An Examination of Judicial Activism and Restraint on the Rehnquist Court

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Abstract

This project seeks to determine whether the Rehnquist Court has indeed rendered decisions in an activist manner with the intention of promoting a conservative public policy agenda, as several scholars have contended. First, detailed definitions of judicial activism and judicial restraint are offered in order to establish the principles and goals of each. Attention is also given to the positive and negative attributes of both philosophies. The ideological standpoints of the current justices as well as the policies generally preferred by conservatives and liberals are described in order to help explain the decisions made by the Rehnquist Court (and, ultimately, whether those decisions were activist).

In order to assess the degree of activism of the Rehnquist Court, I selected five categories of Constitutional law and then chose a case to represent each. The cases that I utilized were each decided at a time when all current justices were serving on the Court, and I consider the cases to be relatively well-known. I realize that I have not given attention to every issue over which the Court has jurisdiction, but the selections are intended to serve as a sample.

After analyzing the cases and applying the principles of activism and restraint to each, I concluded that the Rehnquist Court as a whole cannot be considered activist. Individual justices do make activist decisions in certain instances, but the dynamic of the Court overall does not suggest that the justices have embarked on a mission of furthering conservative policy goals.
The United States’ legal system is quite unique in that courts have jurisdiction over many more issues than do other countries and also enjoy a greater degree of independence from the other branches of government and government agencies. In addition, the United States Constitution has lasted longer than that most other countries, a fact that is partially responsible for political stability in America (Segal and Spaeth 2002). Even when considering these facts, however, the United States judiciary still becomes enveloped in controversy at times due to conflicting legal perspectives. Judges hold varying philosophies when it comes to rendering decisions, so it follows that disagreements arise over whether “correct” decisions have been made. Two main perspectives are generally attributed to judicial decision-making: restraint and activism. While it seems that many judges (and Supreme Court bodies as a whole) are typically thought to favor one over the other, it is certainly possible for any individual or court to utilize both perspectives, depending on the issue at hand.

It is often assumed that conservative judges and courts favor the practice of restraint while liberals seem more interested in making activist decisions (Campbell and Stack 2001). However, several legal scholars have judged the conservative Rehnquist Court that currently mans the bench has been judged to be quite activist in its own right. Their version of activism is thought to be rooted in conservative beliefs and their desire to alter past rulings that were considered activist in a liberal manner (Keck 2002; Segal and Spaeth 2002; Campbell and Stack 2001). Before determining whether the Rehnquist Court is guilty of activism, it is important to consider the traits of both judicial activism and judicial restraint.
Defining Activism and Restraint

Judicial restraint is a legal philosophy which states that courts should not make public policy decisions. Persons favoring restraint believe that only those persons in elected branches should be allowed to create policy because they are accountable to the public, unlike the judicial branch. Proponents of restraint tend to fear that the rights of the American public are in jeopardy when courts are allowed to, in essence, create law. Judges are in a position of extensive authority, but they should not use this power to further their personal goals for society. Some scholars have referred to the phenomenon of judges altering the meaning of constitutions and statutes to align with their preferences as “legislating from the bench” (Porto 2001: 250).

In order to follow the rules of judicial restraint in constitutional cases, judges should keep four rules in mind: follow clear language unless it conflicts with the Framers’ intent; clarify unclear language with the Framers’ intent if there is reasonable certainty regarding the original meaning; clarify unclear language by choosing an outcome that maximizes the ability of the legislature to make policy in the event that the first two rules are inapplicable; clarify unclear language according to the best estimate of intent or in accordance with precedent if no other rule applies (Porto 2001). Segal and Spaeth (2002) agree with this assessment, asserting that when restraint is applied, judicial interpretation should be based only on the facts of a case, plain meaning of the text, original intent, and past precedent when applicable.
However, using these methods to interpret laws or constitutions is not as simple as it may seem. Literal reading of a text can be confusing due to the complexity of the English language. Additionally, legislative or Framers’ intent can be difficult to determine, especially when one considers the fact that the “Framers” were not a consistent group of individuals, and not every person designated as a Framer actually signed the United States Constitution. It is not beyond the realm of possibility that persons agreed to certain clauses for entirely different reasons or interpreted the words in an alternative manner (Segal and Spaeth 2002).

Another issue that surfaces in the debate over judicial restraint is the fact that while those favoring the method believe in following precedent, some form of case law likely exists for both sides of an issue. Judges can select a prior case that seems to align with the facts of the case, but different persons may interpret the meaning of precedent in diverging ways. In addition, even when precedent is cited, policy may change, as the scope of the ruling may be expanded to cover a wider variety of situations (Segal and Spaeth 2002).

Persons subscribing to the philosophy of judicial restraint feel that policymaking is best left to the legislative branch, even when such policy may not be characterized as good or useful. Courts simply do not have the staffs, resources, and hearings that would enable them to examine the policy issues as extensively as possible in order to make the best choice. Because its members are accountable to their constituents, the legislative branch is more in touch with the public’s needs. Judges, especially Supreme Court justices, tend to be insulated and are not prepared to make broad decisions that will substantially affect society (Porto 2001).
Proponents of restraint feel that courts are not intended to make public policy for several reasons. First, they lack the information necessary to make an educated choice because they cannot and do not hold hearings in which a variety of perspectives and solutions can be addressed. Second, the judicial process focuses on the rights of each party rather than on the costs of policies. Therefore, certain institutions may be forced to comply with court remedies even in the event that no consideration was given to the implications of such resolutions. Third, individual court cases cannot broadly address most issues; courts only hear matters that are brought to their attention, and just because a suit was filed does not indicate a serious problem exists. Lastly, many court cases do not deal with general patterns of behavior that would legitimize the need for policy but rather the specific facts of the lawsuit. Plaintiffs and the issues that they bring to the courts are not always representative of the general public, and court remedies may therefore be ineffective (Porto 2001).

Judicial activism, simply stated, is the philosophy asserting that courts “can and should make broad public policy decisions” (Porto 2001: 249). Alternative definitions include the allegation that activists ignore precedent so that they can implement aggressive new policies and participate in molding society to their liking. Another interpretation maintains that activist judges have little regard for the text, history, precedent, and political culture relating to a statute or constitution and instead substitute their personal judgment for that of the legislature. A third alternate contention is that activism entails decision-making based on what the court believes to be best for society rather than following case law (Harwood 1996).
Several scholars have formulated more detailed definitions of activism. Sterling Harwood (1996) offers four criteria in determining whether a judicial action can be characterized as "activist." First, activist judges refuse to defer to the legislative or executive branches' judgment of a statute or policy. Second, activists tend to relax requirements for standing in terms of bringing cases to court. Presumably, activist judges would be more willing to accept a broader range of issues as within the court's jurisdiction. Third, those who favor activism are likely to break precedent rather than subscribe to the idea of *stare decisis* (allowing the current decision to stand). Finally, activists loosely interpret constitutions, statutes and precedents, meaning that they create more meaning for the text than is found in the plain reading of the words.

