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Received: from [128.135.240.190] (sunstein423.uchicago.edu [128.135.240.190]) by midway.uchicago.edu (8.10.1/8.10.1) with ESMTP id e8TIWpX29502 for <hevans@usnews.com>; Fri, 29 Sep 2000 13:32:51 -0500 (CDT)

Mime-Version: 1.0

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To: Harry Evans <hevans@usnews.com>

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Subject: Re: Supreme Court

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>Thanks much. Here's the piece, forthcoming in the American Prospect.

>-- If you'd like to give a call, please do? I'll be here for another

>hour or so -- many thanks, all best wishes --

Federalism's Future

Cass R. Sunstein

What are the powers of the national government? When is the nation allowed to act? When must the states act instead? These are not trivial issues. The answers will determine the ultimate fate of measures safeguarding the environment, preventing violence against women, protecting endangered species, and banning certain crimes in general and hate crimes in particular.

The appropriate exercise of national power sharply divides Republicans from Democrats. Even more important, it sharply divides members of the Supreme Court, making federalism by far the most lively of all issues in current constitutional law. George W. Bush says that his favorite justices are Antonin Scalia and Clarence Thomas, and that he would like to appoint justice who agree with them; Scalia and Thomas have been arguing for a far narrower view of national power than has been taken by the Supreme Court in over sixty years. If Governor Bush is elected President, the Scalia/Thomas view is likely to receive increasing support. There will be more limits on Congress' ability to deal with problems that, in the public's view, deserve national attention -- and greater reliance on state government, which often lack the resources and the will to remedy those problems.

There is a larger, and much-neglected, story in the background here. In the recent past, Governor Bush, and the Republican Party, have made "judicial activism" a national issue. But in the recent past, the real "judicial activism" has come from the right, in the form of countless efforts to persuade federal courts to strike down legislative enactments. The supposed "judicial activism" of which the

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Republicans complain consists, almost entirely, of reaffirmation of long-established law. But judicial activism on the right consists of something very different -- dramatic new departures, abandoning long-established law and threatening a wide range of actual and proposed initiatives from the elected branches of the national government.

Federalists and Antifederalists

To understand the modern debate, a little history in order. According to a standard conservative view, the Constitution was rooted in fear of a national power. But this is a myth. In fact it has things exactly backwards. The Constitution was not born from fear of national authority. It was produced, above all else, because of fear of the power of the states. The framers of the Constitution were enthusiastic centralizers. They sought to create a much stronger national government.

The Constitution was of course predated by the Articles of Confederation. Under the Articles, state power was an obstacle to the creation of a national economic marketplace, even to the creation of the nation itself. The Constitution represented a dramatic and self-conscious expansion of the authority of the central government - above all, perhaps, through the framers' grant of a brand-new authority, to Congress, to regulate "commerce" among the several states. The antifederalists, opponents of the Constitution, claimed that the national government would be remote and unaccountable, and that the only vehicle for genuine self-government would lie in respect for state authority and for a sharply limited central authority. (Whether on the Supreme Court or in the political arena, modern opponents of national power actually carry forward the thinking of the antifederalists, not the framers.)

In rejecting the antifederalists' views, the Federalists spoke from their own unfortunate experiences with state authority. But they also had a theory about why the national government had large advantages over the states. They believed that small governments, operating at the state and local levels, were especially vulnerable to the influence of factions, understood as powerful private groups with their own parochial agendas. In the Federalist No. 10, James Madison urged that in a larger government, it was more likely that elected officials would represent a "fit choice," with "the most attractive merit." Thus Madison favored a strong role for the central government, on the simple ground that it would provide better protection of rights and generally do a better job. "Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other."

Of course the Federalists won the national debate. Equally important, their victory was endorsed and expanded at crucial moments in the nation's history. Two of these moments were especially important. The first was the extension of national power after the Civil War, based largely on Lincoln's arguments about the need for a powerful,

rights-protecting central government and the dangers of oppression at the state level. The second was the rise of greater national authority during the New Deal, with Franklin Delano Roosevelt's insistence on the need for a strong national authority to help the disadvantaged and to promote economic prosperity.

But in every period of American life the antifederalist vision, in one or another form, has also had its vigorous advocates. At least since the New Deal period, Republican candidates have consistently argued for a reduced national role. Here as elsewhere, George W. Bush has not provided many details, but his general direction is clear. It is evident that the Republican Party would seek a diminished national role in many domains, giving states greater flexibility in such areas as environmental protection, health care, and welfare reform. In some of these domains, state flexibility isn't a bad idea. But there is an inevitable danger that such flexibility will mean less protection for citizens, if only because states have to compete against each other to attract business, and the competition will create a kind of "race," among the states, to do less and less.

