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The Rehnquist Court and Criminal Procedure

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THE REHNQUIST COURT AND CRIMINAL PROCEDURE

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INTRODUCTION

This Conference, like a growing body of academic literature, discusses the phenomenon of conservative judicial activism. Has the Rehnquist Court been "activist"—whatever that means—in its approach to constitutional adjudication? With recent rumors that Chief Justice Rehnquist will soon announce his retirement, this is a particularly topical subject. Indeed, even now, one sees the first chiselings of the Court's epitaph, with Professor Erwin Chemerinsky, for example, declaring that the Rehnquist Court has been nothing short of a "disaster" due to its rampant conservative activism.[1] The question of whether, and to what extent, the Rehnquist Court is "activist" or practices the "restraint" that judicial conservatives traditionally preach will likely figure prominently in the ultimate assessment of the Court's jurisprudence.

Much of this Conference addresses this question within the context of the revival of federalism-based limits on Congress over the last decade. The allure of federalism as a topic for discussion is understandable, yet it should not obscure other important developments from the Rehnquist Court. In fact, I would argue that constitutional criminal procedure provides a better context within which to test the Rehnquist Court's commitment to judicial restraint than federalism. In this Essay, therefore, I examine the topic at hand against the

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1. Erwin Chemerinsky, *The Rehnquist Court & Justice: An Oxymoron?*, 1 WASH. U. J.L. & POL'Y 37, 37 (1999).

background of the many important developments that have taken place in criminal procedure on Rehnquist's watch. The results of this examination are surprising because they suggest that activism is not necessarily the antithesis of restraint. That is to say, although the Court has indeed been activist in criminal procedure, its activism may ultimately serve the goal of judicial restraint. If in fact it does, then believers in judicial restraint should embrace rather than condemn the Court's activism.

I. THE RELEVANCE OF CRIMINAL PROCEDURE AND THE PROBLEM WITH FEDERALISM

In any assessment of the Rehnquist Court's jurisprudence, constitutional criminal procedure should take center stage. After all, if there was a single issue that gave rise to the Rehnquist Court, it was criminal procedure. "Law and order" was probably the campaign issue that contributed the most to the string of Republican presidential victories that allowed Richard M. Nixon and his three Republican successors to name the next ten Justices following the retirement of Chief Justice Earl Warren in 1969.[2] The strategy proved so successful that it is now accepted as a political axiom that, whether crime rates are up or not, voters in national elections will not elect a candidate who is "soft" on crime.[3]

From 1968–1992, when Republican presidential candidates had a "lock" on the crime issue, criminal procedure reform emerged as an important factor in judicial selection, as opposed

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2. Eleven, if you count Rehnquist's elevation to Chief Justice in 1986. On the significance of crime in presidential elections from Nixon to Bill Clinton, see Harry A. Chernoff, et al., *The Politics of Crime*, 33 HARV. J. ON LEGIS. 527, 577 (1994).

3. *See, e.g., id.* (noting that "control of the crime issue is a necessary, though perhaps not sufficient, requirement for political victory in America"). As Professor William Stuntz cogently demonstrates, however, the problem goes far beyond mere electioneering. The modern expanse of the criminal law reflects a deeper, "pathological" form of politics in which the fully accountable players in the criminal justice system—legislators and prosecutors—collude to expand the breadth and depth of the criminal law and thereby limit the power of courts to protect the interests of the accused. *See generally* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 523-79 (2001) [hereinafter, Stuntz, *Pathological Politics*]. The bottom of this slippery slope, Stuntz argues, is a criminal law so broad that "the law on the books makes everyone a felon," subject to the good graces—or whims—of police and prosecutors. *Id.* at 511.

to merely a strategy for winning votes. Nixon endeavored to appoint justices who would, in his words, "strengthen the hand of the peace forces" as against the "criminal forces."[4] President Ronald W. Reagan, the architect of the national "war on drugs," likewise stressed criminal procedure reform in judicial selection.[5] Therefore, criminal procedure should figure prominently in any coherent story of the Rehnquist Court.

Needless to say, criminal procedure reform is hardly the only development of significance from the current Court. Indeed, if asked, most academics today would probably identify the Court most closely with some version of federalism.[6] The fascination with federalism is both natural and understandable. There is quite a divide between current notions of federalism as an important, judicially enforceable constitutional value and the prior rule that federalism is merely a prudential concern for Congress to consider (or not) as it sees fit.[7] For myself and other believers in the importance of structural guarantees of liberty, these developments are as

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4. Richard M. Nixon, *Address to the Nation Announcing Intention to Nominate Lewis F. Powell, Jr., and William H. Rehnquist to be Associate Justices of the Supreme Court of the United States, reprinted in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RICHARD NIXON, 1971, at 1055 (1972).

5. *See* SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 302-04 (1997) (noting that the Reagan Administration carefully screened potential judicial nominees for "toughness" on crime). Reagan's emphasis on criminal procedure reform made sense given his fervent, if simplistic, belief that the drug problem and the larger "crime epidemic" were caused by "liberal judges who are unwilling to get tough with the criminal element in this society." 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RONALD REAGAN 1348 (1989). By contrast, President George W. Bush was far less ideological than Reagan in judicial selection, putting a greater premium on ease of Senate confirmation than judicial philosophy. *See* DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES 191 (1999). To be sure, Bush braved the political firestorm and selected as his second pick for the High Court then-Judge Clarence Thomas, who today arguably is the most conservative member of the Rehnquist Court. The motivation, however, was political, not ideological—an attempt to placate conservatives disappointed with Bush's first nominee, Justice David H. Souter, and to avoid criticism for replacing retiring Justice Thurgood Marshall with a white nominee. *Id.* at 193.

6. For a useful categorization of modern federalism doctrines, see Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 431, 452-68 (2002).

7. *Compare, e.g.*, United States v. Morrison, 529 U.S. 598 (2000) (striking down on federalism grounds the civil damages provisions of the Violence Against Women Act) *with* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (rejecting federalism-based limits on Congress).

welcome as they are anathema to advocates of the prior regime.[8]

The danger of fixating on federalism, however, is that it may distract attention from other areas of doctrine—here, criminal procedure—that played a significant role in shaping the Rehnquist Court's legacy. A particularly striking example is a provocative recent article by Professors Jack Balkin and Sanford Levinson contending that the Rehnquist Court's federalism decisions amount to a "constitutional revolution."[9] Curiously, however, they do not regard criminal procedure as part of that revolution because, in their view, "the Rehnquist Court has simply carried on the work of its predecessors" in that field.[10] This assertion proves far too much—and too little.

If novelty is the test of a doctrinal "revolution," then the "New Federalism" joins criminal procedure and virtually every other area of doctrine in flunking it. The idea that states retain some measure of sovereignty and therefore enjoy greater immunity from suit than the Eleventh Amendment literally provides predates the Rehnquist Court by almost 100 years.[11] The notion that there are enforceable limits on the reach of the Commerce Power traces its lineage back to the very foundations of the Republic and, until the New Deal, represented the prevailing understanding of the Commerce Clause.[12] The last broad category of recent federalism

8. The literature addressing the recent developments in federalism is immense, and much of it is sharply critical of those developments. *See, e.g.*, Peter M. Shane, *Federalism's "Old Deal": What's Right and Wrong with Conservative Judicial Activism*, 45 VILL. L. REV. 201 (2000). For some friendly appraisals of the rebirth of federalism, see, for example, Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813 (1998); Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of United States v. Lopez*, 94 MICH. L. REV. 752 (1995).

