The Right and Wrong Kinds of Judicial Activism

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I. Introduction

With President Obama poised to name a new Supreme Court Justice, those who think of themselves as conservatives are demanding that the President appoint someone who is not a "judicial activist" but will interpret the law and not make it. They applaud Chief Justice John Roberts for his statement during his confirmation hearing that his job was like that of an umpire, just calling balls and strikes, and Justice Sotomayor for her vision of a Justice as simply applying the facts to the law. Anyone who has paid the slightest attention to the workings of the Supreme Court knows that there is much more to being a Justice than the kind of mechanical approach suggested. They also know that this minimalist approach is designed to demonstrate that, whoever else might be called a judicial activist, that label cannot be applied to them.

So what is a judicial activist? That is not an easy question to answer because, unlike terms such as Democrat or Republican or liberal (progressive) or conservative, no one proudly wears that mantel. Every judge proclaims that he or she is just following the law, even when the law is embodied in phrases like "due process" or "equal protection" or "probable cause" that are hardly self-defining. But as this Issue Brief shows, every Justice who has been on the bench since at least 1954, whether generally thought of as liberal, conservative, or some place in between, has engaged in judicial activism. The important question is which instances of activism can be justified under a theory of what the Supreme Court should and should not be doing.

The activist label is frequently applied to the era of Chief Justice Earl Warren, but in many respects the *Lochner* era,[1] when the Court struck down most legislative efforts to deal with economic inequities and oppression of those with no power, is at least in a league with the Warren Court. And today, there are those who contend that the current Court, beginning with many decisions from the era when William Rehnquist was Chief Justice and continuing with his successor Chief Justice Roberts, also deserves that title.

A cynic might say that a judicial activist is any judge who issues a decision that disagrees with the views of the person applying the label. A slightly more nuanced definition would call a decision an activist one where it overturns the considered judgment of legislative or executive branch officers, with the prototypical case being one

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[1] Lochner v. New York, 198 U.S. 45 (1905).

in which the Court declares a duly enacted statute unconstitutional. But since *Marbury v. Madison*,[2] the Supreme Court has exercised that very power, as first applied to federal laws and then to those of the states. Thus, unless one is prepared to overrule *Marbury*, some amount of judicial activism is not only inevitable, but necessary if the Constitution is to remain the supreme law of the land. In almost all of the cases discussed below, there are also respectable arguments that the Court reached a result that was incorrect under the prevailing law. But getting the wrong answer is not what is generally meant by a charge of judicial activism and outcomes play a very limited role in the test that I propose.

Most of the outcries over judicial activism relate to decisions on the merits of a case, but there are also significant cases of what I will call procedural activism. For example, for years the States continued to apportion their legislatures and their Congressional districts in ways that greatly favored rural voters over those who lived in the cities. Because any change had to come from a mal-apportioned legislature, nothing happened, and for many years the federal courts refused to become involved. Finally, in 1962, in *Baker v. Carr*,[3] the Court stepped in and subjected the process to constitutional scrutiny under the Equal Protection Clause. The activism there was not on the merits – the entire Court thought that these extreme gerrymanders were unconstitutional – but on whether the Court should remain on the sidelines.

A similar kind of procedural activism can be found in *Flast v. Cohen*,[4] in which the Court held that individual taxpayers had standing to challenge the use of federal funds that allegedly violated the Establishment Clause of the First Amendment. In doing so, *Flast* opened ever so slightly the taxpayer standing door that had been closed in *Frothingham v. Mellon*,[5] and that has subsequently remained closed except in the narrow set of cases covered by *Flast*. Then, on the other side of standing activism, the Court in *Raines v. Byrd*,[6] held that the portion of the Line Item Veto Act that specifically conferred standing on Members of Congress to challenge the constitutionality of that law, because it would interfere with their powers as Members of Congress, was itself unconstitutional and dismissed the suit.

