

Over the course of two centuries, our Constitution, laws and courts have preserved freedom, equality and justice. But over the past 25 years, an increasingly influential cadre of ultra-conservatives—or movement conservatives—has waged a quiet war on the law as we know it. Pushing little by little to roll back decades of precedent, they would shred the fabric of popular laws protecting workers, consumers and public health, expand executive power at the expense of basic civil liberties, and impose a narrow social agenda on the rest of the body politic. “If they succeed,” says University of Chicago law professor Cass Sunstein, “we will, without really seeing it happen, end up with a very different country—one that’s both less free and less equal.”

This movement is well-organized, well-disciplined and well-funded. They haven’t realized many of their goals yet, but they are in it for the long haul. We must be, too. With organization, discipline and resources, we can vigorously defend our own vision of the law and, at the same time, prevent theirs from becoming a reality.

This year’s film, *Quiet Revolution*, shines a light on the transformative legal agenda that movement conservatives are pursuing, often underneath the simplistic and misleading rhetoric that now dominates public discourse about the role of the judiciary. The film is intended to serve as a wake-up call for everyone who believes that the law must continue to ensure justice for all Americans.

Nan Aron, President
Alliance for Justice

“We are talking about a movement that would wield the Constitution, not as a shield, but as a sword to push an extreme agenda.”

—U.S. SENATOR JOSEPH BIDEN

Growth of a Movement

REAGAN ADMINISTRATION

The ultra-conservative legal movement began in earnest in the 1960s and 1970s during the administration of Richard Nixon. With the election of Ronald Reagan in 1980, the movement's genuinely transformative ambitions fully emerged. President Reagan staffed his administration with lawyers, scholars and activists who identified closely with the goals of the New Right. The Reagan Justice Department tried to advance these goals through the arguments it made in litigation throughout the federal courts. Under the leadership of Attorney General Edwin Meese, the Department's Office of Legal Policy also prepared a detailed blueprint for challenging legal doctrines that had been in place for decades. The blueprint, contained in documents like "Guidelines on Constitutional Litigation," called for cutting back Congress's power to enact protective legislation, weakening the courts' authority to remedy legal wrongs, eviscerating fundamental rights like the right of privacy, hollowing out civil rights laws, turning back the clock on the rights of the accused, and more. These documents set forth in depth what lay behind the administration's political rhetoric about "strict constructionism" and "judicial restraint."

ALLIES

Movement conservatives within the Reagan administration didn't act alone. They developed strategic alliances with influential outside interests equally committed to altering established law.

Leaders like Jerry Falwell and Pat Robertson rallied their followers behind the ultra-conservative plan to remake the courts. Opposition to court decisions preserving abortion rights and church-state separation provided the impetus for their involvement.

Meanwhile, large corporations and wealthy donors like John M. Olin, Richard and Sarah Scaife, and Lynde and Harry Bradley championed undercutting regulations protecting workers, consumers and the environment. They invested millions in:

- Non-profit law firms, like the Pacific, Landmark and Washington Legal Foundations and the Institute for Justice, to achieve their goals in the courts
- Think tanks, like the Manhattan Institute and Heritage Foundation, to develop and promote their ideas
- Law schools, to reorient the curriculum

1989:	1989–1992:	1989–2006:	1989–2006:	1989–2006:	1990:	1991:
George H.W. Bush inaugurated	The litigation and judicial selection programs of George H.W. Bush's administration pick up where the Reagan administration left off	Non-profit firms, like the Pacific, Landmark, Atlantic and Washington Legal Foundations, the American Center for Law and Justice, the Center for Individual Rights and the Institute for Justice, advance right-wing causes by litigating hundreds of cases and filing <i>amicus</i> briefs in many more	Organizations like the Heritage Foundation and the Federalist Society continue to expand their budgets and influence	Simplistic ultra-conservative-inspired buzzwords like "judicial activism," "judges who interpret, not make the law" and "legislating from the bench" permeate political discourse about the courts	Pat Robertson founds the American Center for Law and Justice (ACLJ) to advance his social and religious agenda in the courts	George H.W. Bush appoints Clarence Thomas to the Supreme Court

- Privately-run seminars, where judges could learn free-of-charge about ultra-conservative legal theories
- The Federalist Society, to establish a network of young, bright, ultra-conservative lawyers poised for high government office and the federal bench

ALL ABOUT JUDGES

Movement conservatives in the Reagan administration believed that judicial selection was central to implementing their agenda. They actively sought to stock the courts with judges who shared their views.

Religious, business and intellectual ultra-conservatives rallied to the cause. They, too, came to believe what future Supreme Court Justice Lewis Powell had advised the U.S. Chamber of Commerce in 1971: "the Judiciary may be the most important instrument for social, economic and political change."

SUPREME IMPORTANCE

The Supreme Court gets all the attention. But much of the law gets shaped in the federal appeals courts, which serve as the

last stop in numerous cases—cases that never make it to the high court. In 2005, the appeals courts decided a total of 29,913 cases. In the same period, the Supreme Court issued just 72 opinions. Movement conservatives have been working tirelessly ever since the Reagan era to fill the appeals courts with judges who share their views.