9. *See* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1056 (2001) (emphasis added).

10. *Id.* at 1056.

11. *See* Hans v. Louisiana, 134 U.S. 1 (1890). This "immunity interpretation" of the Eleventh Amendment has been considered settled law long for decades. *See, e.g.*, Edelman v. Jordan, 415 U.S. 651, 662-63 (1974) ("While the [Eleventh] amendment by its terms does not bar suits against a state by its own citizens, this Court has consistently held that an unconsenting state is immune from suits brought in federal courts by her own citizens as well as by citizens of another state.") (citing cases).

12. *See* Steven G. Calabresi, *Federalism and the Rehnquist Court: A Normative Defense*, *reprinted in* 574 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 24 (Frank Goodman, ed. 2001) (noting that the

decisions, the so-called "anti-commandeering" cases, was itself foreshadowed by prior decisions.[13]

Indeed, if Balkin and Levinson are correct that judicial doctrine is not revolutionary unless it is completely novel in light of prior doctrine, then the famous Warren Court "Revolution" in criminal procedure was itself badly misnamed. To be sure, the specific rules announced by the Court were a stunning break from the past in terms of doctrine and precedent. The novelty melts away, though, on a more global look at the Court's historical record in criminal procedure.

The great blows struck by the Warren Court were, on the conventional academic account at least, intended as a counterweight to institutionalized racism in the criminal justice system.[14] If that widely shared yet inadequately documented characterization is accurate—and I have my doubts[15]—then there was really nothing new about what the

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Supreme Court enforced federalism-based limits on Congress "from the time of the Founding up through 1937"). *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), for example, left no doubt that Congress was not given, and therefore lacks, the power to regulate "the exclusively internal commerce of a State." *Id.* at 195. *Gibbons* and other notable pre-New Deal Commerce Clause precedents are discussed at length in the various opinions supporting the result in *United States v. Lopez*, 514 U.S. 549 (1995). *See id.* at 552-54 (majority opinion); *id.* at 568-72 (Kennedy, J., concurring); *id.* at 585-600 (Thomas, J., concurring).

13. Examples would include *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264 (1981), and *FERC v. Mississippi*, 452 U.S. 264 (1982), where the Court cast serious doubt on congressional power to compel the states to regulate. In later cases formally embracing anti-commandeering, the Rehnquist Court ruled that *Hodel* and *FERC* "ha[d] made clear that the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." Printz v. United States, 521 U.S. 898, 925 (1997); *see also* New York v. United States, 505 U.S. 144, 176 (1992).

14. *See generally* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 49 (1997) [hereinafter, Stuntz, *Uneasy Relationship*] (describing combating racism as the "conventional understanding" of Warren-era doctrine).

15. I have raised the possibility elsewhere that the Warren Court's criminal procedure jurisprudence may have had less to do with race than generalized concerns about the unfairness of the criminal justice system for all indigent defendants. *See* Stephen F. Smith, *Taking Lessons from the Left? Judicial Activism of the Right*, — GEO. J.L. & PUB. POL'Y – (forthcoming 2002) (on file with the author). Unfortunately, minorities are disproportionately poor, so there is a correlation between race and indigency, yet the two concerns are distinct. Not to put too fine a point on it, but blacks were lynched, beaten into giving false confessions, convicted of crimes they did not commit, and excluded from juries in the South not because they were poor, but because they were black in an era of white supremacy. If the prevailing orthodoxy is right that fighting racism was the motivation behind Warren-era criminal procedure, then it is positively baffling that the Court repeatedly took a pass on areas of criminal justice—most glaringly,

Warren Court did. After all, the Supreme Court's expansion of the Constitution to combat racism in the criminal justice system began decades before Warren's ascent to the Supreme Court.[16]

In each instance, whether it is Rehnquist's federalism or Warren's criminal procedure, one might argue, as Balkin and Levinson do, that these developments were insignificant because the Court simply "followed in the shoes" of its predecessors. Nevertheless, they and other scholars agree on the significance of the Rehnquist Court's contributions to federalism, as a conceptual matter at least.[17] Likewise, the

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the death penalty—where racism often comes into play. *See generally* Michael J. Klarman, *Is the Supreme Court Sometimes Irrelevant? Race and the Southern Criminal Justice System in the 1940s*, 89 J. AM. HIST. 119, 141-42 (2002) [hereinafter, Klarman, *Sometimes Irrelevant*]. At times, the problem went beyond inattention, with the Warren Court affirmatively endorsing controversial law enforcement practices that could be used to racist ends. *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968) (approving "stop and frisk" detentions and searches based on "suspicions" that fall short of probable cause); Swain v. Alabama, 380 U.S. 202 (1965) (allowing prosecutors to use peremptory challenges to strike prospective black jurors, even in racially charged cases involving black defendants, unless blacks are never allowed to serve on any criminal juries in a particular jurisdiction), *overruled in relevant part*, Batson v. Kentucky, 476 U.S. 79 (1986). Racism undoubtedly explains why the Court granted certiorari in a number of cases, but it is hard to see how the rules the Court generated could be expected to counter the pernicious effects of racist law enforcement.

16. For example, long before the Warren Court, discriminatory exclusion of black jurors had been struck down on equal protection grounds, *see, e.g.*, Norris v. Alabama, 294 U.S. 587 (1935); Strauder v. West Virginia, 100 U.S. 303 (1880), and criminal trials conducted in a "lynch mob" atmosphere had been condemned as contrary to the fair adjudication required by due process, *see* Moore v. Dempsey, 261 U.S. 86 (1923). These key early criminal procedure developments are carefully analyzed in Michael J. Klarman, *The Racial Origins Of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000). In later work, Professor Klarman argues that these early decisions, though important for other reasons in the larger struggle for racial justice, had "virtually no impact on southern criminal justice in cases involving allegations of serious black-on-white crime, such as rape or murder." Klarman, *supra* note 15, at 120. Another important example is habeas corpus: by the time Warren became Chief Justice, the Supreme Court had already expanded the "Great Writ" from its narrow common law reaches to a broad vehicle for de novo federal court review of the constitutionality of state court convictions. *See generally* Stephen F. Smith, *Activism as Restraint: Lessons from Criminal Procedure*, 80 TEX. L. REV. 1057, 1065-67 (2002) [hereinafter, Smith, *Activism as Restraint*] (tracing evolution of modern habeas doctrine).

17. *See generally* Fallon, *supra* note 6, at 429-30. Even after more than a decade of Balkin and Levinson's "constitutional revolution," several prominent scholars question the real-world significance of the federalism decisions. *See, e.g.*, John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47,49 (1998) ("The Eleventh Amendment almost never matters. . . .

Warren Court's jurisprudence in criminal procedure has been recognized, by supporters and critics alike, as "revolutionary."[18]

Moreover, Balkin and Levinson sell the Rehnquist Court short on criminal procedure reform. To be sure, prior courts adopted a "law and order" approach to criminal procedure. Nonetheless, after Warren Court decisions like *Miranda* and *Mapp v. Ohio*,[19] Nixon hoped that the new Burger Court would roll back decisions that "handcuffed" police and freed the guilty. While making some strides in that direction, particularly in the area of habeas corpus,[20] the Burger Court never seriously jeopardized its predecessor's legacy. Although the Burger Court chipped away at certain Warren Court precedents, it actually *expanded* others in important ways.[21] It even invalidated capital punishment as then administered nationwide[22]—not exactly the "law and order" results Nixon had promised.[23]

In almost every case where action against the state is barred by the Eleventh Amendment, suit against a state officer is permitted under [42 U.S.C.] Section 1983."); Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911, 1915 (1995) (arguing that "prevailing Spending Clause doctrine appears to vitiate much of the import of *Lopez* and any progeny it may have").