The remainder of this Issue Brief focuses on cases that reached the merits, and it proceeds in two parts. In the first, I describe some of the most prominent cases that gave rise to the charge that the Warren Court was filled with liberal judicial activists, largely because the results were supported by those who are considered political liberals. I then discuss two sets of decisions, mainly from the era of Chief Justice Warren Burger, dealing with the death penalty and separation of powers. I call this the period of "mixed judicial activism" for two sets of reasons: (1) the Justices in this period included holdovers from the Warren Court, as well as those who came to dominate the more conservative Court that followed it; and (2) some of the results pleased liberals, others

[2] 5 U.S. 137 (1803).
[3] 369 U.S. 186 (1962).
[4] 392 U.S. 83 (1968).
[5] 262 U.S. 447 (1923).
[6] 521 U.S. 811 (1997).

were favored by conservatives, and others were seen as largely non-ideological. I conclude the first part by dealing with cases from the Rehnquist and Roberts eras as Chief Justices, for which a similar charge of activism could be leveled, but for which the outcomes were generally favored by conservatives. This part does not attempt to include all or even most of the cases that might be labeled activist, but offers only a representative sample. In doing so, I recognize that the time periods overlap and the labels are over-simplified, but in the end this division seemed a useful way to present the cases from which a theory of judicial activism could be presented, which I do in the second part.

Briefly stated, my theory is that it is most appropriate for the Court to intervene and overturn legislative decisions when there is some reason to believe that our system of representative government has not worked and that the protections that the Constitution is supposed to afford are lacking. The most common circumstance of appropriate intervention is to safeguard rights of a racial or other minority that were not adequately represented in the political process. There is another important area to which this theory is also applicable: where the structural protections afforded by the Constitution's specific guarantees of separation of powers or federalism have broken down because of an imbalance in legislative powers. The meaning and validity of this theory can only be tested by examining cases actually decided, and the second part of this Issue Brief applies it to the major categories of cases discussed in the prior part and includes an assessment of whether the activism of the Court was or was not justified in each of those categories.

This Issue Brief is admittedly not a full treatment of judicial activism, in part because the term has many potential meanings.[7] I have chosen to focus only on rulings that declare either a state or federal statute unconstitutional. I also do not discuss judicial activism in statutory interpretation and, with the exception of campaign finance cases, I generally steer clear of cases dealing with the freedom of speech under the First Amendment, in part because that topic would require a separate Issue Brief and perhaps its own theory. Finally, I do not rate or rank Justices in terms of the degree to which they adhere to the theory propounded here. Rather, my larger point is that all Justices are activists from time to time, with greater or less justification in different cases. My hope is the term judicial activism will become used less as a mild form of slander, and with greater nuance, than has been true to date.

II. Judicial Activism – Some Representative Cases

A. The Warren Era of Liberal Activism

The five cases that combined to produce the unanimous opinion in *Brown v. Board of Education*[8]overturned state laws that specifically prohibited black children from attending school with white children. The laws were clear, their intent was unmistakable,

[7] *See, e.g.*, William Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 COLO. L. REV. 1217 (2002).
[8] 347 U.S. 483 (1954).

and they were supported by a majority of citizens in their jurisdictions, yet the Court held that they violated the Equal Protection Clause of the Constitution. Although indisputably controversial at the time, no person who has been nominated for the Supreme Court since, including Robert Bork, has said that he or she would reverse *Brown*, and even the most vociferous of the anti-activists do not include *Brown* in their litany of judicial misdeeds.

Before *Brown*, the Court decided a number of cases in which it ruled that activities such as the pledge of allegiance[9] and prayer in a variety of forms regularly conducted in public schools[10] violated the First Amendment rights of students who did not wish to participate in them and did not wish to be singled out for their non-participation. These ruling continued in the Warren Court in *Engel v. Vitale*[11] and *Abington Township v. Schempp,*[12] and they resulted in mounting criticism of the Court. Whether the activity at issue was the product of a law or just an official school policy made no difference to the Court, any more than did the fact that the vast majority of students and parents raised no objection to it.

As noted above, the Court decided in *Baker v. Carr*[13] that claims of inequality in numerical representation in state legislatures and Congress were justiciable. Thereafter, the Court first applied that ruling to congressional representation, finding the challenged districts to violate what came to be known as the principal of "one man, one vote,"[14] a result that was rather expected given the population-based approach for the House of Representation in Article I, § 2, clause 3 of the Constitution. However, when the issue of the make-up of state legislatures came to the Court in *Reynolds v. Sims,*[15] the Court not only held that "one man, one vote" applied to the legislative body analogous to the U.S. House of Representatives, but also the body most like the U.S. Senate. In doing so, the Court rejected all claims of allocation based on any principle other than population, although it did allow some limited flexibility for factors such as maintaining the integrity of political subdivisions.