David Luban has established seven "senses" of activism. These include structural remedies (overseeing the operation of institutions such as schools); a tendency to seek to overturn the validity of legislation; creating new rights through court decisions; creating constitutional law that does not relate to the plain text and/or intent; substituting one's own moral convictions for the law; aggressively overlooking the separation of powers (this component was formulated by Richard Posner); and judging in a manner that is intended to produce certain results, most often related to the judge’s personal policy preferences (Harwood 1996).

Similarly, Bradley C. Canon has developed what he has termed the six "dimensions" of activism. The first is the general disregard for policies implemented as a result of democratic procedures. Next is the likelihood that prior decisions will be ignored or their outcomes altered to justify new choices made by judges. Making decisions in a manner that contradicts the explicit language or intent of the text is another
form of activism. The act of judicial policymaking rather than deferring to the legislature is characterized as an activist feat, as is clearly establishing specific policies that leave no room for discretion by non-judicial actors. Finally, the inability of other government branches or agencies to develop solutions for a problem is a hallmark of judicial activism (Harwood 1996; Canon 1983).

Those who favor this legal philosophy tend to believe that courts are properly equipped to increase equality and personal freedoms in American society and that judges have a duty to intervene when legislators fail to address situations that pertain to these issues. Proponents of activism contend that courts should examine what the Constitution means today rather than attempt to determine the intent of the Framers, as only the utilization of this method will result in the capacity of judges to solve current problems (Porto 2001).

Persons that prefer activism as a judicial approach worry that legislatures often fail to rectify negative social situations, especially in the realm of human rights. The issue of school desegregation is often cited as a justification for judicial activism, because it is contended that the elected branches refuse to pass unpopular policy regardless of whether it may be beneficial for society (Porto 2001).

Professor Abram Chayes has compiled a list detailing the reasons that support the role of judges in policymaking. First, he asserts that judges are fairly immune to political pressure because of their job security, but still have experience with the policy process due to their background in law or government. Second, the cases presented to courts allow national problems to be dealt with in a manageable fashion. The outcomes determined by the courts can be adjusted at a later time to fit a broader scope of similar
situations. Next, judges are not making policy decisions entirely on their own when they render verdicts because the lawyers that represent the parties are actively involved in the process. By providing facts, arguments, and information, the attorneys allow judges to make informed decisions. Furthermore, the adversarial system of justice provides that both sides present all possible information, which also contributes to the ability of judges to make good policy. Courts also must respond to suits filed, unlike the elected branches that are able to selectively consider issues. Finally, courts are able to obtain assistance in research and evaluating remedies; judges are not bound to perform these services independently (Porto 2001; Chayes 1976).

**Court Composition and its Implications**

Conservatives tend to oppose the use of judicial activism, although some scholars argue that they merely do not accept the validity of liberal judicial activism and actually participate in their own form of activism. By the end of the 1980s, Republicans were eager to reverse the “radical” decisions made in the 1960s and 1970s, and a valiant effort was made by Republican presidents and senators to appoint conservative justices to the Supreme Court. It was hoped that bringing new justices to the court could help render previous decisions invalid (Campbell and Stack 2001). Around 90% of Supreme Court appointees have been affiliated with the same party as the nominating president, but simply identifying with either the Republican or Democratic Party does not appeal to be the only criteria for judicial selection. Presidents also hope to select individuals who share their ideological viewpoints on certain issues (Tarr 1999).
President Richard Nixon gave serious consideration to a candidate’s style of legal decision-making when making appointments to the Supreme Court. He strongly opposed judicial activism and vowed to name only strict constructionists to the Court. Nixon hoped that his promise would ensure the reinstatement of conservative decision-making; however, his appointees were not entirely successful in furthering the president’s conservative policy goals (Campbell and Stack 2001).

During his two terms, President Ronald Reagan was very involved in federal judicial selection, and was also afforded the opportunity to appoint three Supreme Court justices (Sandra Day O’Connor, Antonin Scalia, and Anthony Kennedy). Reagan favored the selection of very conservative judges and was wary of appointing an individual who appeared to hold more moderate views. Even so, two of his appointees (O’Connor and Kennedy) sometimes vote with the more liberal bloc of justices. President George Herbert Walker Bush appointed Justices David Souter and Clarence Thomas during his term, adding a bit more conservatism to the Court’s dynamic. President William Clinton chose Justices Stephen Breyer and Ruth Ginsburg, whom he believed to be politically moderate, which seems consistent with the description that he gives to himself (Campbell and Stack 2001).

It appears that the ideology of judicial candidates has been given a great deal of consideration in recent decades, and simple dedication to the political party of the president is not enough to render a candidate fit for the position. Also, interest group pressures have begun to sway decisions regarding selection of judges. Since it seems that judicial selection may be tailored toward specific ends, interest groups have an incentive
to support or oppose candidates that may have an effect on their issue of choice (Campbell and Stack 2001).

Despite the assumption that conservative courts refrain from using activism as a legal approach to decision-making, the Rehnquist Court has been accused of participating in a conservative version of activism. Most notably, the Court has allegedly “recharged” state sovereignty (Campbell and Stack 2001: 96) and has used the Tenth Amendment to bring about an emphasis on dual federalism. Chief Justice William Rehnquist and the other justices have handed down several decisions that limit Congressional power, and have asserted that states should be accountable to the people living within them. These decisions of the Court have created barriers to federal involvement in many situations, and the constitutional approach to federalism has therefore been amended (Campbell and Stack 2001).