18. *See, e.g.*, Carol Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466 (1996).

19. 367 U.S. 643 (1961). *Miranda* limited the use of so-called "unwarned" confessions—that is to say, confessions not preceded by the now-famous *Miranda* warnings. *Mapp* required state courts to exclude at trial evidence seized in violation of the Fourth Amendment's prohibition of unreasonable searches and seizures.

20. For an overview of the Burger Court's retrenchment on habeas corpus, see generally Smith, *Activism as Restraint*, *supra* note 16, at 1070-74.

21. A good example is *Brewer v. Williams*, 430 U.S. 387 (1977), often referred to as the "Christian burial" case. *Brewer* involved *Massiah v. United States*, 377 U.S. 201 (1964), which had held that the police cannot deliberately elicit incriminating statements from a defendant, in the absence of his attorney, once formal adversary proceedings have been initiated. The defendant in *Brewer* (who was known to be religious) was shamed into leading authorities to the remains of a little girl he had murdered by police statements that she would be denied the Christian burial she deserved unless her body was discovered before an expected snowstorm hit. The *Williams* Court expanded *Massiah* beyond explicit interrogation to apply to police statements that facilitate incriminating answers from a suspect, ruling that the defendant's statements should have been excluded from evidence. *See Williams*, 430 U.S. at 405-06.

22. *See* Furman v. Georgia, 408 U.S. 238 (1972) (per curiam). The Court allowed executions to resume with its decision four years later in *Gregg* v. *Georgia*, 428 U.S. 153 (1976).

23. These surprising developments led some scholars to minimize the significance of the Burger Court's jurisprudence in criminal procedure. *See, e.g.*, Steiker, *supra* note 18, at 2467-68. (citing sources). Clearly, however, the retrenchment in criminal procedure was significant, as Professor Steiker has

The radical revisions hoped for by conservatives did indeed come, albeit not from the Burger Court and not in the form of overrulings. Rather, the Rehnquist Court has proceeded on the realization that the guillotine is not the only way to produce a revolution and, indeed, sometimes may not even be the most effective way. As French history teaches, revolution can backfire. After all, the flames fanned by the Revolution of 1789, and fueled so famously by the guillotine, were doused by the Thermidorean Reaction.[24] So it was in criminal procedure. The boldness and creativity of the Warren Court in criminal procedure inspired many, but ultimately produced a Rehnquist Court majority determined to swing the pendulum back in the direction of law enforcement.[25]

One of the most significant developments from the Rehnquist Court—habeas anti-retroactivity doctrine—proved utterly devastating to the Warren Court's federal vision of criminal procedure.[26] This vision rested on two key principles—first, that federal constitutional rules should govern all key stages of the law enforcement process, and, second, that the federal courts should be the ultimate guardian of federal constitutional rights.

This broad, remedial vision of habeas corpus survived the Burger years, if not unscathed, at least intact.[27] The Rehnquist

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shown. *See generally id.* at 2504-32.

24. *See* D.M.G. SUTHERLAND, FRANCE 1789-1815: REVOLUTION AND COUNTERREVOLUTION 248-64 (1986).

25. *Miranda* is an example of how, even without overrulings, Warren Court doctrines were changed in ways that favored law enforcement. *See generally* Smith, *Activism as Restraint*, *supra* note 16, at 1109-11. Suffice it to say here that *Miranda* has gone from a doctrine that seemed to spell the end of confessions to a doctrine that the police can usually work around without much difficulty. Indeed, from the defendant's perspective, the current state of affairs is even worse than that because, absent physical abuse or other obviously coercive interrogation techniques, administration of *Miranda* warnings essentially dooms to failure any claim by the defendant that his confession was involuntary. *See, e.g.*, Berkemer v. McCarty, 468 U.S. 420, 433 n.20 (1984). It therefore is no wonder that the Rehnquist Court saw no need to overrule *Miranda* in *Dickerson v. United States*, 530 U.S. 428 (2000).

26. This paragraph builds on a more extensive discussion in Smith, *Activism as Restraint*, *supra* note 16, at 1062-77.

27. In *Stone v. Powell*, 428 U.S. 465 (1976), the Burger Court boldly offered a much narrower view of habeas corpus—that its function ought to be simply to vindicate factually innocent defendants who were wrongfully convicted. The idea never took hold outside of the exclusionary-rule context dealt with in *Stone* itself. As such, with the sole exception of Fourth Amendment claims, habeas corpus offered the prospect of full, de novo relitigation in federal court of federal constitutional claims that were properly preserved in the state court system. To

Court, however, buried it in a single case, *Teague* v. *Lane*.[28] There, the Court held that habeas corpus should be available only to deter egregious misconduct by state courts, a far narrower role than remedying constitutional errors.[29] Henceforth, habeas corpus would only be used to enforce "old" law, barring claims seeking "new law" in habeas cases except in truly extraordinary circumstances.[30]

Teague is a counterrevolution wrapped into a single case. Because of the breadth of *Teague*'s definition of "newness," it is virtually impossible for state court prisoners to get their claims heard on the merits in federal court.[31] To the extent there are any "gaps" between the legal rule announced in prior cases and the case at hand, or between the factual context in which a prior rule was announced and the present case, the prisoner's claim is "new" and therefore barred by *Teague*. As every litigator knows, the facts of two cases are almost never identical, but this is particularly true in an area as dynamic as criminal procedure. In criminal procedure, there are lots of moving parts—law enforcement behavior, legislative crime definition, legislative funding-allocation decisions, and prosecutorial charging and plea-bargaining decisions—that can and do adjust in response to court decisions.[32] Given the fluidity of the criminal justice system, new legal questions constantly arise, and it will be difficult for the Supreme Court to foresee the variation at the time it is formulating a rule of constitutional law.[33] All of these questions are off-limits to habeas under *Teague*.

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this extent, the Warren Court vision remained alive and well throughout the Burger years.

28. 489 U.S. 288 (1989) (plurality opinion).

29. *See id.* at 306. The Court thus explicitly adopted Justice Harlan's view of retroactivity, which previously had never commanded majority support. *See, e.g.*, *Desist* v. *United States*, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting).

30. *See Teague*, 489 U.S. at 301.

31. *See id.*. at 301 (defining a "new" rule is one that is not literally "*dictated* by precedent existing at the time the defendant's conviction became final") (emphasis added).

32. For the best demonstration of this point and its implications for constitutional regulation of criminal procedure, see generally Stuntz, *Uneasy Relationship*, *supra* note 14.