The sexual privacy cases, beginning with the overturning of a ban on the use of contraceptives,[16] followed by the ruling in *Roe v. Wade,*[17] dramatically limiting the ability of the government to ban abortions, and leading eventually to the recent ruling in *Lawrence v. Texas,*[18] striking down all anti-sodomy laws, have proved the most troubling. That is due in no small part to the fact that some scholars who have criticized them agree

[9] West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).
[10] Everson v. Board of Educ., 330 U.S. 1 (1947).
[11] 370 U.S. 421 (1962) (outlawing the widespread practice of beginning the school day with a non-denominational prayer).
[12] 374 U.S. 203 (1963) (prohibiting the reading of the Bible at the opening of the school day).
[13] 369 U.S. 186 (1962).
[14] Wesberry v. Saunders, 376 U.S. 1 (1964).
[15] 377 U.S. 533 (1964).
[16] Griswold v. Connecticut, 381 U.S. 479 (1965).
[17] 410 U. S. 113 (1973); *see also* Doe v. Bolton, 410 U.S. 179 (1973).
[18] 539 U.S. 558 (2003).

with their outcomes, but not with what they perceive as the Court's reaching out to achieve those results, as well as the particular arguments used to support some of the broad rulings.

Another area where many members of the public became upset at what they saw as the activism of the Warren Court was with respect to the rights of persons accused of crimes. There were two different features of the Court's role that troubled its critics. First, the Court applied the Bill of Rights, which literally applies only to conduct by the federal government, to actions by state and local officials, by arguing that these protections were extended to the States through the Due Process Clause of the Fourteenth Amendment, which does apply to the States. This doctrine, known as incorporation, had been initially applied to the States in the 1920s, without great controversy, to the guarantee of freedom of speech in the First Amendment,[19] but the extension of virtually all of the protections available in the other amendments to those accused of crimes was a major expansion by the Court. Second, the Court expanded the substantive protections afforded by the Fourth Amendment (the prohibition against unreasonable searches and seizures),[20] the Fifth Amendment (the ban on coerced confessions),[21] and the Sixth Amendment (guaranteeing the right to counsel),[22] and it enforced those protections by forbidding the States to introduce evidence that was obtained in violation of them, even when it resulted in a probably guilty person going free.

B. The Burger Era of Mixed Activism

Supreme Court decisions in the area of the death penalty are often seen as an example of judicial activism, and to the extent that they have changed the law, it has been only to limit its availability as a punishment. The Warren Court did not issue any significant rulings on capital punishment, but four of its members were still on the Burger Court in 1972 when it temporarily halted the use of the death penalty in *Furman v. Georgia*.[23] Four years later, the Court held that subsequent changes in the manner in which it was applied satisfied the objections of at least a majority of the Court that the death penalty could be constitutionally applied in at least some, if not most, cases and allowed executions to resume.[24] Thereafter, some limitations were imposed, the principal one being that a death sentence was not permitted except where the murder of another person was the basis of the penalty.[25] However, it was not until the Rehnquist era that the Court held that it was unconstitutional to execute persons who are mentally retarded[26] or who were under the age of 18 at the time that they committed the crime.[27]

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[19] Gitlow v. New York, 268 U.S. 652 (1925).
[20] Mapp v. Ohio, 367 U.S. 643 (1961).
[21] Miranda v. Arizona, 384 U.S. 436 (1966).
[22] Gideon v. Wainwright, 372 U.S. 335 (1963).
[23] 408 U.S. 238 (1972).
[24] Gregg v. Georgia, 428 U.S. 153 (1976).
[25] Coker v. Georgia, 433 U.S. 584 (1977); Kennedy v. Louisiana, 128 S. Ct.2641 (2008) (re-affirming *Coker* as applied to rape of an 8 year old girl).
[26] Atkins v. Virginia, 536 U.S. 304 (2002).
[27] Roper v. Simmons, 543 U.S. 551 (2005).