It is for this reason that the Republican Party's opposition to national authority is no mere abstraction. It is closely associated with, and a way of promoting, that party's substantive agenda. In arguing for national action, Democrats, starting with Roosevelt, have made exactly the same point, contending if the nation does not act, no one will.

Judicial Activism Under The Commerce Clause

For this election, however, the most important issue may well be the future of the Supreme Court. For the first time since the New Deal itself, the Court is in the midst of rethinking, in a fundamental way, the powers of Congress under the commerce clause. Indeed, the question of national authority has become the leading issue within the Court. Bush's favorite justices have made it clear that they would like to see nothing less than a constitutional revolution, resulting in a significant curtailment of national authority (so much for conservative complaints about judicial activism). To understand the point, we need to return to history.

In the early decades of the twentieth century, the Supreme Court struck down many national enactments, concluding that Congress's power to regulate commerce "between the several states" should be narrowly construed. In a series of cases, the Court said that Congress lacked the constitutional authority to do many things we now take for granted -- to regulate the mining of coal, to forbid child labor, to establish retirement and pensions plans in the railroad industry, and to regulate the slaughter and sale of chickens. It was only at the end of the New Deal period that the Court relented, concluding that so long as Congress' actions had a "rational" connection to interstate commerce, the judiciary should not stand in its way.

The big shift came in 1937, when the Supreme Court upheld the National Labor Relations Act. The Court made it clear that a

democratic effort to stabilize labor-management relations in any particular area would inevitably have effects on the national economy. The Court learned this lesson, involving the economic interrelationships of the states, very well. Between 1937 and 1995, the Court never struck down legislative action under the commerce clause. The Court allowed Congress to prevent racial discrimination at small restaurants, to apply wheat quotas to a local dairy farm in Ohio, to ban loan-sharking enforced by threats of violence, and to apply maximum hour and minimum wage laws throughout the nation.

Why, for most of the twentieth century, did the Court decide to leave Congress so much room to maneuver? Part of the answer is historical. In the midst of the Depression, the nation required national action, and the Court could not long stand in the way. The Court was also responsive to democratic considerations: Whether national action is appropriate in light of the commerce clause is a question on which the Supreme Court should be reluctant to second-guess the elected legislature. But there are two still more important and enduring points, involving economic interdependence and the nature of the Constitution itself.

Economic interdependence is inevitable in modern societies. If a strike occurs at a plant in Ohio, it is likely that sooner or later, people outside Ohio will be affected. If there is racial discrimination at hotels in Georgia, it is inevitable that some people will be less likely to travel and do business in Georgia. The level of wages for low-income workers in New York will matter to states other than New York. Seemingly local acts often have national repercussions. In any case there is little need for an aggressive role by the Supreme Court in protecting states against national incursions. Under the Constitution, the states are represented as such in the national government - most dramatically through the composition of the Senate, with each state having two representatives regardless of population. As the Court wrote in 1985, the "principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself," for the composition of that government "was designed in large part to protect the States from overreaching by Congress." In these circumstances, the Court has rightly concluded that its own role should be minimal.

A Coming Revolution?

But more recently the Court has shifted ground. In the process, it has started to draw over a half century of law into fresh doubt. In 1995, the Court held, by a 5-4 vote, that Congress exceeded its authority in enacting the Gun-Free School Zones Act, which made it a federal crime to possess a firearm in a school zone. On behalf of Congress, the government argued that interstate commerce would inevitably be affected by gun violence near schools, because such violence would threaten education, which was central to the development of the national economy. The Court rejected the argument, signalling that it would be prepared to look carefully at any claimed connection between national law and interstate commerce. In a separate opinion, Justice Thomas said that he was skeptical of much of the constitutional law of federalism that had emerged in the last

six decades.

A far more dramatic step came just this year, when the Court, again by a 5-4 vote, struck down a key provision of the Violence Against Women Act (a law that claimed bipartisan support). The relevant provision creates a federal civil rights remedy for victims of sex-related violence. Congress was well aware of the risk of a challenge in the Supreme Court, and it found, reasonably and on the basis of extensive evidence, that sex-related violence has significant adverse effects on the economy -- not least because it deters women from travelling at times and to places where violence might occur. But the Court said that this was not enough. In its most important passages, the Court raised new doubts about Congress' power to regulate noncommercial activity, such as violence - in the process drawing into question the constitutional validity of the Endangered Species Act, the Clean Water Act, and current proposals designed to penalize hate crimes at the national level.