33. Even the most comprehensive opinion in criminal procedure—*Miranda*—left lots of unanswered questions, questions that the federal courts struggled with for decades. By the time of *Dickerson v. United States*, 530 U.S. 428 (2000), the Supreme Court itself had decided close to sixty case involving *Miranda* questions, *id.* at 462-63 (Scalia, J., dissenting), and the lower federal

The discussion so far relates only to the second element of the Warren Court vision—namely, federal court enforcement of federal rights. The problems run deeper, however. The Warren Court envisioned the federal courts, and the Supreme Court in particular, as the *expositor* of the body of law known as constitutional criminal procedure, as well as its enforcer. *Teague* cuts the lower federal courts out of the lawmaking equation altogether, so far as state cases are concerned. True, the district and circuit courts can make new criminal procedure rules in the context of federal criminal prosecutions, but those rules cannot bind state courts.[34]

Of course, the Supreme Court can still make new law binding on states on certiorari from the state courts or in federal cases. One obvious point in response is that the Rehnquist Court is far less inclined, as an ideological matter, than the Warren Court was to disagree with state court decisions rejecting claims by criminal defendants.[35] The larger, less obvious point is that exclusive reliance on the Supreme Court is *itself* a repudiation of the Warren Court vision. That vision was premised upon the realization that, due to docket constraints, the Supreme Court cannot adequately police the administration of justice in the state courts without the aid of the lower federal courts.[36]. *Teague*, however, prevents the

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courts countless more.

34. Only decisions of the Supreme Court can bind state courts. *See generally* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 825 (1995). The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") implicitly recognizes this point, allowing habeas relief only in cases where state court violated or unreasonably applied "clearly established Federal law, *as determined by the Supreme Court of the United States*." 28 U.S.C. § 2254(d)(1) (emphasis added).

35. *See infra* note 39 and accompanying text; *see generally* Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-first Century*, 35 IND. L. REV. 335, 354 (2002) (noting the declining rates of reversal of state court decisions from the Warren Court to the Rehnquist Court). Although most state judges are elected and therefore must be "tough" on crime, they are also "softer" on crime, meaning more solicitous of the interests of defendants, than prosecutors and legislators. *See generally* Stuntz, *Pathological Politics*, *supra* note 3, at 540-42. Given their tough-but-not-too-tough attitudes on crime, plus the decline of virulent racism in the criminal justice system, the attitudes of contemporary state judges are likely to mirror the Rehnquist Court's on criminal procedure. If true, this means that state courts today will be likely to avoid gross disregard, or aggressive expansion, of constitutional criminal procedure, the two decisional outcomes that would be of most concern to the Rehnquist Court.

36. *See* Smith, *Activism as Restraint*, supra note 16, at 1063 n.30. The sheer volume of criminal cases in state courts, which account for the overwhelming majority of criminal litigation even after the explosion of the federal criminal law

lower federal courts from performing the close, case-by-case scrutiny of state court convictions that the Warren Court deemed essential.

So, after *Teague*, who has primary responsibility for the fair administration of justice in state criminal cases? Certainly not the federal courts. As it did before the criminal procedure revolution, that responsibility lies with the state courts. Due to *Teague* as much as all the chipping away that has occurred since Warren's retirement, state courts need not fear reversal by a habeas court. As long as state courts do not flout clear constitutional mandates that are directly on point, habeas relief will almost always be denied.[37] Consequently, state courts again have the final word on the meaning and application of federal law, subject only to the small possibility of a grant of certiorari by the Supreme Court. In other words, the Warren Court vision for the federal courts in criminal procedure is officially dead, thanks to the Rehnquist Court.

II. "ACTIVISM" AND "RESTRAINT" FROM THE VANTAGE POINT OF CRIMINAL PROCEDURE

This sea-change in criminal procedure brings us to the subject of conservative judicial activism. Everyone knows the roll-back in criminal procedure was conservative; one of the defining characteristics of judicial conservatism is "toughness" on crime, or a strong disposition to favor the prosecution and the interests of crime victims over the criminally accused.[38]

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since the 1960s, makes it inevitable that Supreme Court intervention can only be sporadic. Such oversight, needless to say, is unlikely to be effective in changing the behavior of lower courts.

37. According to the most recent statistics available, ninety-nine percent of all habeas petitions are unsuccessful. *See* RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1364 (4th ed. 1996) (reporting data from early 1990s). Successful prisoner petitions will, in all likelihood, become even more rare under the restrictive standards of the AEDPA. *See, e.g.*, 28 U.S.C. § 2244(d) (prescribing a one-year statute of limitations for habeas actions); *id.* at § 2254(d)(1) (imposing more stringent standard of review for habeas filings).

38. *See generally* Fallon, *supra* note 6, at 447 (listing identifying characteristics of judicial conservatism). Of course, "toughness" on crime is not the only substantive value cherished by judicial conservatives, *id.*, and where that value conflicts with other conservative values—such as federalism—a conservative court may side with the criminal defendant. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995) (agreeing with the criminal defendant's contention that the Gun-Free School Zones Act is beyond the scope of the Commerce Power).

The real question is whether or not the roll-back in constitutional criminal procedure was "activist."

Defining "activism" turns out to be a difficult enterprise. Usually, the term is used as an epithet—a charge to be leveled at a judicial decision or style of judging that one finds objectionable.[39] So, for example, conservatives outraged at the perceived excesses of the Warren Court hammered away at the Court for being activist, and liberals distressed at the current resurgence of federalism are giving the Rehnquist Court the same rough treatment. For all the resonance and rhetorical power that the charge of "activism" has as a tool for criticizing court decisions, it is surprising how little effort has been made to define the concept.[40]

One thing that seems fairly clear is that Occam's Razor does not hold in this context; the simplest definition of activism cannot be considered the best. Some have argued, for example, that an activist decision is simply one that declares unconstitutional action of other branches of government.[41] Though simple, this definition cannot be reconciled with the

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39. *See, e.g.*, RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 198 (1985) (referring to judicial activism as "a premier term of judicial opprobrium"). Occasionally, the term is used in neutral fashion. For example, in his treatment of the Burger Court's response to the liberal jurisprudence of the Warren Court, Vincent Blasi argues that *both* Courts were activist. *See, e.g.*, Vincent Blasi, *The Rootless Activism of the Burger Court, in* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 201 (1983) (arguing that the Burger Court activist in part because of "its preservation of the activist landmark precedents of the Warren era. . . ."). To him, what differentiated the two Courts was not that one was "activist" and the other "restrained," but rather the *way* in which both Courts used activism. The Warren Court's activism was "rooted" in a "vision of the equal dignity of man," *id.* at 212, whereas the Burger Court's was "rootless" and "reflect[ed] no deep-seated vision of the constitutional scheme or of the specific constitutional clauses in dispute." *Id.* at 216-17.

40. *See* Bradley C. Canon, *The Framework For The Analysis Of Judicial Activism, in* SUPREME COURT ACTIVISM AND RESTRAINT 385 (Stephen C. Halpern & Charles M. Lamb, eds, 1982) (noting that "conceptions of activism are usually not explicitly noted or articulated").

41. *See, e.g.*, Glendon Schubert, *A Functional Interpretation, in* THE SUPREME COURT IN AMERICAN POLITICS: JUDICIAL ACTIVISM VS. JUDICIAL RESTRAINT 17 (David F. Forte, ed. 1972) (noting that a court "is activist whenever its policies are in conflict with those of other major decision-makers"); Erwin Chemerinsky, *The Rehnquist Court & Justice: An Oxymoron?*, 1 WASH. U. J.L. & POL'Y 37, 37 (1999) (arguing that a court is activist if it "shows little deference to the majoritarian branches of government"). Richard Posner advances a similar definition of activism: To him, an activist decision is one that expands the "power of the federal courts vis-a-vis the other organs of government." Posner, *supra* note 39, at 210.

premises of American-style judicial review. Under *Marbury* v. *Madison*,[42] a written constitution trumps lesser law, including statutes, and a statute that is repugnant to the Constitution is "void."[43] As a result, when the Constitution and lesser law point to different resolutions of a case or controversy, it is "the very essence of judicial duty" for the court to follow the Constitution and declare the lesser law unconstitutional.[44]

Given *Marbury*, it would be odd to say that a judicial decision is "activist" whenever it invalidates the actions of the other branches of government. A court that strikes down an unconstitutional act, where necessary to the resolution of a real case or controversy, has done precisely what it is *supposed* to do in our system.[45] Such a court, therefore, cannot be considered "activist."

