tend to be more speech protective, especially when it comes to protecting campaign contributions and commercial speech. On the current Court, the most conservative Justices seek to change the law and find contribution limits in election campaigns unconstitutional.<sup>31</sup>

A recent example of this shift in speech cases is *Republican Party of Minnesota v. White*,<sup>32</sup> in which the five most conservative Justices voted to declare unconstitutional a state law prohibiting candidates for elected judicial office from making statements about disputed legal or political issues. The four more progressive Justices would have upheld the restrictions. This decision reflects a conservative philosophy of interpreting the First Amendment to require government deregulation of speech, whereas progressives are more willing to allow regulation of speech to achieve other social goals.

As with any brief summary, this list does not capture all of the differences between liberals and conservatives, and it certainly does not reflect the nuances of a range of positions that exist on many issues. For example, on the current Court, Justices Kennedy and O'Connor are more likely to vote in a conservative direction and join Justices Rehnquist, Scalia, and Thomas. But as the 2002-03 Supreme Court term revealed, these two justices sometimes do not take the conservative position in key cases, such as in striking down the Texas sodomy

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28. 536 U.S. 24 (2002).

29. *Lockyer v. Andrade*, 538 U.S. 63 (2003); *Ewing v. California*, 538 U.S. 11 (2003).

30. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

31. *See Fed. Election Comm'n v. Beaumont*, 539 U.S. 146 (2003) (Scalia, J., and Thomas, J., dissenting).

32. 536 U.S. 765 (2002).

law<sup>33</sup> and in upholding affirmative action,<sup>34</sup> and their votes are decisive in producing a more progressive result.

### III

#### THE DIVIDE BETWEEN PROGRESSIVES AND CONSERVATIVES IS OVER RESULT, NOT METHODS

Conservatives attempt to portray the difference between their views and those of progressives as being about methodology; they assert that conservative positions are the product of following a neutral methodology, whereas they contend progressives are just imparting their own values into constitutional law. For example, in a recent essay, conservative Professor John McGinnis wrote, “The ultimate measure of any Chief Justice’s service is fidelity to the Constitution. By that standard, Rehnquist has earned very high marks. . . . Because of William Rehnquist, the court has largely regarded the Constitution as law rather than as a mirror of the Justices’ own desires.”<sup>35</sup>

Nonsense. Obviously, it is not coincidence that conservatives find in the Constitution results that reflect their conservative ideology and that progressives do exactly the same thing and interpret the Constitution to come to liberal conclusions. There is a parallel between Justice Scalia’s interpretation of the Constitution and the Republican platform: both oppose abortion rights, favor more aid to religious institutions, are against affirmative action, and so on. It is not that the Republican platform is based on an originalist approach to the Constitution. Rather, it is that Justice Scalia’s conservative ideology, and not his interpretive methodology, determines his position on most constitutional issues. This is no different from progressives who come to opposite substantive conclusions; the only difference is that progressives do not pretend to be following a neutral methodology.

Many examples reveal how differences are a result of value choices between progressives and conservatives and not at all about methodology. For instance, the Rehnquist Court’s dramatic expansion of sovereign immunity, holding that states cannot be sued in state courts or federal agencies,<sup>36</sup> has no basis in the text of the Constitution. No provision of the Constitution says anything about sovereign immunity in state courts or federal agencies. Nor is there any discoverable Framers’ intent—even assuming that it is relevant—with regard to this issue. Conservatives have made a value choice to favor state immunity over state accountability, and no neutral methodology can explain these decisions.

Likewise, the conservative position on affirmative action, as expressed by Justices such as Scalia and Thomas, is all about ideology and not methodology. Conservative Justices who espouse a belief in an originalist methodology do not

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33. *Lawrence v. Texas*, 539 U.S. 558 (2003).

34. *Grutter v. Bollinger*, 539 U.S. 300 (2003).

35. John O. McGinnis, *Rehnquist Court Renewed Civic Virtues*, TIME, June 30, 2003, at 24.

36. *Alden v. Maine*, 527 U.S. 706 (1999).

follow it in the face of strong evidence that the Framers of the Fourteenth Amendment supported affirmative action. As such scholars as Professor Stephen Siegel have demonstrated, the Framers of the Fourteenth Amendment engaged in aggressive affirmative action.<sup>37</sup> Yet here, Justices Scalia and Thomas ignore this, just as they ignore their commitment of deference to state choices that they express in many other contexts.

In *Bush v. Gore*,<sup>38</sup> Justices Scalia and Thomas were key votes for the majority, even though it is virtually the only instance in which either of them ever has found an equal protection violation—except in striking down affirmative action programs. Likewise, neither Justice seemed the least bit concerned about the Court's substituting its own judgment for that of the Florida Supreme Court.

To be sure, occasionally, a conservative Justice, like Scalia, votes in a way contrary to how conservative judicial ideology would predict.<sup>39</sup> But such exceptions are rare, and overwhelmingly the conservative Justices find conservative value choices in the Constitution. Values, not methodology, determine decisionmaking. In fact, it is not surprising that conservatives embraced originalism at a time when their agenda included strong opposition to nontextual rights, such as abortion. This allowed them to express their political agenda in seemingly neutral, methodological terms. But conservatives are willing to abandon originalism, such as in the affirmative action area, where it does not serve their substantive ends.