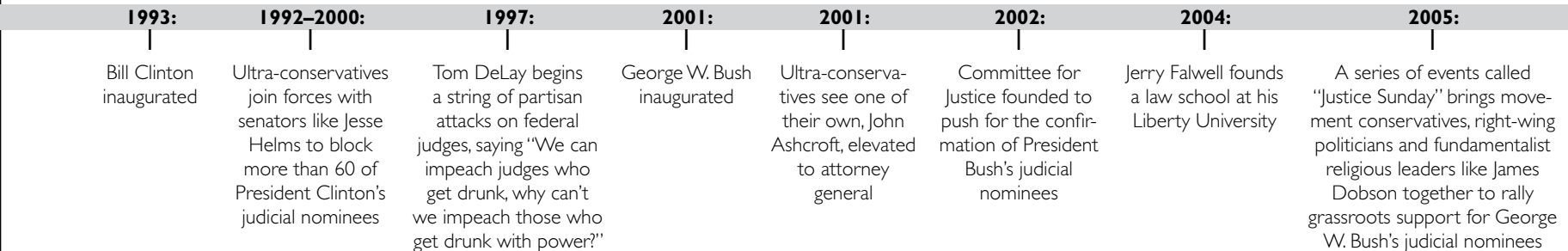
** For a map of the circuit courts, please see inside back cover.*

Judge Bork's Defeat

Outspoken Federalist Society co-founder Robert Bork embodied the kind of judge that movement conservatives wanted. But the Senate rejected his nomination to the Supreme Court in 1987 precisely because he embraced—indeed, helped shape—the movement conservative agenda. Stung, movement conservatives devised a new strategy, and redoubled their efforts, to achieve their goals. As Professor Bruce Ackerman explains it, "We no longer have candid, revolutionary efforts to change the American Constitution as we know it. [They]d rather have a stealth revolution."

President Reagan

appointed 378 judges, including three Supreme Court justices. Nearly 100 Reagan appointees remain active judges on the federal bench today.



The Agenda

The ultra-conservative vision for upending established law is far-reaching. On one hand, it would substantially weaken the government's ability to make society safer, cleaner and more fair. On the other, it would substantially strengthen the government's ability to dictate intensely private decisions, control personal relationships and infringe on civil rights and civil liberties.

Dismantling Vital Laws

Congress has enacted most landmark legislation under one or more of three grants of constitutional authority: the Commerce Clause, the Spending Clause and Section 5 of the 14th Amendment. By dramatically shrinking Congress's powers under all three, ultra-conservatives would cut a wide swath through existing federal law and gut Congress's long-accepted power to address problems requiring a national response. Distorting other constitutional provisions, they would further undermine the ability of not only the federal government, but state and local governments, to address everything from land use and pollution to telecommunications and food and drug safety. At bottom, what ultra-conservatives have in mind is undoing the New Deal and its legacy—undoing, that is, a consensus vision for a stronger America that dates back to Franklin Roosevelt.

WHAT'S AT STAKE

- Environmental laws like the Clean Air Act, Clean Water Act, Safe Drinking Water Act and Endangered Species Act
- Civil rights laws like the Americans with Disabilities Act, Age Discrimination in Employment Act, Voting Rights Act and Civil Rights Act of 1964
- Labor laws like the Occupational Safety and Health Act, Fair Labor Standards Act and National Labor Relations Act
- Consumer protections, including food and drug safety laws
- Local land use laws
- Social safety net laws like social security, Medicare/Medicaid, Individuals with Disabilities in Education Act and Housing and Community Development Act
- The work of regulatory agencies like the Occupational Safety and Health Administration, National Labor Relations Board, Securities and Exchange Commission, Food and Drug Administration, Consumer Products Safety Commission, Environmental Protection Administration, Federal Elections Commission, Federal Trade Commission and Federal Communications Commission

“Congress will be robbed of its power to enact federal legislation that it believes is necessary to protect the America people.” —PROF. DAWN JOHNSEN, INDIANA UNIVERSITY

“I think what is really needed here is a fundamental intellectual assault on the entire New Deal edifice. . . . Judicial activism will have to be deployed.” —MICHAEL GREVE, AMERICAN ENTERPRISE INSTITUTE

The Agenda in Action

Movement conservatives have not yet accomplished much of what they want. But they have made strides.

“THE MOST ACTIVIST COURT IN HISTORY”

In the mid-1990s, a razor-thin conservative majority on the Rehnquist Court ushered in what scholars call “the new federalism,” using various constitutional provisions to invalidate over 35 federal protections—far and away the highest annual rate ever. Since 1995, the court has struck down part or all of the following laws:

- 1995:** Gun Free School Zones Act (*U.S. v. Lopez*)
- 1997:** Religious Freedom Restoration Act (*City of Boerne v. Flores*)
- 1997:** Brady Act (background checks on gun purchasers) (*Printz v. U.S.*)
- 1999:** Fair Labor Standards Act (*Alden v. Maine*)
- 2000:** Age Discrimination in Employment Act (*Kimel v. Bd. of Regents*)
- 2000:** Violence Against Women Act, (*U.S. v. Morrison*)
- 2001:** Americans with Disabilities Act (*Univ. of Ala. Bd. of Trustees v. Garrett*)