What, then, does "activism" mean? Space does not permit me to offer a comprehensive discussion of activism here.[46] For now, the key issue is the extent, if any, to which fidelity to precedent factors into the definition of activism. This is so because the bulk of the constitutional rules and limitations that occupy the attention of prosecutors, defense attorneys, and judges in criminal cases are creatures of precedent.

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42. 5 U.S. (1 Cranch) 137 (1803).

43. *Id.* at 180; *see also* THE FEDERALIST NO. 78, at 436 (A. Hamilton) (C. Rossiter ed. 1999) ("[The written Constitution] supposes that the power of the people is superior to both [the judicial and legislative power]; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter instead of the former.").

44. *Id.* at 178.

45. Of course, the theory of judicial review under *Marbury* does not entitle federal courts to invalidate action of other branches simply because that action strikes them as bad policy. The courts are duty-bound to enforce the Constitution, no more and no less—in other words, to "say what the law is." *id.* at 177. Delineating the point at which courts have gone beyond constitutional enforcement, however, is quite difficult, if not impossible, without choosing sides in intramural disputes over the proper theories of constitutional interpretation. Perhaps the most that can be said to represent anything approaching a consensus view is that courts have discretion in resolving indeterminate questions—questions that the Constitution itself does not specifically answer—but may not reach results at odds with constitutional text. *See generally* Smith, *Activism as Restraint*, *supra* note 16, at 1084-86. For a spirited defense of the primacy of the Constitution over judicial doctrine, see Akhil Reed Amar, *The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000) [hereinafter, Amar, *Document and Doctrine*].

46. I offer a more detailed definition of activism in Smith, *Activism as Restraint*, *supra* note 16, at 1077-94.

Much of criminal procedure—whether under Warren, Burger, or Rehnquist—has not involved constitutional interpretation in the sense that we know it from other areas of constitutional law. Constitutional criminal procedure tends not to be guided by the usual theories of constitutional interpretation, such as textualism, representation-reinforcement, originalism, or tradition.[47] Instead, interest-balancing takes center stage in criminal procedure, and has for decades.

Consider a century-old issue—whether, and to what extent, illegally seized evidence should be admissible at trial. The Fourth Amendment neither provides for nor logically implies that illegally seized evidence should be excluded from evidence in a criminal trial.[48] The traditional response of the courts to illegal searches was not a "get-out-of-jail-free" card for the guilty but rather a damages action against the offending officer of the law.[49]

Ever since *Weeks v. United States*,[50] the Court has charted a completely different course. In *Weeks*, the Court created the exclusionary rule for federal prosecutions, reasoning that, absent the rule, the Fourth Amendment "is of no value, and . . . might as well be stricken from the Constitution."[51] Fifty years later, the Supreme Court, invoking what it described as "reason and truth," extended the exclusionary rule to state prosecutions.[52] In its more recent cases, the Court has found

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47. *See* Akhil Reed Amar, *The Future of Constitutional Criminal Procedure*, 33 AM. CRIM. L. REV. 1123, 1132 (1996). For a careful discussion of the various interpretive methods that are utilized in constitutional law, see Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535, 540-57 (1999). Critics on both ends of the political spectrum might protest that these methods do not actually *drive* the search for constitutional meaning but rather serve as *ex post* justifications for decisions reached on other grounds. Even if true, the objection would not diminish the force of the comparison. It would still be significant that, outside of criminal procedure, the Court at least feels the *need* to justify its constitutional decisions by invoking some accepted interpretive methodology.

48. *See* U.S. Const. amend IV ("The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated. . . .").

49. For an excellent discussion of these points, see Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994).

50. 232 U.S. 383 (1914).

51. *Id.* at 393.

52. *See* Mapp v. Ohio, 367 U.S. 643, 660 (1961). In so ruling, *Mapp* rejected the Court's previous holding in *Wolf v. Colorado*, 338 U.S. 25 (1949), that *Weeks* was merely an exercise of the Court's power of supervision over the lower federal courts and not a construction of the Fourth Amendment. *See Mapp*, 367 U.S. at

exclusion of illegally seized evidence to be unnecessary, in many instances, to maintain what it deems "sufficient" deterrence against police misbehavior.[53] The common thread running throughout the exclusionary-rule cases is that judicial policy assessments—precedent, in other words—determines the applicable constitutional rules.

Consequently, determining whether the Rehnquist Court has been activist in criminal procedure depends in large part on whether or not precedent figures into the definition of activism. There appear to be two schools of thought on this issue. The first, more traditional view, is that activism does incorporate some notion of fidelity to precedent. The basic idea seems to be that, at least in a precedent-based system, courts are generally supposed to follow binding precedent, and failure to do so should be considered activist.[54] Not surprisingly, this view is central to recent accusations of conservative judicial activism because so many of the results the Rehnquist Court has reached—in criminal procedure, federalism, and elsewhere—would not have occurred had the Court fully adhered to prior precedent.[55]

The second, less widely held view is that precedent is a constitutional irrelevancy, if not unconstitutional in its own right.[56] On this view, the Constitution (or, on questions of

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653-55 (overruling *Wolf*).

53. For example, in *United States v. Leon*, 468 U.S. 897 (1984), the Court crafted a "good faith" exception to the exclusionary rule. The Court grounded its decision on a cost-benefit calculus: suppressing probative evidence of guilt where the police relied in good faith on a defective search warrant would have only "marginal or nonexistent benefits" yet would impose "substantial costs." *Id.* at 922. Similarly police-laden inquiries have led to additional exclusionary-rule exceptions. *See, e.g.*, Pennsylvania Bd. of Probation & Parole v. Scott, 524 U.S. 357, 364 (1998) (holding that *Mapp* does not apply to parole-revocation hearings); Murray v. United States, 487 U.S. 533, 539 (1988) (ruling that exclusion is not warranted where evidence obtained during an illegal search would have been discovered anyway through legal means).

54. *See, e.g.*, Canon, *supra* note 40, at 392-93 (noting that the definition of activism includes "the degree to which a Supreme Court decision either retains or abandons precedent or existing judicial doctrine").

55. *See, e.g.*, Chemerinsky, *supra* note 1, at 37 (arguing that the Rehnquist Court is activist because it "has little respect for precedent"); Shane, *supra* note 8, at 225 (suggesting that activism exists when, as in the federalism cases, a court "is self-consciously creative in generating a largely unprecedented constitutional outcome. . . ."); Donald H. Ziegler, *The New Activist Court*, 45 AM. U.L. REV. 1367, 1369 (1996) (stating that "judges are considered activist when they . . . overrule prior precedent").