The Burger Court was also very active in the field of separation of powers – which the federal Constitution does not require of the States – where it struck down a significant number of statutes passed by Congress and, in most cases, signed by the President. One of the most significant separation of powers cases, *Youngstown Sheet & Tube Co. v. Sawyer*,[28] was decided the year before Earl Warren became Chief Justice and laid the predicate for later decisions. The United States was at war in Korea, and steel was desperately needed for weapons of all kinds. The President had imposed a wage and price freeze, and he had declined to grant an exemption to allow the steel companies to raise their prices so that they could avert a strike from their workers. When they struck, the President ordered a Government take-over of the steel mills, and both the owners and the unions sued. The Court stepped in and set aside the president's order, finding that he lacked statutory or constitutional authority to issue it. The decision could be characterized as one supporting the primacy of Congress over the President, but President Truman and the dissenters saw it as the Court interfering with the country's ability to wage effective war.

The next significant separation of powers ruling did not occur until more than twenty years later in *Buckley v. Valeo*.[29] The Court there held that the manner by which the members of the newly created Federal Election Commission were appointed was inconsistent with the method set forth in the Appointments Clause, and thus they could not exercise the powers that Congress had granted to them in a statute that the President had just signed into law. Almost a decade later, the Court ruled in *INS v. Chadha*,[30] that the legislative veto, which had been included in over 200 laws passed by Congress, was a violation of separation of powers because it gave Congress power to act in a manner not provided for in the Constitution, in that case to order an alien deported after immigration officials concluded that the law entitled him to remain in this country. And on his final day in office, Chief Justice Burger authored the opinion in *Bowsher v. Synar*,[31] holding that Congress violated separation of powers when it assigned executive powers to the Comptroller General because he was subject to removal by Congress and not the President.

These cases continued into the Rehnquist era. Thus, when Congress finally agreed to cede to the President the right to sign a bill into law, and then reject certain spending and tax provisions of which he disapproved, the Court in *Clinton v. City of New York*[32] held that the statute – the Line Item Veto Act -- was unconstitutional because the Constitution requires the President either to sign or veto an entire bill, and does not allow him to pick and choose among its provisions, even when authorized by Congress to do so. Finally, when President George W. Bush sought to establish rules for detaining and trying enemy combatants at Guantanamo Bay Cuba, without explicit congressional

[28] 343 U.S. 579 (1952).
[29] 424 U.S. 1 (1976).
[30] 462 U.S. 919 (1983).
[31] 478 U.S. 714 (1986).
[32] 524 U.S. 417 (1988).

authority and without protections traditionally accorded persons detained in wartime, the Court stepped in and halted those efforts.[33]

C. The Rehnquist/Roberts Era of Conservative Activism

Political conservatives often oppose an expanded role for the federal government, but beginning in 1938 when the Court began upholding New Deal legislation, instead of striking it down, Congress increasingly relied on the Commerce Clause to exercise power in areas that once had been thought the exclusive province of the States. That trend continued unabated until 1995 when the Court in *United States v. Lopez*,[34] held that the federal law that made it a crime to have a gun in or in close proximity to a school exceeded Congress' power under the Commerce Clause. A similar fate befell the Violence Against Women Act in *United States v. Morrison*,[35] when the Court again found that Congress had no authority to outlaw violent acts against women where there was no direct connection to interstate commerce. The Court seemed to back off somewhat from this approach when, in *Gonzales v. Raich*,[36] it upheld the power of Congress to use the Commerce Clause to extend the prohibition against the sale of marijuana to individuals who grow it for their personal use, in that case to relieve pain that responded only to marijuana.

Other efforts by the Court to limit federal power based on other parts of the Constitution had more lasting impacts. In one set of rulings, the Court expanded its interpretation of the Eleventh Amendment, which prohibits certain kinds of lawsuits against States in federal courts, and thereby overrode the powers of Congress under the Commerce Clause and other parts of the Constitution to have generally applicable laws providing for money damages apply to States, including state universities and other state-created institutions that are not part of the governance structure of the state.[37] In one case, *Alden v. Maine*,[38] it found that an Eleventh Amendment-like immunity applied to cases based on federal law that were filed in state court, even though the Amendment speaks only of federal courts. In two other significant cases, the Court reached similar results, using the Tenth Amendment to limit the power of the federal government to require States to engage in certain conduct regarding the disposal of nuclear waste materials[39] and the control of the sale of firearms.[40] And when Congress tried to rely on its remedial authority under section 5 of the Fourteenth Amendment, the Court narrowly