NEAR MISSES

Certain Supreme Court justices and lower court judges idolized by ultra-conservatives have tried to expand upon these Rehnquist Court rulings. Since 1995, courts have saved all or part of the following laws, but just barely:

- 1996 & 1997:** Ban on fully automatic machine guns (*U.S. v. Rybar*, 3d Cir.; *U.S. v. Kirk*, 5th Cir.)
- 1996:** Ban on felons possessing guns (*U.S. v. Chesney*, 6th Cir.)
- 1998:** Driver Privacy Protection Act (*Condon v. Reno*, 4th Cir.), *rev'd* by S. Ct. in 2000
- 1999:** Clean Air Act (*American Trucking Ass'n v. EPA*), *rev'd* by S. Ct. in 2001
- 2000:** Endangered Species Act (*Gibbs v. Babbitt*, 4th Cir.)
- 2001:** Child Support Recovery Act (“deadbeat dads law”) (*U.S. v. Faasse*, 6th Cir.)
- 2003:** Family and Medical Leave Act (*Nevada v. Hibbs*, S. Ct.)
- 2004:** Americans with Disabilities Act (*Tennessee v. Lane*, S. Ct.; *McCarthy v. Hawkins*, 5th Cir.)
- 2004:** Berkeley’s “living wage” law (*RUI One Corp. v. City of Berkeley*, 9th Cir.)
- 2006:** Clean Water Act (*Rapanos v. U.S.*, S. Ct.)

The Playbook:

Ultra-conservatives have devised a series of maneuvers to achieve their goals. It is part of what Cass Sunstein calls “a political program in legal dress.”*

- Cutting back on the Congress’ Commerce Clause power
- Cutting back on Congress’ power under Section 5 of the 14th Amendment
- Cutting back on Congress’ Spending Clause power
- Bolstering the Tenth Amendment
- Bolstering the Eleventh Amendment
- Bolstering the Takings Clause of the Fifth Amendment
- Bolstering the Contracts Clause
- Reviving the non-delegation doctrine
- Adopting the unitary executive theory

* See *Glossary* for more details.



Waging a Culture War

It is no secret that ultra-conservatives want to overturn *Roe v. Wade*. The dissent in *Planned Parenthood v. Casey* (1992) succinctly captured their view: “We believe that *Roe* was wrongly decided, and that it can and should be overruled.” But that is only the beginning of the constitutional upheaval hardliners advocate. In their view, the law broadly permits the government to dictate intensely personal decisions, relationships and beliefs.

THE RIGHT OF PRIVACY

Justice Clarence Thomas (dissenting in *Lawrence v. Texas*): “I can find neither in the Bill of Rights nor any other part of the Constitution a general right of privacy.”

Professor Bruce Ackerman: “They are against the very *idea* of the right to privacy.”

Precedents They Reject

1942: *Skinner v. Oklahoma* (right not to be forcibly sterilized)

1965: *Griswold v. Connecticut* (right of married couples to use contraceptives)

1967: *Loving v. Virginia* (the right to marry (as derived from due process clause))

1972: *Eisenstadt v. Baird* (right of unmarried individuals to use contraceptives)

1973: *Roe v. Wade* (right to choose abortion)

1977: *Moore v. City of East Cleveland* (right to live together as a family)

1990: *Cruzan v. Director, Missouri Dept. of Health* (right to refuse medical treatment)

2003: *Lawrence v. Texas* (right of consenting adults to private sexual intimacy)

THE SEPARATION OF CHURCH AND STATE

Pat Robertson: “There is no such thing as separation of church and state in the Constitution. It is a lie of the left and we are not going to take it anymore.”

Justice Clarence Thomas (concurring in *Elk Grove School District v. Newdow*):

“[Applying the Establishment Clause against the states] would prohibit precisely what the Establishment Clause was intended to protect—state establishments of religion.”

Professor David Strauss: “What [Justice Thomas’ position on the Establishment Clause] means is ... any state could, if it wanted to, declare an official state-supported religion and use tax money officially ... to support that religion, to pay the salaries of clergymen from that religion.”

Precedents They Reject

Virtually every single decision resting on the church-state separation principle, as they do not believe that *Everson v. Board of Education of Ewing*—the seminal case applying the Establishment Clause to the states and not just the federal government—was correctly decided.

“Constitutional language should be construed as it was publicly understood at the time of its drafting and ratification, and government attorneys should advance constitutional arguments based only on this ‘original meaning.’” GUIDELINES ON CONSTITUTIONAL LITIGATION, FEB. 1988

Expanding Executive Power

Torture. Warrantless wiretapping. Illegal military commissions. Indefinite detentions. Extraordinary renditions.

The Bush administration’s often-secretive assertions of the president’s authority to circumvent acts of Congress, international treaties and the Bill of Rights are making headlines. But ultra-conservative efforts to expand executive power—and jeopardize our system of checks and balances—are nothing new.

July 1970—President Nixon ratifies Huston Plan, a strategy for domestic intelligence gathering that includes illegal wiretaps, burglary and opening of mail. He later withdraws Plan, but elements are used throughout his administration.

1977—President Nixon summarizes his views on executive power in response to question on his use of techniques outlined in Huston Plan. Nixon declares, “When the president does it, that means it is not illegal.”