56. *See, e.g.*, Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994).

statutory interpretation, the relevant Act of Congress) is the exclusive yardstick by which the performance of the Supreme Court should be measured. As such, if a decision is "right" under written law, it is irrelevant that it is "wrong" as a matter of precedent. Given that choice, the argument goes, the Supreme Court should disregard the precedent and follow the Constitution or the statute.[57]

In my view, both schools of thought are right—and both are wrong as well. It is right to say that judges are bound to uphold the Constitution. The same Constitution that confers jurisdiction on federal judges to decide cases or controversies also declares that it is "the supreme Law of the Land."[58] Clearly, the Constitution would not be the "paramount and fundamental law"[59] *Marbury* held it to be if its commands could, in effect, be erased by judge-made doctrine that is repugnant to the Constitution. To this extent, even the strongest believer in precedent would probably agree that "[i]f the Constitution says X and a prior judicial decision says Y, a court has not merely the power, but the obligation, to prefer the Constitution."[60] Any other view, as Professor Akhil Amar aptly explained, would "submerge the document and privilege the doctrine," leaving us with the perversity of "constitutionalism without the Constitution."[61]

It does not follow, however, that precedent is an irrelevant or improper consideration. Precedent is an important feature of our judicial system, and has been since the time of the Founding. Previously, the dominant "declaratory" theory of precedent was that court decisions were "evidence" of the law, not themselves law.[62] These ideas, however, gave way by the

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57. Note that, even on this view, different considerations may apply to the lower federal courts, as they assuredly do to state courts. The Vesting Clause of Article III specifically denominates the lower federal courts as "inferior" to the Supreme Court. U.S. Const. art. III, § 1. A strong argument can be made that, by branding them inferior to the Supreme Court, Article III obligates lower federal courts to follow Supreme Court decisions. *See* Caminker, *supra* note 34, at 828-34. For a skeptical view, see John Harrison, *The Power of Congress Over the Rules of Precedent*, 50 DUKE L.J. 503, 513-20 (2000).

58. U.S. Const. art. VI, § 2.

59. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

60. Lawson, *supra* note 56, at 28.

61. Amar, *Document and Doctrine*, *supra* note 45, at 82, 84.

62. Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 660 (1999). Opponents of *stare decisis* sometimes assume that the declaratory theory is not a theory of precedent—that, in other words, if precedents are not themselves law,

time of Blackstone to the more modern notion of *stare decisis*—that courts have a "'general obligation'" to follow prior precedent.[63] Blackstone himself, whose views were well known to the Framers and accepted as authoritative,[64] declared that "it is an established rule to abide by former precedents, where the same points come again in litigation," subject always to the power to disregard precedents that are "manifestly absurd or unjust."[65]

In creating the Constitution, the Framers expected the federal courts to decide cases or controversies within the context of a precedential system. As Alexander Hamilton argued: "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case."[66] Precedent therefore was hardly a foreign concept when the Constitution was drafted and ratified.

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they are irrelevant. *See, e.g.*, Michael Stokes Paulsen, *Abrogating Stare Decisis By Statute: May Congress Remove The Precedential Effect Of* Roe *And* Casey*?*, 109 YALE L.J. 1535, 1577 (2000). This, however, is a misconception. Even under the declaratory view, courts seeking to determine what the law is "*must* start with their own precedent." Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81, 84 (2000) (emphasis added). It is for this reason that Alexander Hamilton, expounding on the task of Article III judges and the qualifications for judicial office, stated that "precedents . . . must demand long and laborious study." THE FEDERALIST NO. 78, at 439 (A. Hamilton) (C. Rossiter ed. 1999). Stated differently, under the declaratory view, precedents are not just *some* evidence of what the law is, but rather *good and sufficient evidence* of the law unless affirmatively proven to misrepresent the true state of the law. *See, e.g.*, Amar, *Document and Doctrine*, *supra* note 45, at 81, 87.

63. *Id.* at 661 (quoting MAX RADIN, STABILITY IN THE LAW 18 (1944)).

64. *See* Schick v. United States, 195 U.S. 65, 69 (1904).

65. 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND *69-*70. As Professor Lee explains in his extensive treatment of the origins of *stare decisis*, "Blackstone's venerable statements on the law of precedent (which coincide with the period in which the United States Constitution was framed) seem to chart a compromise course between the classic adoption of the declaratory theory and a strict notion of *stare decisis*." Lee, *supra* note 62, at 662. Lee 's statement that the Blackstonian view was not a "strict notion of *stare decisis*," *id.*, is easily misunderstood out of context. To be sure, Blackstone did not endorse the positivist notion that judicial decisions are themselves "law," but he most certainly *did* have a robust understanding of *stare decisis*, as Lee himself recognizes elsewhere in his study. *See id.* at 683 (explaining that "Blackstone placed a weighty thumb on the scale in favor of the previous decision, with any doubts being resolved in favor of staying the course"). Justice Scalia accurately described the Blackstonian view as giving *stare decisis* "near-dispositive strength." *See* Rogers v. Tennessee, 532 U.S. 451, 473 n.2 (2001) (Scalia, J., dissenting).

66. THE FEDERALIST NO. 78, at 439 (A. Hamilton) (C. Rossiter ed. 1999). Hamilton was not alone in this view. *See* Lee, *supra* note 62, at 664-66 (noting

If the Framers had intended the radical steps of jettisoning the concept of precedent and adopting something other than the familiar common law method of adjudication, surely there would be some evidence of that radical intent. Such radical change would have been enshrined in explicit constitutional provisions, or the matter would have been discussed at the Constitutional Convention or in state ratification debates. Not only do no such provisions and discussion exist, but also, as Hamilton noted, the Founding generation expected that the federal courts would discharge their duties according to precedent.[67]

At the same time, the view advanced by Rehnquist Court critics that overruling precedent is always activist is untenable. That view is supported neither by historical understandings of precedent—which, as shown, never regarded the obligation to follow precedent as absolute—nor by current *stare decisis* doctrine. In terms of current doctrine, the Supreme Court has repeatedly held that "[s]tare decisis is not an inexorable command," particularly "in constitutional cases, because in such cases 'correction through legislative action is practically impossible.'"[68] This aspect of modern *stare decisis* doctrine, specifically recognizing the propriety of overrulings in certain contexts, undermines the notion that overrulings are inherently activist. If courts were always obligated to follow precedent, *stare decisis* rules would say so instead of expressly contemplating the propriety of overrulings.[69]

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similar views of James Madison, Chancellor James Kent, author of an influential treatise, and William Cranch, the second reporter of Supreme Court decisions). Chancellor Kent, for example, had this to say about precedent: "If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness; and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it." 1 James Kent, COMMENTARIES *475-*476.

67. This is not to suggest, however, that *stare decisis* is mandated by the Constitution. I make only the more modest claim that *stare decisis* is a constitutionally permissible rule for the courts to follow. For an argument that *stare decisis* is of constitutional dimension, see Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570 (2001).

68. Payne v. Tennessee, 501 U.S. 808, 828 (1991); *see also, e.g.*, Agostini v. Felton, 521 U.S. 203, 235 (1997).

69. *Stare decisis* rules allow overrulings in a variety of circumstances, such as where prior decisions have proven to be "unworkable," rest on changed factual circumstances, or depend on theoretical foundations that have been undermined by subsequent cases. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 854-55 (1992). For a good discussion of these factors and how the Court has applied

The key to reconciling these competing views of interpretive fidelity comes from the purpose served by the concept of activism. At its root, the notion of activism attempts to identify judicial action that is illegitimate. In determining the legitimacy of overrulings, *stare decisis* rules are the most natural guidepost. After all, the obvious purpose of *stare decisis* is to delineate precisely when precedents should be overturned and when precedents should be followed.[70] To the extent it appears circular to say that judge-made *stare decisis* rules should determine the propriety of overrulings, the apparent circularity is due to the fact that written federal law—the Constitution and Acts of Congress—does not speak to the question of when overrulings are proper, a question that only *stare decisis* rules address.[71]

Accordingly, consistent with *stare decisis* rules, in determining whether an overruling was activist, one must look to the *reasons* advanced for the overruling. Current *stare decisis* rules emphasize that decisions may not be overruled simply because they are considered to be wrong by a later court.[72] Instead, in both constitutional and statutory cases, "special justification" is required, in the form of a

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them, see Paulsen, *supra* note 62, at 1551-64.