There is much more. The Court has recently created a brand-new obstacle to national power, saying that Congress cannot "conscript" states by telling them to enforce federal laws calling for background checks on handgun purchasers and regulation of the disposal of radioactive waste. The Court has also expanded the immunity of state government from liability for its own unlawful acts, including unlawful discrimination on the basis of age. The result is a singularly strange situation in which Congress can create rights against states, but cannot make states pay for violating them.

Are we in the midst of a revival of the pre-New Deal view of congressional power? What parts of national criminal law might now be vulnerable to federal challenge? Is the Court really prepared to raise questions about national environmental law? It is much too early to tell. In some cases, a majority continues to allow action by the national government. In the 1980s, the Court went back and forth on some crucial federalism questions, involving the power of national government to impose certain requirements (such as minimum wage and maximum hour laws) on the states. By a slim majority, which continues to prevail today, the Court eventually concluded that Congress could indeed do so. And in the face of a dissent from Justice O'Connor, the Court has also upheld "conditional spending" programs, by which Congress gives money on condition that states comply with national requirements (for example, prohibiting the purchase of alcohol by people under the age of 21).

But the reach and future of these decisions is uncertain, and some evidence of new departures is provided by the Court's recent decision to hear a constitutional challenge to the Clean Water Act. Of course the particular arguments made to the Court will matter. But the ultimate answers will inevitably turn in large part on the Court's future composition. Consider the Court's internal dynamics. Justices Scalia and Thomas would like to go much further than the Court has thus far. Chief Justice William Rehnquist often seems to agree with them, but he is more likely to proceed cautiously, in line with precedents, and one case at a time. Justices Ruth Bader Ginsburg, Stephen Breyer, David Souter, and John Paul Stevens are the regular dissenters from decisions questioning Congress' authority.

That means that as usual, Justices Sandra Day O'Connor and Anthony Kennedy are the swing votes. In hard federalism cases, they tend to swing toward Scalia and Thomas. O'Connor, usually a centrist on the Court, and almost invariably attuned to the facts of individual cases, seems uncharacteristically drawn to an extreme position on federalism issues. What this means is that a narrow majority is quite willing to reject the Court's own previous reasoning and to erect new obstacles to democratic efforts at the national level. And many of the key federalism cases are 5-4 divisions. If Gore is elected, it is unlikely that the Court will much expand on the recent cases; it might well retreat from them. If Bush is elected, it is likely that the Court will continue to raise doubts about Congress' constitutional power. Such a development would have immense importance. It would force the public to rely, much more of the time, on state governments, which are often financially strapped and which are often deterred from regulating by the constant need to compete with one another to attract business.

There is an undoubted connection between the developments in the area of federalism and developments in other areas in which the Court has drawn the authority of national and state governments into doubt. In the last years, the Court has also limited congressional power to enforce the fourteenth amendment, the Constitution's most general guarantee of both equality and liberty. Hence the Court has invalidated the Religious Freedom Restoration Act (enacted with overwhelming and bipartisan support in Congress) and shown no patience with Congress' argument that the Violence Against Women Act was a legitimate effort to protect the equal rights of women. Affirmative action may or may not be a good thing; reasonable people disagree on that question. But the Court has shown little reluctance to decide that issue on its own, in the process throwing almost all affirmative action programs into serious constitutional doubt, even when enacted by Congress.

In a related development, the Court, again by a 5-4 vote, struck down the attempt by the Food and Drug Administration to assert authority over the sale and marketing of tobacco. And the Court has been badly divided on the question whether and when Congress may give citizens "standing" to sue the government when it is not enforcing laws protecting the environment. Justice Scalia and Thomas would sharply cabin congressional power, and have occasionally gotten five votes for their position; but they have lost too, often by 4-5 votes, which could easily become 5-4 or 6-3 majorities if Governor Bush is elected. Within federal courts generally, there is an unmistakable trend, promoted by Reagan and Bush appointees, toward aggressive judicial interference with national action, on some issues the most aggressive since the New Deal itself.

There are real ironies in the recent developments. The Republican Party in general, and George Bush in particular, have spent a great deal of time complaining of an excessive judicial role in overseeing the elected branches, and proclaiming their commitment to "judicial restraint." Don't believe it for a second. In the last decade, the real "judicial activism" has come from Republican appointees -- often in the form of decisions invalidating congressional enactments in the