1978—Foreign Intelligence Surveillance Act (FISA), which establishes physical and electronic surveillance procedures, is enacted in response to Nixon administration’s abusive domestic intelligence gathering practices. Ultra-conservatives view FISA as unwarranted encroachment on executive power.

1985—Samuel Alito joins Justice Department's Office of Legal Counsel, where, he later said, "we were all strong proponents of the theory of the unitary executive."

1987—Then-Representative Dick Cheney commissions Minority Report on Iran-Contra investigation, which argues that the president acted appropriately in evading ban on funding Nicaragua's Contra rebels because Congress had encroached on his foreign policy-making authority. Cheney has since referred people to Minority Report for his views on executive power.

1988—In *Morrison v. Olson*, Reagan administration argues that independent counsel law—which vested power to appoint counsels in judicial branch and restricted the attorney general's power to remove them—is unconstitutional infringement on presidential authority. Supreme Court rejects argument. Justice Scalia casts lone dissent.

1989—Assistant Attorney General William Barr releases memo staking out expansive view of executive power. Memo states that "Only by consistently and forcefully resisting ...congressional incursions can Executive Branch prerogatives be preserved."

1996—Previewing legal arguments on executive power he will later advance as key figure in Bush II administration, law professor John Yoo testifies before Congress that Chemical Weapons Convention is unconstitutional because it provides that inspectors will be appointed by an international body rather than the president.

September 11, 2001—Al Qaeda terrorists attack World Trade Center, Pentagon and UA Flight 93.

September 18, 2001—President Bush signs Authorization for Use of Military Force (AUMF). His administration uses it as legal justification for all of its detention, interrogation and intelligence gathering policies. Administration also claims that even without AUMF, president has inherent authority to pursue these policies based on his commander-in-chief powers.

November 2001—Bypassing Congress, which long ago enacted laws governing military commissions, President Bush signs executive order unilaterally creating new commissions to try suspected terrorists.

February 7, 2002—After receiving advice from White House Counsel Alberto Gonzales, Attorney General John Ashcroft, and DOJ Office of Legal Counsel lawyer John Yoo, President Bush issues memo asserting Geneva Conventions do not apply to al Qaeda detainees. He also declares that although he will not do so now, he has constitutional authority to suspend Conventions altogether.

August 1, 2002—Jay Bybee, assistant attorney general for the Office of Legal Counsel, issues memo on detainee interrogation standards under U.S. law. Memo says statute banning torture is inapplicable as an unconstitutional infringement on the president's commander-in-chief powers. Memo also defines torture to include "only extreme acts. ...Where the pain is physical, it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure."

April 4, 2003—Department of Defense working group led by Pentagon General Counsel William Haynes approves numerous, coercive, previously unauthorized interrogation techniques and says that U.S. law banning torture is "inapplicable to interrogations undertaken to the president's commander-in-chief authority." Haynes is nominated to seat on the 4th Circuit in September.

April 28, 2004—Abu Ghraib scandal breaks.

June 2004—Bybee Memo surfaces, leading to firestorm of criticism. Bybee had been confirmed to lifetime appointment on 9th Circuit three months earlier.

June 28, 2005—Supreme Court hands down *Rasul v. Bush* and *Hamdi v. Rumsfeld*, repudiating several Bush administration claims. In *Rasul*, Court determines that foreign nationals detained at Guantanamo Bay may challenge their detentions in U.S. courts. In *Hamdi*, Court rules that U.S. citizens detained as enemy combatants have the right to challenge their detention before a neutral decision-maker. Justices Scalia, Thomas and Rehnquist dissented in *Rasul*. Justice Thomas dissented alone in *Hamdi*.

Fall 2005—Vice President Cheney attempts to block McCain Amendment, which would prohibit cruel, inhuman and degrading treatment of detainees by U.S. personnel. He says it would infringe on executive authority.

December 2005—President Bush signs McCain Amendment, but issues signing statement claiming to reserve power, as supervisor of “the unitary executive branch” and commander-in-chief, to circumvent it.

December 15, 2005—*New York Times* story reveals that Bush administration bypassed FISA to order National Security Agency (NSA) to conduct warrantless wiretapping on U.S. citizens participating in overseas calls.

December 19, 2005—President Bush says that, despite FISA’s requirements, he “absolutely” has the power to authorize NSA wiretapping program.

January 19, 2006—Office of Legal Counsel issues memo defending NSA program.

February 6, 2006—Attorney General Gonzales defends NSA program before Congress and says administration “won’t rule out” applying it to purely domestic calls between two Americans.

June 29, 2006—Noting that “Congress has not issued the executive ‘a blank check,’” Supreme Court determines, in *Hamdan v. Rumsfeld*, that military commissions unilaterally established by Bush administration are illegal. Court also rejects administration’s key claim that Geneva Conventions do not apply to conflict with al Qaeda. Justices Scalia, Thomas and Alito dissented. Chief Justice Roberts did not participate because he had upheld administration’s claims when on D.C. Circuit.

“They would give the government vast power to invade our lives and little or no power to protect us.”

— PETER EDELMAN, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY

Movement Icons

Clarence Thomas, Supreme Court Justice.