[33] Hamdan v. Rumsfeld, 546 U.S. 557 (2006).
[34] 514 U.S. 549 (1995).
[35] 529 U.S. 598 (2000).
[36] 545 U.S. 1 (2005).
[37] Seminole Tribe v. Florida, 517 U.S. 44 (1996); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627 (1979).
[38] 527 U.S. 706 (1999).
[39] New York v. United States, 505 U.S. 144 (1992).
[40] Printz v. United States, 521 U.S. 898 (1997).

construed that provision and declared a variety of federal statutes unconstitutional on that basis.[41]

In the area of campaign finance reform, in which both Congress and the States have attempted to place limits on the influence of money on elections, the Court has placed major roadblocks in their way. This began with *Buckley* where, in addition to its Appointment Clause ruling, the Court also struck down the limits on the amounts that candidates could spend of their own money to run for office, the caps on the total amount from all sources that a candidate could spend, and the limit that an individual could spend – independently of a candidate – to support or oppose a candidate for elected office.[42] Although *Buckley* upheld the Government's right to impose some limits on how much can be contributed by any individual to a candidate for office, the Court in subsequent cases has made it more difficult to sustain lower limits based on a concern that restricting the size of contributions too far makes it too difficult for candidates to run for office, especially when they are opposing an incumbent.[43] On the other (liberal) side, the Court in *Caperton v. A. T. Massey Coal Co.*,[44] overturned a state supreme court ruling as a violation of Due Process, where a judge who successfully ran in an election for a seat on that court had been the beneficiary of more than $3 million in election-related support from the president of one of the parties, and then had cast the deciding vote in favor of that party. But the most activist ruling in this area came in January 2010 when the Court held that for-profit corporations have a First Amendment right to make independent expenditures to support or oppose a candidate for office, overturning a law that had been in effect since 1947 that specifically forbade corporations and unions from using their treasuries to make independent expenditures in federal elections.[45]

The Roberts court also intervened to upset decisions made by state and local officials who were trying to deal with the difficult remedial problems that remained when the formal segregation that preceded *Brown* had ended. The efforts of the Seattle and Louisville public schools to assure a modest level of integration and to assure equal opportunities for all students were found wanting by the Court in *Parents Involved in Community Schools v. Seattle School Board No. 1*,[46] with at least four Justices prepared to hold that any race-conscious method of assigning students violated Equal Protection. Similar rulings were also made in other areas involving laws that set aside a certain percentage of government contract work for historically disadvantaged minorities[47] or gave a modest assist to minorities seeking admission to a state university.[48]

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[41] United States v. Morrison, 529 U.S. 598 (2000); Kimmel v. Florida Board of Regents, 528 U.S. 62 (2000); University of Alabama v. Garrett, 531 U.S. 356 (2001).
[42] Buckley v. Valeo, 424 U.S. 1 (1976).
[43] Randall v. Sorrel, 548 U.S. 230 (2006).
[44] 129 S. Ct. 2252 (2009).
[45] Citizens United v. Federal Election Commission, 130 S. Ct. 876 (2010).
[46] 551 U.S. 701 (2007).
[47] Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).
[48] Gratz v. Bollinger, 539 U.S. 244 (2003).

Surely the most dramatic example of judicial intervention during the time of Chief Justice Rehnquist was the set of decisions that halted the recount in Florida and assured George W. Bush's election as President. Those cases, which had three separate rulings, contain examples of both procedural and substantive activism. As to the former, the Court's initial (unanimous) decision, which was issued while the recount was still underway, told the Florida Supreme Court that the United States Constitution required that the Florida court rulings had to be based on existing state law and that the Court stood ready to enforce that requirement.[49] Next, after the Florida courts had issued another decision, the Court, this time by a vote of 5-4, ordered the recount stopped until the Court could hear the appeal by candidate Bush.[50] And third, after finding (7-2) that the recount procedures violated the substantive protections of the Equal Protection Clause, the same 5-4 majority stopped the recount entirely.[51] In addition, three Justices also would have found that the Florida Supreme Court had so far deviated from the existing dictates of that State's election laws in its order relating to the recount that it had violated the constitutional provision that had been the focus of the first round in the Supreme Court.[52] Despite, or perhaps because of, its unique significance to the outcome of the 2000 election, none of the rulings in *Bush v. Gore* has been followed to make other changes in election law or even in Equal Protection jurisprudence generally.