70. *See, e.g.*, Payne, 501 U.S. at 827 ("Adhering to precedent 'is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right.' Nevertheless, when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'") (citations omitted).

71. Though judge-made, it bears emphasis that *stare decisis* rules may not properly be casually ignored by courts. Rather, those rules are "authoritative legal rules," albeit legal rules that do not purport to be of constitutional dimension. Harrison, *supra* note 57, at 508.

72. *See generally* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 2 (2001) (noting that the "conventional wisdom" is that "a purported demonstration of error is not enough to justify overruling a past decision"). In this respect, current *stare decisis* doctrine is overprotective of precedent and underprotective of the supremacy of written law. As understood by the Rehnquist Court, it is irrelevant how wrong a holding is: no matter how egregiously wrong a precedent is, it may not be overruled without special justification. The better view, I think, is the rule that the Court followed before the Rehnquist years—namely, that a clear showing of error is itself a sufficient justification for an overruling, barring unusually strong reliance interests warranting continued adherence to precedent. The paradigmatic case of clear error would be a decision resolving a question of interpretation in a manner that is plainly contrary to the constitutional or statutory text in question. Outside the realm of clear error, however, overrulings should not occur without special justification. For similar views, see Amar, *Document and Doctrine, supra* note 45, at 81-83.

demonstration that a recognized ground for overruling exists, before a court can properly depart from precedent.[73] To do otherwise—that is to say, to deviate from precedent without special justification—should therefore be regarded as activist.[74]

There is another important component to precedent that bears directly on the activism question. *Stare decisis* rules not only limit the proper occasions for overrulings; they also posit that where a recognized ground for overruling does not exist, prior precedent should be *followed*. The concept of following precedent would be familiar to anyone schooled in the common law tradition. The process of common law reasoning is that present cases are resolved by analogy to past cases, so that the law is a continuous whole running from past to present. Prior cases establish what the right legal outcome is on a set of "material" facts, and future cases where those same facts exist should be resolved in accordance with past cases, absent a valid ground for an overruling.[75] In other words, *stare decisis,* and therefore a precedent-based understanding of activism,

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73. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989) (statutory case); *see also, e.g.,* Harris v. United States, 122 S.Ct. 2406, 2414(2002) (holding that "[e]ven in constitutional cases, where *stare decisis* considerations are less pronounced, we will not overrule a precedent absent 'special justification'") (quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984)).

74. What, then, of overrulings of precedents that are clearly wrong? Under my definition of activism, such overrulings are activist because mere error, however clear, is not a recognized ground for overruling under current *stare decisis* rules. This conclusion may seem inconsistent with my earlier claim that clear error should be a valid ground for overruling, *see supra* note 72. In fact, there is no inconsistency. What this asymmetry indicates is the neutrality of my definition of activism, as compared to the more common, ideologically driven usage of the term. Activism, as I have defined it, is not dependent on legal correctness—legally correct decisions may nonetheless be activist, just as erroneous decisions are not necessarily activist. Even though it would be activist to overrule a clearly erroneous decision solely on grounds of error, this brand of activism would be a justifiable response if the prior decision was clearly erroneous in light of constitutional or statutory text. *See* Smith, *Activism as Restraint*, *supra* note 16, at 1098.

75. The point is nicely made in Linda Meyer, *"Nothing We Say Matters": Teague and New Rules*, 61 U. CHI. L. REV. 423 (1994):

> "[T]he most traditional understanding of the common law doctrine of precedent does not locate the binding power of a prior case in its author's intentions or words. Instead, the 'material facts' and the result of a case guide later decisions. The later court evaluates whether the material or 'important' facts in the prior case are also present in the case at bar. If so, the judge should reach the same result as in the prior case, unless she finds other 'important' facts that would distinguish the case at bar."

Id. at 465-66 (footnotes omitted).

demands that the Court refrain from overruling cases except on recognized grounds *and* faithfully follow prior cases where such grounds are inapplicable.

So defined, the Rehnquist Court has indeed engaged in activism in criminal procedure. The problem, however, has not been overrulings. Those who assail the Court for being activist would have us believe that overrulings have been common during Rehnquist's tenure.[76] In fact, however, the number of overrulings by the Rehnquist Court has been rather low—according to one assessment, "infinitesimal[ly]" so.[77] Moreover, leading candidates for overruling, such as *Miranda*, survive.[78] Also, on the occasions where the Rehnquist Court has overruled precedents in criminal procedure, it has been careful to demonstrate a valid ground for overruling under *stare decisis* doctrine.[79] In terms of overrulings, then, the Rehnquist Court has been fairly restrained.

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76. See sources cited in *supra* note 54.

77. *See* Christopher P. Banks, *Reversals of Precedent and Judicial Policy-Making: How Judicial Conceptions of Stare Decisis in the U.S. Supreme Court Influence Social Change*, 32 AKRON L. REV. 233, 244 (1999) (citing data showing that "[i]n terms of the Court's total docket, the mean rate of overturned cases is slightly less than one-half percent (.046%)"). In terms of raw data, Banks reports an average of 2.55 overrulings per Term by the Rehnquist Court, which leads him to conclude that "the Rehnquist Court is not an activist Court in terms of the sheer frequency of overruling and overruled cases." *Id.* at 243. By comparison, the Warren Court holds the record for most overrulings in a single Term—seven—and overruled thirty-three cases during 1963-69 alone, for a grand total of forty-five overrulings. *See* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 486 (2000). This rate of overrulings is quite high even adjusting for the larger docket of the Warren Court.

78. A more accurate way to put it would be that the Court has declined to overrule *Miranda as reshaped and modified* in the years following the Warren Court. *See* Dickerson v. United States, 530 U.S. 428 (2000) (reaffirming *Miranda* but endorsing decades of limitations on *Miranda*). For an illustration of the significant differences between *Miranda* as originally announced and *Miranda* doctrine as reaffirmed in *Dickerson*, see Smith, *Activism as Restraint*, *supra* note 16, at 1109-12.

79. *See, e.g.*, Atkins v. Virginia, 122 S. Ct. 2242 (2002) (overruling Penry v. Lynaugh, 492 U.S. 302 (1989)); United States v. Gaudin, 515 U.S. 506, 519-21 (1995) (overruling Sinclair v. United States, 279 U.S. 263 (1929)); United States v. Dixon, 509 U.S. 688, 709-12 (1993) (overruling Grady v. Corbin, 495 U.S. 508 (1990)); Payne v. Tennessee, 501 U.S. 808, 828 (1991) (overruling South Carolina v. Gathers, 490 U.S. 805 (1989), and Booth v. Maryland, 482 U.S. 496 (1987)); California v. Acevedo, 500 U.S. 565, 579 (1991) (overruling Arkansas v. Sanders, 442 U.S. 753 (1979); Teague v. Lane, 489 U.S. 288, 302-05 (1989) (plurality opinion) (overruling in part Linkletter v. Walker, 381 U.S. 618 (1965)). Note that, of these Rehnquist Court overrulings, only one—*Teague*—rejected a Warren Court precedent, an illustration that overrulings were not the way the current Court has waged counterrevolution in criminal procedure. Even as to *Teague*, there was

This does not mean, however, that the Court has been a model of fidelity to precedent. Instead of overruling Warren Court precedents it deemed to be erroneous, the Rehnquist Court has distinguished, created exceptions to, and reinterpreted such precedents. Rarely is this approach analytically elegant and, much of the time, makes criminal procedure quite complicated, if not a morass.[80] Whatever else might be said about the Court's approach, it was highly effective in producing the "law and order" results Nixon and Reagan promised to deliver.