Campbell and Stack (2001) assert that the Rehnquist Court is indeed activist because it has actively tried to change the relationship between the federal government and the states, and this agenda is rooted in conservative ideals related to public policy. Segal and Spaeth (2002) also contend that the Rehnquist court makes activist decisions that further the principles of conservatism and cite *Bush v. Gore 000 U.S. 00-949* (2000) as a prime example. Scholar Thomas Keck (2002) believes that the Rehnquist Court has made several activist decisions, mainly in regard to limits put on the national government’s power. Given these allegations, I have decided to analyze a selection of the Rehnquist Court’s decisions to gauge the degree to which the Court has participated in making activist judgments.
Ideological Perspectives of the Justices

Although the Rehnquist Court acts as a cohesive group, attention must be given to the individual actors in order to better understand the decisions that are made. Justice Scalia, Chief Justice Rehnquist and Justice Thomas are considered the most conservative members of the Court, with Scalia typically thought of as the most staunchly right-wing of the three (Yarborough 2000; Epstein, Segal, Spaeth, and Walker 1996). Justices O’Connor and Kennedy have both established a moderately conservative voting record, although they sometimes side with the more liberal justices (as was mentioned previously) (Yarborough 2000). O’Connor is likely to vote in a liberal manner when the issue at hand involves federal taxation and civil rights. Kennedy also boasts a liberal track record in terms of his federal taxation votes in addition to demonstrating a fair degree of liberalism in First Amendment cases (Epstein, et al. 1996). Justice Souter was initially thought to be moderately conservative at the time of his appointment (Yarborough 2000), but many of his recent votes indicate that perhaps his views have shifted to a moderate or moderately liberal standpoint. Souter has voted most liberally in First Amendment and right-to-privacy cases (Epstein, et al. 1996). Justice John Paul Stevens has been referred to as somewhat conservative; however, his decisions within the past decade suggest that he tends to hold increasingly liberal ideological perspectives, especially in matters involving civil liberties and the First Amendment (Epstein, et al. 1996). Justices Breyer and Ginsburg are typically thought of as the most liberal justices that currently sit on the Rehnquist Court (Epstein, et al. 1996).

In addition to examining the ideological perspectives of each justice, it is also imperative to discuss the characteristics of each ideology and the policy preferences that
result. (Both conservatism and liberalism will be described in their “ideal” senses; not all persons identifying with either ideology will subscribe to every component of the philosophy). Conservatives tend to favor limited federal government intervention in the economy but prefer that more control is exerted over social issues (Kraft and Furlong 2004). More specifically, conservatives would typically side with the government in matters involving civil liberties, such as criminal proceedings, First Amendment controversies, civil rights, due process, and privacy rights. Conservatives are also proponents of state’s rights and tend to oppose expanded powers of the national government. However, when issues involving business and taxation surface, conservative persons are likely to push for the rights of individuals and their economic interests (Epstein, et al. 1996).

Broadly speaking, liberals tend to prefer that the national government allow expanded personal freedoms to individuals while exerting more control over business and the economy (Kraft and Furlong 2004). In proceedings involving civil liberties (as listed previously), liberals would likely side with the individual or group rather than the government. Liberal persons are also likely to favor expanded powers of the national government relative to the states (Epstein, et al. 1996).

Is the Rehnquist Court “Activist?”

In order to determine the degree of activism present in the decisions of the Rehnquist Court, I have selected a variety of cases for examination. Each case falls under a different classification, in order to help demonstrate whether the Court has adopted activist or restrained attitudes depending on the pertinent issue. The topics were
chosen first; I then selected a case under each that was reasonably well-known and was
decided during the years in which all current members of the Rehnquist Court have
manned the bench. Although the cases presented for analysis are not entirely
comprehensive and do not address every topic with which the Rehnquist Court has been
cconcerned, it is my hope that these examples will serve as a dependable sample from
which one can draw broader conclusions.

_Federalism: Alden v. Maine (1999)_

_Alden v. Maine_ was initiated when sixty-five probation officers employed by the
state of Maine filed a suit in the Federal District Court, alleging that the State had broken
the Fair Labor Standards Act of 1938 by ignoring the statute’s overtime guidelines. The
petitioners hoped to obtain monetary damages as a result of the case. However, while the
suit was pending, the United States Supreme Court handed down the opinion in _Seminole
Tribe of Florida v. Florida_ 517 U.S. 44 (1996), which asserted that Congress was unable
to overrule the sovereign immunity (freedom from lawsuits) of states when such states
were sued in federal courts. As a result, the Federal District Court dismissed the
proceedings and the petitioners subsequently filed the same claim in Maine’s state court.
The trial court also concluded that Maine was entitled to sovereign immunity and
therefore refused to hear the case, and the Maine Supreme Court confirmed this decision
(_Alden v. Maine_ 000 U.S. 98-436 (1999)).

In a 5-4 decision, the United States Supreme Court affirmed the ruling of the state
courts and asserted that Congress did not have the Constitutional authority to force states
to be sued without their express consent in private suits within their own court systems.
Justice Kennedy issued the majority opinion, which Justices Rehnquist, O'Connor, Scalia, and Thomas joined. Justice Souter composed the dissenting opinion, with which Justices Stevens, Ginsburg, and Breyer agreed (*Alden v. Maine* 000 U.S. 98-436 (1999)).

The Eleventh Amendment of the United States constitution grants states sovereign immunity; however, the Court contended that this right of the states is derived not only from the Amendment, but also from the original intention of the Constitution. While the Constitution does maintain that the laws of the national government are considered supreme, there is no doubt that states were intended to be sovereign entities that were allowed to retain a variety of rights. The Tenth Amendment clearly establishes that the powers not delegated to the federal government by the constitution are reserved to the states and the people (Epstein and Walker 2001; *Alden v. Maine* 000 U.S 98-436 (1999)).

The majority opinion of *Alden* contends that the history and ratification processes of both the Constitution and the Eleventh Amendment clearly indicate that states cannot be sued in their own courts without their approval. The Framers were products of the English government, and no question existed over whether the King could be sued in his own court by a private party. To even suggest this situation as a possibility seemed preposterous, and it was unlikely that the individuals drafting the Constitution would intend to implement a reversal of this system (*Alden v. Maine* 000 U.S 98-436 (1999)).

The Federalist papers, most notably those written by Alexander Hamilton and James Madison, indicate that the Framers of the Constitution assumed that states would be entitled to sovereign immunity, and felt no need to explicitly establish this principle in the text of the Constitution (*Alden v. Maine* 000 U.S 98-436 (1999)).
Regardless of these assumptions, the Supreme Court did decide in 1793 that Article III of the Constitution enabled Congress to force states to consent to a lawsuit brought by a private citizen (Chisholm v. Georgia 2 Dall. 419 (1793)). However, this ruling did not stand for long, as the Eleventh Amendment was passed soon after. While it may seem that Congress proposed the Amendment in order to simply change the outcome of this decision, the majority seems to believe that legislators backing the amendment believed that the Court rendering the Chisholm verdict made an error in judgment, and they wished to reinstate the original meaning of the Constitution in regard to sovereign immunity. According to Justice Kennedy, who offered the opinion of the Court for Alden, “the Eleventh Amendment confirmed rather than established sovereign immunity as a constitutional principle; it follows that the scope of the State’s immunity from the suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design” (Alden v. Maine 000 U.S. 98-436, 729 (1999)). Case law since the implementation of the Amendment has resulted in an overwhelming majority of decisions that have defended state’s sovereign immunity rights (Alden v. Maine 000 U.S. 98-436 (1999)).