The most aggressive proponent of ultra-conservative ideals, Justice Thomas has voted to strike down numerous federal laws and revisit dozens of precedents. He would drastically cut Congress's authority to enact nationwide worker, consumer, civil rights, environmental and public safety protections under the Commerce Clause (*U.S. v. Lopez*; *Printz v. U.S.*), Section 5 of the 14th Amendment (*Nevada v. Hibbs*; *Tennessee v. Lane*), and the Spending Clause (*Cutter v. Wilkinson*); hamstringing federal regulatory agencies by reviving the non-delegation doctrine (*Whitman v. Amer. Trucking Assn.*); reduce local land use authority under the Takings Clause (*Tahoe-Sierra Preservation Council v. Tahoe RPA*); eliminate the constitutional right to privacy (*Lawrence v. Texas*) and overturn *Roe v. Wade* (*Casey v. Planned Parenthood*); allow states to establish official religions (*Elk Grove v. Newdow*); weaken the Voting Rights Act (*Holder v. Hall*) and other civil rights laws; abolish affirmative action (*Adarand Constructors v. Peña*); undo campaign finance reforms (*Randall v. Sorrell*); and grant the president nearly unfettered authority to compromise liberty in the name of national security (*Hamdi v. Rumsfeld*; *Hamdan v. Rumsfeld*). Ultra-conservatives favor Justice Thomas even more than Justice Scalia because of Justice Thomas' attitude toward precedent. According to Justice Scalia, "He doesn't believe in *stare decisis*, period."

Antonin Scalia, Supreme Court Justice.

The most prominent intellectual force behind the ultra-conservative legal movement, Justice Scalia takes many of the same positions as Justice Thomas—e.g., on federalism, due process-based freedoms, property rights, affirmative action, campaign finance, voting rights, civil rights laws and executive power—often using barbed language to condemn his jurisprudential opponents. He sometimes tempers his transformative views by deferring to precedent and by robustly interpreting the express protections in the Bill of Rights. Justice Scalia is the father of modern textualism, which, when combined with originalism, tends to reduce judicially enforceable legal protections to the greatest extent possible.

Robert Bork, former D.C. Circuit Judge.

Judge Bork is perhaps the most forceful early advocate of originalism. His embrace of the theory led him to reject a number of landmark Supreme Court rulings that, by the time of his 1987 nomination to the Supreme Court, the country had come to embrace. Such rulings had, for example, recognized the right of privacy, established the one man-one vote principle, and acknowledged Congress's broad authority to address national problems. Judge Bork also had said, "I don't think that in the field of constitutional law, precedent is all that important." The Senate's refusal to confirm Judge Bork to the Supreme Court continues to rankle among ultra-conservatives, who do not believe they can truly win the battle of legal ideas until the Senate confirms an originalist Supreme Court nominee as candid about his or her views as Judge Bork.

Bill Pryor, Eleventh Circuit Judge.

As Alabama Attorney General, Pryor gave voice to nearly every ultra-conservative cause celebre—from calling *Roe v. Wade* the "worst abomination of constitutional law in history" to deriding the "so-called separation of church and state," from filing a brief comparing laws outlawing sex between gays with those outlawing "necrophilia, bestiality ...and pedophilia" to ending a speech with "Please God, no more Souters." Perhaps most significantly, Pryor spearheaded the resurgent states' rights movement. Under his leadership, Alabama was the only state among dozens that sought to strike down parts of the Violence Against Women Act and the Clean Water Act; filed briefs seeking to eliminate protections in the Family and Medical Leave Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Endangered Species Act; and testified in Congress against EPA enforcement of the Clean Air Act and in favor of repealing a key section of the Voting Rights Act. Describing how ultra-conservatives can remake the law, scholar Michael Greve said Judge Pryor is "the key to this puzzle; there's nobody like him. ... He gets almost all of it."

Edith Jones, Fifth Circuit Judge.

Variouslly called ultra-conservatives' "dream [Supreme Court] candidate," "consistently hard right," and an "enthusiastic proponent of the Constitution in Exile," Judge Jones has said that the Supreme Court "has been operating on fundamentally flawed philosophical premises" and referred to its rulings as "the debacles of the 20th century." She has voted, on federalism grounds, to strike down parts of federal laws banning machine guns, preserving endangered species, protecting school children and state workers with disabilities, and outlawing robbery, car bombings and murder-for-hire. Often reversed by the Supreme Court, she also has lashed out at *Roe v. Wade*, held that a sleeping lawyer provided effective assistance of counsel, brushed aside stark evidence of racial discrimination in jury selection, condemned the high court's church-state rulings, displayed open hostility toward sexual harassment claims, accused courts of "social engineering" for enforcing constitutional rights, voted consistently to weaken anti-discrimination laws, and refused to recognize the constitutional right to bodily integrity (which protects public school children from being sexually abused by their teachers, e.g.).

Edwin Meese, Heritage Foundation.

As Attorney General in the Reagan administration, Meese publicly embraced originalism and made advancing the theory a matter of official government policy. He commissioned several memos, such as "Guidelines on Constitutional Litigation," that represent a detailed blueprint for the ultra-conservative vision of the law.