Davis v. United States[81] is a good example of the Rehnquist Court's approach to Warren Court precedents in criminal procedure. In *Davis,* the Court confronted an issue of importance to the integrity of the *Miranda* regime—namely, how must police interrogators respond to statements that could be construed as invocations of *Miranda* rights? *Miranda* doctrine says that all interrogation must cease once a suspect has invoked his right to counsel,[82] but until *Davis* it was uncertain how clear an invocation had to be to count. The

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widespread agreement that the *Linkletter* standard of retroactivity was in desperate need of revision. *See* Teague, 489 U.S. at 303 (noting that "commentators have 'had a veritable field day' with the *Linkletter* standard").

80. Take, for example, the simple question: must evidence seized in violation of the Fourth Amendment be suppressed at trial? Due to post-Warren developments in the law, the answer is anything but simple. The general rule is that suppression is required where the prosecution seeks to use illegally seized evidence against a criminal defendant. Mapp v. Ohio, 367 U.S. 643 (1961). Impeachment, however, is different, the Court says, so illegally seized evidence can be used to impeach the defendant who takes the stand in his own defense. United States v. Havens, 446 U.S. 620 (1980). There are even circumstances where illegally obtained evidence can be used as substantive evidence of guilt, in the prosecution's case-in-chief, instead of simply as evidence impeaching the defendant's credibility. For example, suppression will not be ordered if the police would have inevitably discovered the evidence anyway or had an independent source for the evidence. *See* Murray v. Carrier, 487 U.S. 533 (1988). Similarly, evidence will not be suppressed if the officers conducted an illegal search in good-faith reliance on a defective search warrant, *United States v. Leon*, 468 U.S. 897 (1984), a state statute later deemed unconstitutional, *Illinois v. Krull*, 480 U.S. 340 (1987), or a warrant mistakenly issued as a result of a clerical error, *Arizona v. Evans*, 514 U.S. 1 (1995). Even when suppression would otherwise be required, special Fourth Amendment "standing" rules strictly limit the ability of defendants to move to suppress evidence obtained in searches of third parties, *Minnesota v. Carter*, 525 U.S. 83 (1998), and habeas corpus is not available to correct erroneous denials of exclusionary-rule claims in state trials, *Stone v. Powell*, 428 U.S. 465 (1976).

81. 512 U.S. 452 (1994).

82. *See, e.g.*, Edwards v. Arizona, 451 U.S. 477 (1981).

investigators in *Davis* responded to the defendant's ambiguous statement ("Maybe I should talk to a lawyer.") by asking follow-up questions to clarify whether he indeed wished to terminate questioning. The Court was unanimous that such a response was consistent with *Miranda*.[83]

The majority, however, did not rest on those narrow, uncontroversial grounds. Instead, five Justices, in an opinion by Justice Sandra Day O'Connor, issued a sweeping ruling that the police can completely disregard a suspect's attempts to invoke his right to counsel under *Miranda*, and continue efforts to secure a confession, unless the invocation is "clear."[84] This ruling simply makes no sense in light of *Miranda*. The premise of *Miranda* is that, given the coercion inherent in custodial interrogation by police, decisions to confess are not truly voluntary unless the police advise the suspect of his rights *and* demonstrate, by their actions, that they will "scrupulously honor[]" those rights.[85]

It is difficult to imagine a rule more destructive of the premises of *Miranda* than the notion that police can flatly ignore invocations that are not crystal-clear. Allowing questioning to continue notwithstanding a potential effort to request counsel sends the suspect who actually wants a lawyer the message that the police will *not* honor his rights and that, as a practical matter, he has no choice but to confess. It also weakens the protection of *Miranda* for the suspects who need it most: "suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present."[86] The only rule consistent with *Miranda* was the one offered by the concurring Justices—that "when law enforcement officials 'reasonably do not know whether or not the suspect wants a lawyer,' they should stop their interrogation and ask him to make his choice clear."[87]

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83. *See* Davis, 512 U.S. at 459; *id.* at 466 (Souter, J., concurring in judgment). The defendant had argued that all questioning must cease in response to an ambiguous invocation, a view that no justice endorsed.

84. *See id.* at 461 ("We therefore hold that, after a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney."); *see also id.* at 459 (stating that "the suspect must unambiguously request counsel.").

85. Miranda v. Arizona, 384 U.S. 436, 479 (1966).

86. *Davis,* 512 U.S. at 460.

87. *Id.* at 467 (Souter, J., concurring in judgment).

The majority's contrary ruling can be seen only as an effort to limit *Miranda* while giving the appearance of adhering to it. Handling perceived erroneous precedent in this way may be perfectly understandable as an alternative to a controversial overruling, but it is judicial activism nonetheless.[88]

CONCLUSION

At the conclusion of every contest, a contestant is declared the winner. So, who won the showdown in criminal procedure—Earl Warren or William Rehnquist? The answer is surprising: they both did. Criminal procedure remains thoroughly constitutionalized, with rules of federal constitutional law covering virtually every aspect of the criminal justice system. Even if the Rehnquist Court were to last another two decades, there would be no going back to the days of old when criminal procedure was almost entirely a state-law subject. To this extent, Warren won, and his victory is now probably for the ages.

Warren, however, has to share the victory circle with Rehnquist. Rehnquist, unable to get his first-best preference (overruling *Miranda* and other Warren-era precedents), went for—and *got*—second-best. Disfavored Warren Court doctrines were altered through case-by-case adjudication so that they no longer threatened what Rehnquist and his "law and order" colleagues regarded as "legitimate law enforcement."[89] The results have been dramatic: much evidence that the Warren Court would have suppressed under *Miranda* or *Mapp* now comes into evidence again, and habeas petitions that might have been successful even a generation ago are now doomed to failure. Thanks to the Rehnquist Court, in short, things are again rosy for law enforcement.

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88. This descriptive conclusion, if correct, raises a larger normative question: was it principled for the Rehnquist Court to resort activism in criminal procedure? In one sense, the question seems to answer itself, for the common assumption, especially among judicial conservatives, is that activism, liberal or conservative, is per se unprincipled. *See, e.g.*, Lino A. Graglia, *Judicial Activism of the Right: A Mistaken And Futile Hope*, *in* LIBERTY, PROPERTY, AND THE FUTURE OF CONSTITUTIONAL DEVELOPMENT (E. Paul & H. Dickman eds., 1990). As I argue elsewhere, this argument is basically right, except that activism promotes restraint—and therefore *is* principled—when used to redress prior instances of judicial activism. *See* Smith, *Activism as Restraint*, *supra* note 16, at 1097-1115.

89. *See* Dickerson v. United States, 530 U.S. 428, 443 (2000).

Regardless of who succeeds Rehnquist as Chief Justice, it is unlikely that defendants will ever see anything like the heady days of the Warren Court again. If that stunning reversal of fortune resulted from activism by the Rehnquist Court, I would venture to say that police, prosecutors, and crime victims are appreciative nonetheless.