Furthermore, the Alden majority contends that states would never have ratified the Constitution if they were expected to defer to the national government’s interpretation of their sovereignty rights. They also assume that since the United States Government is entitled to the privilege of immunity from being sued within its own courts, a reciprocal power would be extended to the states as well. This assertion is likely attributed in part to the fact that if a government is sued for damages, the entity will likely encounter significant financial problems that will hinder the ability of the administration to provide
for its citizens. The majority opinion cites this concern as a significant reason that supports the theory of sovereign immunity (*Alden v. Maine* 000 U.S. 98-436 (1999)).

The majority opinion of *Alden* also states that although Congress is granted a wide range of powers, the principles of federalism mandate that the federal legislative branch allow the states to be “joint participants in the governance of the nation” (*Alden v. Maine* 000 U.S. 98-436, 748 (1999)). It is asserted that states are entitled to such respect regarding their immunity because they have consented to participate in a federation and are therefore afforded “mutual rights and obligations to the people who sustain it and are governed by it” (*Alden v. Maine* 000 U.S. 98-436, 751 (1999)). The concept of sovereign immunity is therefore viewed as instrumental to the states’ abilities to effectively carry out their responsibilities to citizens. The provisions of the Constitution do not prevent states from allowing themselves to be subject to lawsuits (which has occurred on several occasions), but Congress is unable to assert any authority over whether a state chooses to participate in litigation against itself (*Alden v. Maine* 000 U.S. 98-436 (1999)).

I would conclude that, based on the majority opinion of *Alden*, the Rehnquist Court subscribed to the philosophy of judicial restraint. Careful attention was paid to the original intent of the Framers and the history that accompanied the concept of sovereign immunity, which is consistent with a main principle of restraint. In addition, the Court was following precedent by pointing out that a vast majority of cases involving sovereign immunity had been decided in favor of the states. Although most of these had been heard following the implementation of the Eleventh Amendment, the Court provides a convincing account that demonstrates the intention of the amendment to restore original constitutional principles that had been undermined by the *Chisholm* decision.
The fact that the majority deferred to precedent cannot, however, indicate a restrained decision on its own. The justices that dissented cited a different precedent in order to support their argument. *Garcia v. San Antonio Metropolitan Transit Authority* 469 U.S. 528 (1985) was utilized to demonstrate that a prior decision had allowed the same law that had been questioned in this case to apply to state governments, therefore guaranteeing the petitioners a remedy. Justice Souter stated within the dissenting opinion of *Alden* that he had also dissented in the *Seminole Tribe* case, which had been the reason for the case's dismissal in the federal court system (*Alden v. Maine* 000 U.S. 98-436 (1999)).

I would classify the *Alden* decision as a conservative one (and the 5 justices that composed the majority are all considered either conservative or moderately conservative), but it does not appear that the desire to promote a conservative agenda was the sole reason that was responsible for the outcome of the case. The majority opinion does not offer much reasoning that is consistent with the definitions of activism discussed within this paper. While the Court did not defer to the legislative branch, the facts of the case do not indicate that debate existed over a democratically enacted statute or that the Court was ignoring the principles that govern the separation of powers. The controversy was simply over the interpretation of a section of the Constitution rather than over a public policy issue, so I feel that the failure of the Court to allow Congress to retain power over the immunity of the states cannot be classified as an activist decision.

A lawsuit was initiated in 1995 against the Santa Fe Independent School District by Catholic and Mormon students within the school system and by their parents. The petitioners asserted that Santa Fe High School’s tradition of allowing the student chaplain to read a prayer over the public address system before each school football game violated the Establishment Clause of the First Amendment. In the meantime, the school amended the policy by allowing the student body to vote on whether prayer should occur at the football games, and if the measure passed, which student should deliver the prayer. The District Court ruled, after the students had voted to maintain the tradition of prayer, that only “non-sectarian, non-proselytizing” (*Santa Fe Independent School District v. Doe 000 U.S 99-62, 297 (2000)*) prayer or messages could be allowed at such public events. In contrast, the Fifth Circuit Court of Appeals reversed the decision, asserting that the policy was not consistent with the rights afforded to citizens in the First Amendment (*Santa Fe Independent School District v. Doe 000 U.S 99-62 (2000)*).

The Supreme Court affirmed the decision of the Court of Appeals in a 6-3 decision. Justice Stevens authored the majority opinion, with Justices O’Connor, Kennedy, Souter, Ginsburg, and Breyer in agreement. Chief Justice Rehnquist issued the dissenting opinion, with the approval of Justices Scalia and Thomas. The majority agreed with the judgment stating that under the Establishment Clause, the Constitution provides that the government cannot “coerce anyone to support or participate in religion or its exercise, or otherwise act in a way that establishes a state religion or religious faith, or tends to do so” (*Santa Fe Independent School District v. Doe 000 U.S 99-62 (2000)*). (This principle had been established in the previous case *Lee v. Wiseman 505 U.S. 577*,...
(1992). Although the District court had argued that the prayers had been “private student speech,” the Supreme Court rejected this argument on the grounds that the speech occurred at public school-sponsored events; it was delivered by means of the public address system; a speaker representing the student body was broadcasting the message; and the speech was supervised by school officials (Santa Fe Independent School District v. Doe 000 U.S 99-62 (2000)).

Another problem with the policy identified by the Santa Fe majority was the fact that the school district had not enacted a policy that allowed any and all students to deliver a message of their choosing; rather, one student was chosen to give the reading for each event occurring within the year. Therefore, although the student was elected, the school has effectively ensured that only the majority’s viewpoint would be broadcast, and any minority opinions would likely be suppressed. The Court of Appeals, with whom the Santa Fe majority agreed, asserted that one purpose of the Establishment Clause was to ensure that the government would not be required to settle issues of religious debate (Santa Fe Independent School District v. Doe 000 U.S 99-62 (2000)).