Others:

Supreme Court Justice Samuel Alito
former Fourth Circuit Judge J. Michael Luttig
Fifth Circuit Judge Emilio Garza
Sixth Circuit Judge Alice Batchelder
D.C. Circuit Judge Douglas Ginsburg
D.C. Circuit Judge David Sentelle
D.C. Circuit Judge Janice Rogers Brown

“There are few factors that are more critical to determining the course of the Nation, and yet are more often overlooked, than the values and philosophies of the men and women who populate the third co-equal branch of the national government—the federal judiciary.”

—THE CONSTITUTION IN 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION, JUSTICE DEPARTMENT OFFICE OF LEGAL POLICY, 1988

Glossary

Commerce Clause. Article I, Section 8. Empowers Congress to regulate commerce with foreign nations and among the states. Provides the constitutional basis for most of the landmark worker, consumer, environmental, civil rights and public safety protections enacted in the 20th century. By shrinking Congress' Commerce Clause authority, ultra-conservatives would strike down many such protections and forbid Congress from enacting them in the future.

Constitution in Exile. Term coined by D.C. Circuit Judge Douglas Ginsburg. Refers to a supposedly "lost" Constitution—the Constitution as it was interpreted prior to the 1930s—that certain, largely libertarian ultra-conservatives want "restored." Would cut back on the authority of the federal government to enact nationwide worker, consumer, environmental and civil rights protections, elevate the status of private property rights, and resuscitate the *Lochner* era's rigid limitations on even the states' ability to pass progressive legislation.

Contracts Clause. Article I, Section 10. Forbids states from passing laws that impair contractual obligations. Ninth Circuit Judge Jay Bybee, appointed by President George W. Bush, recently relied on it in a dissenting opinion in voting to invalidate a living wage law (*RUI One Corp. v. City of Berkeley*).

Due Process Clause, "Substantive Due Process." Amendments V and XIV. Protects against deprivations of "life, liberty or property without due process of law." The liberty component has been interpreted to protect fundamental rights "implicit in the concept of ordered liberty," such as the rights to marry; to bodily integrity; to refuse medical treatment; to have, not to have and raise children; and to private, consensual, non-commercial sexual intimacy. Many ultra-conservatives would eliminate these fundamental rights. The liberty component was also infamously used during the *Lochner* era, but is no longer, to preserve "freedom of contract" by striking down legislation intended to improve working conditions, including child labor, minimum wage and maximum hour laws. Libertarian ultra-conservatives favor reviving this usage.

Eleventh Amendment. By its terms, prohibits states from being sued by citizens of other states, but has been interpreted to prohibit states from being sued by their own citizens, as well. Congress can override, or "abrogate," the amendment's sovereign immunity protection for the states, but recent decisions by a slim conservative Supreme Court majority now prevent such legislation except in limited circumstances.

Federalism. The principle that the federal government exercises the powers granted to it under the Constitution, while all other powers are reserved for the states. Ultra-conservatives use the Constitution's federalism principles to curb Congress' authority to address national issues.

Fourteenth Amendment, Section 5. Empowers Congress to pass laws that effectuate, or "enforce," the equality and liberty guarantees of the 14th Amendment. Recent decisions by a slim conservative Supreme Court majority dramatically curtailed Congress's Section 5 authority.

Lochner Era. Named after the case *Lochner v. New York* (1905), it represents the period from approximately 1890–1937 when the Supreme Court used a variety of constitutional provisions, including the due process and commerce clauses, to strike down legislation aimed at curbing the excesses of a laissez-faire economy, including child labor, minimum wage and maximum hour laws. While the legal doctrines of the era have long been discredited, ultra-conservative libertarians would revive them.

Non-Delegation Doctrine. The principle that Congress, being vested with "all legislative powers," cannot delegate that power to anyone else. Has long been limited to allow Congress to delegate significant rule-making and enforcement authority to regulatory agencies, which, unlike Congress, have expertise best-suited to address complicated issues. Ultra-conservatives like D.C. Circuit Judge Douglas Ginsburg have sought to revive the doctrine, which would hamstring regulatory authority.

Originalism. Collection of interpretive theories based on the idea that the Constitution's provisions each have a fixed meaning established at the time of ratification. Some originalists believe that the intent of a provision's drafters is the lodestar of interpretation. Others, like Justice Scalia, believe that all that counts is the ordinary meaning of the words of the provision at the time of adoption. Prominent originalists include Justice Scalia, Justice Thomas, Robert Bork and Edwin Meese. As many scholars have pointed out, Justices Thomas and Scalia have not faithfully adhered to originalism when confronted with constitutional questions—on affirmative action, property regulation, commercial speech, e.g.—where originalism would produce results inconsistent with ultra-conservative politics. Numerous scholars and judges have condemned originalism as both unworkable and unjustifiable. Justice William Brennan once called it “arrogance cloaked as humility.”

Privacy, Right of. Protected by the substantive liberty component of the due process clauses. Includes the rights to bodily integrity, procreation, contraception, abortion and sexual intimacy.

Quiet Revolution. The Federalist Society and the Heritage Foundation sponsored a July 2000 event called “Federalism: The Quiet Revolution.” Refers to efforts to fortify constitutional provisions reserving powers to the states and thereby curtail Congress's authority to enact laws addressing issues that require a national response. Efforts started bearing fruit with a string of rulings by the Rehnquist Court.