I do not mean to imply that conservatives are more likely than progressives to bring their values to constitutional interpretation. Interpreting a document written in broad open-textured language, deciding what is a compelling interest, inherently requires value choices by the Justices. The main difference between conservatives and progressives here is that conservatives are much more likely to pose their decisions as the products of a neutral methodology and not as the products of value choices.

#### IV

#### WHAT SHOULD BE THE FOCUS OF PROGRESSIVE CONSTITUTIONAL SCHOLARSHIP?

At a time when the judiciary is becoming steadily more conservative as a result of President George W. Bush's nominations, and with the prospect of a Supreme Court that is likely to be conservative for the foreseeable future, what should be the focus of progressive constitutional scholarship?

Several possibilities seem misguided. First, it does not seem possible or fruitful to try to generate a "neutral" theory of constitutional interpretation that

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37. Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477 (1998) (pointing to affirmative action programs by the Congress which passed the Fourteenth Amendment, including the creation of the Freedmen's Bureau).

38. 531 U.S. 98 (2000).

39. For example, Justices Scalia and Thomas have dissented from decisions limiting punitive damages. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

will generate liberal, but not conservative, results. Certainly, it is attractive to try to invent some method of constitutional interpretation, analogous to the role originalism plays for conservatives, that will justify all the results progressives want. But I believe that no such theory ever can exist.<sup>40</sup> Constitutional law is inherently about value choices, and no grand theory can tell which values are so important as to be protected from majoritarian decisionmaking. Protecting abortion, allowing affirmative action, and rejecting sovereign immunity are all choices, and no neutral interpretive methodology can be invented to justify them.

Second, I vehemently reject the approach of those who would turn against the courts as a solution to the reality of conservative courts. Mark Tushnet, for example, has proposed the complete elimination of judicial review.<sup>41</sup> Larry Kramer has urged a substantial lessening of the role of the courts in favor of what he terms “popular constitutionalism.”<sup>42</sup> A full response to this movement is beyond this short essay, but I believe that those who reject judicial review are making several errors. First, their argument against the courts focuses only on the Supreme Court and ignores the tremendous importance of judicial review in lower federal and state courts in invalidating unconstitutional laws. Advocates of popular constitutionalism are fond of dismissing judicial review by pointing to the aberrational nature of the Warren Court. This, however, ignores all of the blatantly unconstitutional laws that are struck down by other courts and that would be in effect without any judicial review.

Second, the argument that judicial review is unnecessary, by scholars such as Professors Tushnet and Kramer, focuses on Congress’s willingness to abide by the Constitution. This, however, ignores the need for judicial review of actions by state legislatures, city governments, public entities such as school boards, and acts of government officers such as police officers. Constitutional cases, at all levels of courts, are far more likely to focus on these government actions than on laws enacted by Congress.

Third, popular constitutionalists fail to account for the much greater willingness of governments at all levels to violate the Constitution if there is no judicial review. The existence of judicial review deters governments from enacting laws that will be declared unconstitutional. Without any judicial review, governments can simply disregard the Constitution when it is politically expedient to do so.

Fourth, popular constitutionalists fail to realize that for many, especially the most politically powerless, it is the courts or nothing. Unpopular minorities—criminal defendants, prisoners, undocumented immigrants—must have judicial

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40. This argument as to why such a progressive “grand theory” of constitutional law is impossible is developed in Erwin Chemerinsky, *A Grand Theory of Constitutional Law?* 100 MICH. L. REV. 1249 (2002) (book review).

41. MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 155-76 (1999).

42. Larry Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4 (2001).

protection; there is no realistic chance that such individuals will succeed in the majoritarian political process.

It is certainly understandable why progressives would be tempted to turn away from the courts today. But it is not necessary to attack the institution of judicial review to criticize decisions that seem misguided. For example, it is possible to challenge the Court's cramped interpretation of Congress's powers under section five of the Fourteenth Amendment without attacking the legitimacy of judicial review itself.

So what should progressives constitutional scholars do? It is essential that there be a voice in the academic literature articulating a progressive vision of constitutional law based on respecting the dignity of each individual, advancing equality, and enhancing freedom. If nothing else, progressives can expose that the conservative emperor has no clothes; progressives can show that the conservative claim of neutral decisionmaking is nonsense. Progressives can demonstrate that conservative decisions are a result of value choices by conservative judges and that the activism that occurs today is conservative judicial activism.

Progressives can articulate an alternative vision of constitutional law, both generally and in the specific doctrinal areas of constitutional law. Perhaps this law review literature will persuade lower courts. Maybe it will help shape and change public opinion. Perhaps it will occasionally triumph in the Supreme Court. If nothing else, it may provide the foundation for a very different constitutional law in the future. The conservative criticisms of the Warren Court became the basis for the conservative constitutional jurisprudence of today. The attacks on the *Lochner* era Court led to the judicial deference that dominated from 1937 until the mid-1950s. How the Court is talked about today can affect what is likely to occur in the future.

## V

### CONCLUSION

We are at a time in U.S. history when the nation is ideologically deeply divided. Certainly, this has happened before. But one aspect of the ideological chasm today is that the differences between political liberals and conservatives are so much defined in terms of constitutional issues. If people on the street were asked to identify the issues that determine whether a person should be called liberal or conservative, they likely would point to issues such as abortion, the death penalty, affirmative action, and the relationship between religion and government.

The most important challenge for progressive professors today is to decide what the most useful role for their scholarship can be at a time of increasingly conservative courts. There are no easy answers. But the result is likely to have profound consequences for how thinking about the law and ultimately the law itself takes shape years and decades in the future.