The District Court also found in its ruling that the prayer taking place at the football games did not force anyone to engage in religious worship. However, the Supreme Court (as well as the Court of Appeals) maintained that certain students are required to attend the games (for example, players, cheerleaders, and band members) and that these persons’ rights could easily be violated by such policy. Attention was also paid to the desire of many students to attend the games and the contention that students should not need to risk being offended simply because they have elected to attend the event with
other students whose views may differ from their own \textit{(Santa Fe Independent School District v. Doe} 000 U.S 99-62 (2000))

Another holding of the District Court that was invalidated in the subsequent appeals was the fact that since no prayer had taken place since the District Court had mandated the implementation of an amended prayer policy, the respondents had no standing to sue because actual injury had yet to occur. The majority contended that the policy as it stood was enough to suggest that the school district was attempting to promote certain religious beliefs within the public school system, even though elections were held in order to determine whether the practice of reading prayers would actually take place. Countering the principles of the First Amendment, the school district \textit{“has established a government mechanism that turns the school into a forum for religious debate and empowers the student body majority to subject students of minority views to constitutionally improper messages”} \textit{(Santa Fe Independent School District v. Doe} 000 U.S 99-62, 316 (2000)). For these reasons, the majority determined that the policy did not need to be practiced in order to be harmful \textit{(Santa Fe Independent School District v. Doe} 000 U.S 99-62 (2000)).

The Court stated in the majority opinion of \textit{Santa Fe} that nothing in the Constitution prevents public school students from choosing to pray on their own in the context of the school environment. However, the fact that the school district was effectively endorsing such activity in a public group setting was a violation of Constitutional principles \textit{(Santa Fe Independent School District v. Doe} 000 U.S 99-62 (2000)).
The assertion that the Rehnquist Court as a whole has been activist in attempting to further conservative ideas does not pertain to this case. I would expect that if such allegations were valid, the justices would have reversed the Court of Appeals’ decision. The decision itself was liberal, as the integration of religion and public life is typically the preference of conservatives. Interestingly enough, two justices (O’Connor and Kennedy) that are considered moderately conservative sided with the staunchly liberal justices in this decision. Portions of this case do fit under definitions of activism; however, I must assert again that conservative agendas did not influence the majority’s decision. For example, unlike many cases decided by the Rehnquist Court, the *Santa Fe* decision invalidated the authority of the local governing body to use its discretion in implementing the policy in question. In addition, it does appear that the Court eased the qualifications for standing to sue. It is true that the parties had not actually suffered an injury under the new policy implemented by the school district when this case was filed. By asserting that the rule would likely result in an injury, it seems that the Court was altering, in some sense, the standards usually required to register a constitutional complaint.

The Court used a very basic interpretation of the Establishment Clause in order to render the school district’s policy unconstitutional. The justices asserted that any policy that seemed to establish a religion could not be approved, and they believed that the facts of this case clearly indicated a constitutional violation. It was the majority’s decision that the Santa Fe School District’s policy regarding prayer at football games established, or at the very least, endorsed and promoted particular religious beliefs by allowing only one student to deliver messages over the public address system. Since the program essentially ensured that minority religious views would not be heard, a First Amendment
conflict was identified. Due to the strict reading of the text, it seems that the justices in the majority were actually acting in a fairly restrained manner. Although it may seem that this case established a broad public policy (which would be consistent with activism), I decline to believe that it has. It does appear that the justices concurring with the majority opinion paid careful attention to the facts of the case, namely the portion of the policy that allowed only one student (however elected) to address the school. It seems possible that a prayer policy with different provisions could still be upheld by the Court in the future, as I do not believe that the justices have completely invalidated all matters involving religion in the realm of public schools.

It is feasible to deduce that the three dissenting justices in this case acted in an activist manner when developing their argument. In the dissenting opinion of Santa Fe, Chief Justice Rehnquist states that the majority’s decision indicates a “hostility” toward the mixture of religion and the public sphere, and claims that the Founding Fathers never intended for the United States to be completely secular. He also contends that the student elections were not implemented for the purpose of voting for or against religion, but rather to select a student who would likely be selected for qualities other than personal religious beliefs. In addition, Rehnquist and his compatriots denied that public speech occurred in this case because a student and not a school official (the government) would be responsible for the message. However, the dissenting opinion does not give much consideration to the Establishment Clause beyond suggesting that the clause itself does not require that all speech within a public forum be completely secular (Santa Fe Independent School District v. Doe 000 U.S 99-62 (2000)).
Rehnquist, Scalia, and Thomas are the three most conservative justices on the Court (as mentioned previously), and it seems consistent to assume that given their ideological standpoints each would approve of school prayer in principle. Had O'Connor and Kennedy concurred with their reasoning and Rehnquist's opinion became the majority, the decision could have been characterized as activist due to the fact that the argument seemed to consist of relatively little constitutional weight. The *Santa Fe* case could be deemed a restrained decision more easily if all nine justices (including the extreme conservatives) had agreed that the school district's policy violated the Constitution, but I remain convinced that the Court as a whole utilized restraint in this case.

*Civil Liberties: Boy Scouts of America v. Dale (2000)*

*Boy Scouts of America v. Dale* 000 U.S. 99-699 (2000) attempted to reconcile the question of whether a New Jersey statute regarding "public accommodations" could mandate that the Boy Scouts admit a certain person as a member. The Boy Scouts claimed that such an action violates the organization's First Amendment right of "expressive association," and the Supreme Court agreed that the application of the law would indeed result in a Constitutional violation (*Boy Scouts of America v. Dale* 000 U.S. 99-699 (2000)).

James Dale had held a position as an assistant scoutmaster to a group of Boy Scouts in New Jersey while attending Rutgers University. At the university, he became involved with the Lesbian and Gay Alliance, which came to the attention of the Boy Scout Council after Dale had been featured in a newspaper article discussing the group.
His membership in the Boy Scouts was subsequently revoked, and Dale then filed a complaint that the organization had violated New Jersey’s public accommodations law. The law prohibits discrimination on the basis of sexual orientation (among other classifications). The New Jersey Superior Court asserted that the Boy Scouts was a private organization and therefore did not qualify as a “public accommodation.” The New Jersey Court of Appeals reversed this decision by claiming that the Boy Scouts were subject to the provisions of the law, and the New Jersey Supreme Court affirmed this decision. Both the Appellate Court and the Supreme Court decided that allowing Dale to be a member would not hinder any of the organization’s goals or impede their ability to carry out their stated purposes (Boy Scouts of America v. Dale 000 U.S 99-699 (2000)).