Spending Clause. Article I, Section 8. Includes Congress's power not only to spend money for the “general welfare,” but to place conditions on its disbursement to state governments, including conditions that it may not impose under other constitutional grants of authority. Relied on by Congress to require states that accept federal funds to comply with federal standards in a host of areas, including education, medical care, housing, child welfare and internet privacy. Has become increasingly important in ensuring state compliance with certain civil rights laws given the recent demise of Congress's Fourteenth Amendment powers. Certain ultra-conservative theories would abolish judicial enforcement of laws passed under the Spending Clause.

Takings Clause. Amendment V. Requires “just compensation” for government expropriation of private property. Ultra-conservatives have sought to apply it to any land use or environmental regulation that diminishes a property's value.

Tenth Amendment. Reserves to the states all powers not delegated to the federal government. Ultra-conservatives believe it limits Congress's authority to pass legislation on issues that, in Congress's eyes, require a national response.

Textualism. Theory that a statute must be interpreted based exclusively on the ordinary meaning of its language, without any reference to the legislative history or intent. Ordinarily, when combined with originalism, reduces judicially enforceable legal protections to the greatest extent possible.

Unitary Executive Theory. Holds that all executive power resides exclusively with the president and may not be guided by Congress in any way. Means that independent regulatory agencies headed by officials not removable by the president (e.g., Securities and Exchange Commission, Federal Communications Commission, National Labor Relations Board, and many more) are unconstitutional—a result that would have “dramatic” implications, according to Professor Steven Calabresi, one of the theory's leading academic proponents. Also means that as commander-in-chief, the president is not bound by acts of Congress and treaties touching on national security, such as laws that prohibit using cruel interrogation tactics on military prisoners or that regulate wiretapping conducted to gather intelligence. Justices Scalia, Thomas and Alito each have embraced different applications of the theory. The administration of George W. Bush has relied heavily on it.

Selected Readings

Bruce Ackerman, *The Stealth Candidate*, LONDON REVIEW OF BOOKS, Feb. 4, 2005

Jack Balkin, *Alive and Kicking*, SLATE, Aug. 29, 2005

Randy E. Barnett, RESTORING THE LOST CONSTITUTION (2003)

Emily Bazelon, Phillip Carter & Dahlia Lithwick, *What is Torture?*, SLATE, May 26, 2005 (contains collection of key Bush administration documents relating to detainee treatment)

Robert H. Bork, THE TEMPTING OF AMERICA (1989)

David Cole, *The Dictator Defense*, SALON, Feb. 10, 2006

Dawn Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363 (2003); *Tipping the Scale*, WASHINGTON MONTHLY, July/Aug. 2002.

Neil Kinkopf, *Furious George*, LEGAL AFFAIRS, Sept.–Oct. 2005

Dahlia Lithwick, *The Dangling Conversation*, SLATE, Nov. 4, 2005

Jane Mayer, *The Hidden Power*, NEW YORKER, July 3, 2005; *The Memo*, NEW YORKER, Feb. 27, 2006

Andrew Napolitano, THE CONSTITUTION IN EXILE (2006)

Reagan Justice Department Office of Legal Policy, *Guidelines on Constitutional Litigation* (1988), available at <http://www.americanconstitutionsociety.org/pdf/guidelines.pdf>.

Judith Resnik, *Citizenship and Violence*, THE AMERICAN PROSPECT, March 27–April 10, 2000

Jeffrey Rosen, *The Unregulated Offensive*, NEW YORK TIMES MAGAZINE, April 17, 2005; *Power of One*, THE NEW REPUBLIC, July 24, 2006

Herman Schwartz, RIGHT WING JUSTICE: THE CONSERVATIVE CAMPAIGN TO TAKE OVER THE COURTS (2004)

Peter M. Shane, *Federalism's "Old Deal": What's Right and Wrong with Conservative Judicial Activism*, 45 VILL. L. REV. 201 (2000).

David Strauss, *Testimony before the Senate Judiciary Committee, Confirmation Hearing for Judge John G. Roberts to be Chief Justice of the United States*, Sept. 15, 2005

Cass R. Sunstein, RADICALS IN ROBES (2005)

Symposium, *War, Terrorism and Torture: Limits on Presidential Power in the 21st Century*, 81 IND. L. J. 1139 (2006), available at <http://www.acslaw.org/taxonomy/term/65> (includes David Cole & Martin Lederman, *The National Security Agency's Domestic Spying Program: Framing the Debate*, which contains Justice Department memos justifying Bush administration's NSA spying program, and Harold Hongju Koh, *Can the President Be Torturer-in-Chief?*)

Mark Tushnet, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW (2004)

Participant Biographies

Bruce Ackerman, *Sterling Professor of Law and Political Science, Yale Law School*. Ackerman clerked for Supreme Court Justices Henry Friendly and John Marshall Harlan, II He is a noted constitutional law scholar and is the author of 15 books and more than 50 articles.

Drew S. Days, III, *Alfred M. Rankin Professor of Law, Yale Law School*. Days is the former solicitor general of the United States, a post he held from 1993–1996. He is the head of the Supreme Court and appellate practice at Morrison & Foerster. Days also served as assistant attorney general for civil rights.