The United States Supreme Court reversed the decision of the New Jersey Supreme Court with a 5-4 ruling. Chief Justice Rehnquist authored the majority opinion and was supported by Justices O’Connor, Scalia, Kennedy, and Thomas. Justice Stevens issued the dissenting opinion, with which Justices Souter, Ginsburg, and Breyer joined. Justice Souter also issued a dissenting opinion with the agreement of Justices Ginsburg and Breyer. The majority asserted that the First Amendment does guarantee a right to associate with others for a variety of purposes, and the forced inclusion of persons in certain organizations may infringe on this. The Boy Scouts were deemed a group that engages in “expressive association,” therefore rendering them an assembly that could possibly be harmed by such forced inclusion (Boy Scouts of America v. Dale 000 U.S 99-699 (2000)). It appears that the decision of the majority was conservative as it did not find a discrimination issue that necessitated the inclusion of Dale. I would contend that
liberals would be more likely to determine that Dale was unfairly discriminated against due to his sexual preference and was therefore subject to the protection of the courts.

The Boy Scouts is a “private, non-profit organization” and seeks to teach its members certain values. The Boy Scouts contended that allowing homosexuals to become members violates the order that scouts remain “clean” and “morally straight.” Although these goals do not explicitly refer to homosexual behavior, the majority agreed that statements made by Boy Scout officials suggested that the prohibition of homosexual behavior within the organization did indeed fall within the realm of the group’s beliefs. It was further contended that allowing Dale to serve as a scoutmaster would send the message that the Boy Scouts approved of (or at the very least, did not disapprove of) his personal life outside of scouting. Dale’s inclusion would essentially send the message that the Boy Scouts had adopted a point of view contrary to their stated goals (Boy Scouts of America v. Dale 000 U.S. 99-699 (2000)).

The majority explained that it believed public accommodation laws to apply to “traditional places of public accommodation—like inns and trains” (Boy Scouts of America v. Dale 000 U.S 99-699, 656 (2000)). The Boy Scouts of America was not deemed subject to this law, as it did not seem to fit with the original intention of such statutes (Boy Scouts of America v. Dale 000 U.S 99-699 (2000)).

I believe that the Boy Scouts decision contains both elements of judicial activism and restraint. While the majority did not defer to the New Jersey Court’s interpretation of the public accommodation statute, the justices did not attempt to render the law invalid in all situations; it was simply deemed a violation of the First Amendment as it applied to the facts of the particular case, which suggests some degree of restraint. Also, the
majority examined what they believed to be the original intent of public accommodation laws rather than prevailing current ideologies surrounding the law, and such consideration is consistent with the practice of judicial restraint.

However, the majority (which did consist of the five most conservative justices) can be deemed activist in terms of this decision due to portions of their reasoning. Judicial restraint generally provides that the clear language of the text be used. The majority contends that the Boy Scouts’ First Amendment right to freedom of “expressive association” is violated by the New Jersey law. However, an explicit guarantee to expressive association is not found within the text of the First Amendment; it is a right that was found to be implicitly guaranteed when participating in First Amendment activities in the Roberts v. United States Jaycees 468 U.S. 609 (1984). The Boy Scouts case itself did not create new rights that are not found in the Constitution, but it is possible that the majority has based part of its argument on a past precedent that created such a right. On the other hand, it is a hallmark of judicial restraint to abide by the concept of stare decisis, and it appears that the majority was examining past cases that had dealt with similar situations in order to render a verdict in this case.

I do believe that the majority is correct in asserting that in some cases, the forced inclusion of members into a private organization can prevent the group from carrying out their goals and expressing certain messages. I think the question remains, however, as to whether “expressive association” was intended to accompany the freedom of speech and other First Amendment guarantees.

It seems likely that had the dissenting justices been able to draw one more vote to their side, this decision would have exhibited elements of liberal activism. In his Boy
Scouts dissent, Justice Stevens asserted that the main purpose of the Boy Scouts was not to oppose homosexuality and that for this reason such a member would not hinder the group's goals. He also states that homosexuality is not explicitly mentioned within the Boy Scouts' rules and therefore this group could not be singled out as ineligible for membership. Justice Souter echoed this sentiment in his Boy Scouts dissent, claiming that the Boy Scouts had not taken a strong stand against homosexuality prior to this case (Boy Scouts of America v. Dale 000 U.S 99-699 (2000)). It appears that both justices that authored dissents (as well as Justices Breyer and Ginsburg, who joined in judgment) were giving more weight to their own interpretation of the Boy Scouts' regulations than the constitutional argument in question. I believe that with any outcome of this case, some degree of activism would likely be involved.


Congress enacted the Gun Free School Zone Act in 1990, which held that it was a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone" (United States v. Lopez 000 U.S U10287, 551 (1995)). In 1992, Alfonso Lopez Jr., a high school senior in San Antonio, arrived at school with a concealed gun and ammunition. School officials received an anonymous tip that Lopez possessed the weapon and subsequently confronted him about the matter. Lopez was then arrested and charged with violating a Texas law that prohibited the possession of firearms on school property. These charges were dismissed after a federal complaint was filed and it was contended that Lopez had violated the Gun Free School Zone Act (United States v. Lopez 000 U.S U10287 (1995)).
Lopez contested the federal charges on the grounds that Congress did not have the Constitutional authority to pass laws to which public schools are subject. The Federal District Court responded by asserting that in enacting the law, Congress was acting within its powers to regulate commerce and that public schools were directly related to such a cause. Lopez was then found guilty of violating the Act, but appealed on the grounds that the Gun Free School Zone Act was not a valid application of the Commerce Clause and that Congress could therefore not exert authority in such a manner. The Fifth Circuit Court of Appeals agreed with this contention and reversed the order of the District Court. The Supreme Court affirmed this judgment in a 5-4 decision. The majority was composed of Chief Justice Rehnquist (who authored the opinion) as well as Justices O'Connor, Scalia, Kennedy, and Thomas. Justice Breyer issued the dissenting opinion, which was signed by Justices Stevens, Souter and Ginsburg; Justices Stevens and Souter offered additional dissenting opinions (United States v. Lopez 000 U.S U10287 (1995)).

The majority opinion of Lopez states that the federal government's powers are minimal and specific, whereas the state governments enjoy a vast amount of authority within their jurisdictions. The Constitution does allow Congress to "regulate Commerce within foreign Nations, and among the several States, and within the Indian Tribes" (Article I, 8, cl. 3). However, many prior holdings of the Court have demonstrated that limits exist in terms of the activities that can be classified as "commerce." The 1935 decision of A.L.A. Schecter Poultry Corp. v. United States (295 U.S. 495) was the first case to draw a clear distinction between activities that directly affected interstate commerce and those that were only indirect. Congress was deemed able to legislate only in regard to measures found to have a direct relationship with interstate commerce. It
was contended at this time that allowing Congress to regulate any measure that may even indirectly affect interstate commerce would lead to unlimited federal power in this sense (*United States v. Lopez* 000 U.S. U10287 (1995)).

As a result of *NLRB v. Jones and Laughlin Steel Company* 301 U.S. 1 (1937), the commerce power was expanded somewhat to include intrastate commerce activities that were so closely related to interstate commerce that their regulation was instrumental for the effectiveness of the interstate commerce policy in question. The *Jones* case offered reasoning similar to that found in the *Schecter* suit, alleging that the power of Congress to regulate interstate commerce must not be interpreted in a manner that strips states of their Constitutionally mandated jurisdiction and authority, therefore creating a fully centralized governmental system (*United States v. Lopez* 000 U.S. U10287 (1995)).

Using the ideas set forth by past precedents, the *Lopez* majority developed a list detailing the aspects of commerce that Congress was authorized to regulate. Channels of interstate commerce were subject to federal rules; Congress was authorized to make law regarding persons and things involved in interstate commerce, even if such entities originated from intrastate commerce; and any activity that significantly affects interstate commerce could be subject to federal scrutiny. The majority held that the fact that an activity may affect interstate commerce in some manner is not enough to afford full discretion to Congress; rather, a “substantial” effect must be demonstrated in order for Congress to maintain authority over the issue (*United States v. Lopez* 000 U.S. U10287 (1995)).

In terms of the Gun Free School Zone Act and its applicability under the Commerce Clause, the *Lopez* majority determined that the legislation is a criminal statute
and is in no way related to interstate commerce (or any form of commerce). The simple possession of a gun was found to have no substantial effect in interstate commerce

(United States v. Lopez 000 U.S U10287 (1995)).

The federal government’s argument in attempting to connect the commerce clause to the Lopez situation asserted that the possession of firearms on school grounds could lead to violent crime, which could potentially affect the economy. Taxpayers would be burdened with the high costs of violent crime within their communities; persons would be less willing to spend time in areas considered to be crime-ridden, therefore depressing businesses within such neighborhoods; and a threatening school environment could lead to less productive students and consequently less productive workers in the future. If these ideas were to be upheld, Congress would likely be able to regulate any activity possibly leading to violent crime, as well as any activity found to decrease productivity of a segment of the population. In considering these arguments, the Court also considered whether such an interpretation could lead to the ability of Congress to regulate any activity (not only violence) having an impact on classroom learning. This, in turn, could result in federal authority over many educational issues currently controlled by the states

(United States v. Lopez 000 U.S U10287 (1995)).

The majority opinion of the Supreme Court rejected the federal government’s claim that the actions taken by Lopez would significantly affect the operations of interstate commerce, even as manifested in the possible effects described above. According the majority, “a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that
he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce” (United States v. Lopez 000 U.S. 10287, 567 (1995)). The majority was not willing to allow for an interpretation that would significantly expand the powers afforded to Congress under the Commerce Clause, as it was contended that such action would end the distinction between federal power and the authority of state and local governments (United States v. Lopez 000 U.S. 10287 (1995)).

Although this case resulted in a conservative decision handed down by decidedly conservative justices, United States v. Lopez 000 U.S. 10287 (1995) seems to exhibit more signs of judicial restraint than judicial activism. The majority did not defer to the judgment of Congress in this situation; however, it was not invalidating all legislative discretion in regard to this issue. Nothing in the majority’s opinion prohibited stated from enacting their own laws to punish persons bringing firearms onto the property of public schools.

The majority opinion of Lopez also offers a fairly strict interpretation of the Commerce Clause. The justices cited the history of interpretation governing Congress’ power to regulate commerce, and refused to adhere to a more broad definition than had previously been established. Had the Court decided to accept the Government’s ideas regarding commerce, it would have effectively created constitutional law that did not relate to the text or intent of the provision (one signal of an activist decision).

Since the actions taken by Lopez were not considered commercial, and no contention or suggestion exists that the Gun Free School Zone Act is related to another power specifically delegated to Congress by the Constitution, the majority seems to have
followed the Tenth Amendment by delegating this matter to state discretion. Although some scholars characterize the Rehnquist Court as activist partly due to the preponderance of decisions that restrict the power of the federal government, I would argue that the *Lopez* decision demonstrated restraint because of the majority’s attention to language and intent of the contested text.

I think that the dissenting justices formulated their reasoning in a more activist manner than did the majority. It appears that the more liberal justices took great pains to stretch the definition of “interstate commerce” in order to include this particular situation and therefore expand the power of the national government. Liberals do tend to favor a more prominent role for the federal government (as was mentioned previously), so it seems likely that their interpretation of the commerce clause was tailored to this end.


*Bush v. Gore* 000 U.S. 00-949 (2000) is perhaps the Rehnquist Court decision that is most often subject to allegations of conservative judicial activism. The case was initiated during the 2000 presidential election between Republican George W. Bush and Democrat Al Gore. The race was remarkably close in Florida, where Bush had been determined the winner by less than 2000 votes. Due to this small margin, an automatic recount was administered in accordance with Florida law. Following the recount, Bush still led the race by over 200 votes, although absentee ballots had not been totaled at the time. As the recount progressed, the state noted discrepancies in the manner that different counties in Florida had implemented voting procedure, and it was alleged that certain traditionally Democratic counties had undercounted ballots. Democratic Party
supporters demanded a hand-recount of all ballots in order to ensure the accuracy of the final numbers (*Bush v. Gore* 000 U.S. 00-949 (2000)).

However, Florida statutes mandated that election results be certified by November 14, electors chosen by December 12, and that electors cast ballots by December 18. These provisions did not allow time for the recount that was requested. The Florida Supreme Court did decide to extend the deadlines in order to authorize the recount, but was subsequently asked by the United States Supreme Court to provide reasoning behind this holding (*Bush v. Gore* 000 U.S. 00-949 (2000)).

The election results were certified on November 26, in accordance with the extension that had been granted, and Bush was declared the winner in Florida. Gore then filed a complaint in a Florida Circuit Court, claiming that the certification was invalid. He alleged that a significant number of illegal votes had been counted, and a significant number of legal votes had not been counted. The Circuit Court dismissed the matter, and Gore appealed to the Florida Supreme Court, which then agreed to hear the case (*Bush v. Gore* 000 U.S. 00-949 (2000)).

The Florida Supreme Court determined that Gore had demonstrated the proper burden of proof in contending that during the hand recount, Miami-Dade County had failed to examine ballots that the voting machines had not counted. Since a “legal vote” was defined as one that indicates the intent of the voter, a recount of these supposedly undercounted ballots was authorized. It was also decided that a net gain for Gore could be added to the votes already counted, despite the fact that the certification deadline had already passed. Because the votes were deemed “legal,” the fact that they could possibly
change the outcome of the election was not viewed as a problem by the Florida Supreme Court (*Bush v. Gore* 000 U.S. 00-949 (2000)).