Dawn Johnsen, *Professor of Law, Indiana University School of Law*. Johnsen has served as counsel to a number of advocacy groups. She was also deputy assistant attorney general and acting assistant attorney general for the Office of Legal Counsel.

Harold Koh, *Dean of Yale Law School*. Koh was assistant secretary of state for democracy, human rights and labor. The author of numerous books and articles, he is a noted human rights expert. Koh clerked for Supreme Court Justice Harry Blackmun.

Dahlia Lithwick, *Senior Editor, Slate Magazine*. Lithwick is a graduate of Stanford Law School. Lithwick authors the “Supreme Court Dispatches” and “Jurisprudence” columns for *Slate*.

Barack Obama, *United States Senator, Illinois*. Before being elected to the United States Senate in 2004, Senator Obama served in the Illinois State Senate for seven years. A graduate of Harvard Law School, he was the first African-American president of the Harvard Law Review. Senator Obama was also a lecturer at the University of Chicago Law School on constitutional law.

Judith Resnik, *Arthur Liman Professor of Law, Yale Law School*. Before coming to Yale, Resnik taught law at the University of Southern California. She has also been a visiting professor at NYU, Harvard Law and University of Chicago Law School. She has served on a number of prominent commissions and committees and is a consultant for the Institute for Civil Justice at RAND.

David Strauss, *Henry N. Wyatt Professor of Law, University of Chicago School of Law*. Strauss has served in the Office of Legal Counsel and was assistant to the solicitor general. He has argued 18 cases before the Supreme Court and is co-editor of the *Supreme Court Review*.

Cass Sunstein, *Karl N. Llewellyn Distinguished Service Professor of Jurisprudence, University of Chicago School of Law*. Sunstein clerked for Supreme Court Justice Thurgood Marshall and has worked in the Office of Legal Counsel. He is the author of numerous books including *Radicals in Robes*.

Bradley Whitford, *Narrator*. Whitford is a classically trained stage actor who has received critical acclaim for his roles in theater, film, and television. He played Josh Lyman on NBC’s *The West Wing*. His movie work includes *Philadelphia*, *Presumed Innocent* and the upcoming *An American Crime*. Whitford can be seen this fall in *Studio 60 on the Sunset Strip* on NBC.

FILMMAKERS

Virginia A. Williams. Virginia Williams is an Emmy Award -winning producer who has written and produced a wide variety of news feature and international documentary specials for television. She is Her credits include *The Action Asia Challenge*, *The Lost City of Dwarka* and *Jack the Ripper: An Ongoing Mystery*, for which she won an ITVA Best Director Award. Her film company is New View Films.

Harry Hanbury. Harry founded Parrhesia Pictures, Inc. in 1997. Harry produces dramatic and enlightening non-fiction films in just about every genre: history, politics, science, archaeology, natural history, cinema verite and personal narrative. His clients include the Discovery Channel, TLC, Hollywood studios and non-profit organizations.

Member Organizations Of The Alliance For Justice

ADA Watch

AIDS Action

Asian American Legal Defense and Education Fund

Bazelon Center for Mental Health Law

Business and Professional People for the Public Interest

Center for Children's Law and Policy

Center for Constitutional Rights

Center for Digital Democracy

Center for Law and Social Policy

Center for Law in the Public Interest

Center for Reproductive Rights

Center for Science in the Public Interest

Children's Defense Fund

Conservation Campaign

Consumers Union

Disability Rights Education and Defense Fund

Drug Policy Alliance

Earthjustice

Education Law Center

Equal Rights Advocates

Food Research & Action Center

Harmon, Curran, Spielberg & Eisenberg

Human Rights Campaign Foundation

Institute for Public Representation

Justice Policy Institute

Juvenile Law Center

Lambda Legal

Lawyers' Committee for Civil Rights Under the Law

League of Conservation Voters Education Fund

Legal Aid Society of New York

Legal Aid Society-Employment Law Center

Legal Momentum

Methodist Healthcare Ministries of South Texas, Inc.

Mexican American Legal Defense and Educational Fund

NARAL Pro-Choice America

National Abortion Federation

National Association of Criminal Defense Lawyers

National Campaign for Sustainable Agriculture

National Center for Law and Economic Justice

National Center for Lesbian Rights

National Center for Youth Law

National Center on Poverty Law

National Citizens' Coalition for Nursing Home Reform

National Council of Nonprofit Associations

National Council on Research for Women

National Education Association

National Employment Lawyers Association

National Family Planning and Reproductive Health Association

National Immigration Forum

National Immigration Law Center

National Law Center on Homelessness and Poverty

National Lawyers Guild

National Legal Aid & Defender Association

National Low Income Housing Coalition

National Mental Health Association

National Partnership for Women and Families

National Senior Citizens Law Center

National Veterans Legal Services Program

National Women's Law Center

National Youth Advocacy Coalition

Native American Rights Fund

Natural Resources Defense Council

New York Lawyers for the Public Interest

One Connecticut

Physicians for Human Rights

Planned Parenthood Federation of America

Public Advocates

Seton Hall University School of Law Center for Social Justice

Sierra Club Foundation

States United to Prevent Handgun Violence

Tides Center

University of Pennsylvania Law School Public Service Program

Violence Policy Center

The Wilderness Society

Women's Law Project