In response to the Florida Supreme Court’s verdict, Bush filed a claim that Florida had violated Article II of the Constitution by creating new guidelines for determining the outcome of federal elections, and also that the inconsistent recount policies in Florida violated the Equal Protection Clause and the Due Process Clause. The per curiam opinion of the Supreme Court asserted that Florida’s election recount process did indeed violate the principle of “equal protection.” Chief Justice Rehnquist, along with Justices O’Connor, Kennedy, Scalia, and Thomas, constituted the majority. Justices Stevens, Souter, Breyer, and Ginsburg each offered a dissenting opinion (*Bush v. Gore* 000 U.S. 00-949 (2000)).

The majority opinion of *Bush* explained that individuals have no federal constitutional right to vote for their state’s electors in Presidential elections. However, when states decide to choose a statewide vote as the method of elector selection, all eligible citizens are entitled to equal protection regarding their votes. First, all persons meeting the requirements must be able to vote; second, the state may not treat votes in a manner that gives preference to some over others. The practice of counting votes in an inconsistent manner was deemed just as problematic as arbitrarily denying certain citizens a vote (*Bush v. Gore* 000 U.S. 00-949 (2000)).

The procedures implemented by Florida officials to recount the ballots were found to result in the denial of equal consideration of votes. Since different counties (and even different ballot-interpretation groups within each county) utilized different methods in order to determine voter intent, it cannot be asserted that all votes were considered
fairly. Furthermore, the recount totals from two counties were allowed to be included in the certified vote, which presumably discriminates against voters in other counties whose ballots had not been recounted by hand (Bush v. Gore 000 U.S. 00-949 (2000)).

Another problem with the recount process was that not only were the supposed “undervotes” counted, the ballots in which more than one candidate appeared to be selected were subject to interpretation as well. Because neither type of vote would have registered when counted by machine, this process also discriminates against voters whose counties did not participate in a manual recount. It is certainly feasible that the inclusion of these votes could significantly change the outcome of the election, and the majority found that this remedy was not consistent with offering equal protection to all voters (Bush v. Gore 000 U.S. 00-949 (2000)).

The Supreme Court contended in the per curiam Bush opinion that in order for the recount process to be fair, Florida would need to adopt comprehensive and consistent laws governing the issue, which it lacked at the time of this case. With the current laws, it was decided that Florida would not have enough time to develop such statutes and correctly administer a recount in time for the national deadline of elector selection; therefore the recount was ordered to cease (Bush v. Gore 000 U.S. 00-949 (2000)).

In their dissenting opinions, Justices Souter and Breyer argued that the case should not have been heard in the first place, and all four dissenting justices would have allowed the recounts to proceed if Florida courts mandated that this happen. The dissenting opinions also failed to find a valid equal protection claim (Bush v. Gore 000 U.S. 00-949 (2000)).
I must agree with the assertion that Bush v. Gore was indeed a decision motivated by judicial activism. (Although it could technically be classified as a liberal decision because it granted more power to the federal government, far too many factors overshadow any contention that the conservative justices made a liberal decision and therefore acted in a restrained manner). First of all, the majority was quick to invalidate the Florida laws governing voting and the selection of electors in order to implement what David Luban would likely term a “structural remedy.” Although the only remedy that immediately applied to the case was to stop the recount, the Court was essentially creating a policy. It can also be argued that the majority used a loose interpretation of the Equal Protection Clause of the Fourteenth Amendment when deciding the case. While I do not believe that the justices were incorrect in asserting that the inconsistent recount policies violated the principle of equal protection, I am unsure as to whether the only way to guarantee such protection was to impose a prescribed course of action onto the State of Florida. This issue is somewhat addressed in concurring and dissenting opinions for the case, but the per curiam opinion does not seem to seriously consider other options or allow Florida to amend its own system.

One characteristic of an activist decision is the probability that the decision was judged in a manner that would produce certain results, and it seems likely that this may be true for Bush. The halting of the recount ensured that the election would stand as it was following Florida’s certification and it is certainly possible that the justices had an interest in the eventual result. The five justices comprising the majority are considered conservative or moderately conservative, and their decision resulted in the election of a conservative president. The (liberal) dissenting justices also appeared to prefer
resolutions that furthered the goals of the liberal presidential candidate. (Allowing the recount to proceed would possibly have worked for the benefit of Gore). It seems evident that party affiliation and preference manifested itself in both arguments. However, I do not feel that this occurrence is necessarily restricted to the Rehnquist Court, as I would imagine that justices on any Supreme Court would hold a personal preference for one candidate in a presidential election.

Conclusions

Despite allegations that the Rehnquist Court has consistently made activist decisions with conservative ideals in mind, my examination of this sample of cases does not indicate that this is true in all instances. Although I would consider the Bush decision an activist one and concede that Boy Scouts and Santa Fe contain some characteristics of activist decision making, I cannot identify an overwhelming tendency of the Court to exercise judicial activism. I believe that the Rehnquist Court as a whole has used restraint just as much as activism, perhaps depending on the issue before the Court. It seems reasonable to assume that the Court utilizes both major decision making models, and it does not appear that the justices are consciously choosing one over the other.

It is possible, however, that the justices as individuals do participate in activist decision making in regard to certain issues (which differs depending on each particular person). Santa Fe indicated that perhaps the three most conservative justices would have used their personal preferences to create policy had they been afforded the chance. Also, the opinions issued in Bush suggest that several of the justices may have ruled in order to
bring about specific results. However, I do not believe that the Rehnquist Court as a whole can be characterized as an activist court simply because of these instances.

Perhaps the most important conclusion I can draw as a result of this examination is that liberal judges do not necessarily subscribe to the philosophy of judicial activism, and not all conservative judges use judicial restraint in all situations as the stereotype implies. Nor is the reverse true, especially for the Rehnquist Court. The liberal justices have not acted in a more restrained fashion than the conservatives. It seems that judicial decision-making, especially as it applies to the Supreme Court, can depend on a variety of factors and often varies depending on the issue at stake. Based on the cases that I have examined, it is evident that the justices of the Rehnquist Court utilize both judicial activism and judicial restraint.
References


*The Canon and Chayes articles were referenced in the footnotes of other sources that I utilized. Therefore, I am aware that the information was derived from those works. However, I did not have firsthand access to these sources and have cited the authors who discussed their theories.*