The most recent area where the Court reached a result that liberals decried and conservatives applauded was in *District of Columbia v. Heller*.[53] There the Court struck down a law that banned the private possession of handguns, including in the home, on the ground that the statute violated the right to bear arms contained in the Second Amendment. And in *McDonald v. City of Chicago*,[54] the Court is almost certain to make *Heller* applicable nationwide, under the incorporation doctrine relied on by the Warren Court to extend most other provisions of the Bill of Rights to the States.

III. A Theory of Appropriate Judicial Activism

No one who has given the matter any serious thought contends that the Court should never overturn decisions made by the political branches. Aside from having to reverse *Marbury* and more than 200 years of Supreme Court jurisprudence, most people are comfortable with the Court playing some role as a check on the other branches. The hard question is determining the circumstances in which that role is legitimate. The only determinate that is clearly wrong is whether one agrees with the outcome of the decision on the merits. That does not mean that if there is a clear violation of the Constitution, that fact may not properly play a part in the Court's deciding to reach the merits. If there is such a clear violation, the Court is expected to step in and perform its checking function. But when the violation is less clear, we need guideposts to inform the Court as

[49] Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000).
[50] Bush v. Gore, 531 U.S. 1046 (2000).
[51] Bush v. Gore, 531 U.S. 98 (2000).
[52] *Id.* at 111-122.
[53] 128 S. Ct. 2783 (2008).
[54] No. 08- 1521, argued March 2, 2010.

to when intervention is appropriate and, once a decision is made to decide an issue, what deference should be given to the law being challenged.

I begin with the proposition that the Constitution, including the Bill of Rights and the Civil War Amendments, was enacted to provide a more or less permanent baseline for the structural protections that would assure a working democracy and as a guard against intrusions on important liberties. The Framers were aware that temporary majorities might enact laws inconsistent with these basic protections, and the Constitution was set up as a bulwark against such actions. And, as established by *Marbury*, the Court is there to enforce the Constitution and preserve those basic rights.

Of course, virtually every time Congress acts, some person or interest is harmed in some way and in theory could invoke claims based on denials of Due Process or Equal Protection. But if the courts were to pass on the merits of all such claims by re-balancing the interests that the legislature considered, they would become, in effect, super-legislatures, which is decidedly not the role that the Framers envisioned for them. The trick is to figure out when the general rule of deferring to the legislature should not apply, and the Court should actively seek to protect the right being asserted.

One part of the answer is found in famous footnote 4 in *Carolene Products*, where the Court embraced the notion of judicial activism (although not in those terms) to protect the rights of discrete and insular minorities.[55] Justice Brennan, in his opinion *Kramer v. Union Free School District*,[56] made a similar point in advocating a heightened standard of review (which almost invariably is the manner in which judicial activism is brought about). In rejecting deference to the legislature, the Court observed that a relaxed standard is "based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality." Thus, when there is reason to believe that the normal functioning of government has broken down and the rights of the challengers were not protected, often because of some structural impediment in the process of their representation, the case for judicial intervention is much stronger.

Those cases seem on target, but I would frame the issue more broadly than simply in terms of protecting the rights of minorities or others who are not full participants in the political process. I would also look to other structural impediments that might explain why the challenged law favors one outcome over another and/or why the current advantage is unlikely to change, absent court intervention. These propositions are not intended to provide a litmus test for appropriate interventions that can be mechanically applied to tell courts what they should and should not do, but are factors that the Court should consider in deciding whether the situation is an appropriate one for judicial activism. Whether these general propositions are useful and produce sensible results can

[55] United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).
[56] 395 U.S. 621, 628 (1969).

only be assessed by applying them to the cases discussed above, a task to which I now turn.

Let us begin with *Brown*, which no one cites as an example of inappropriate judicial intervention because it is undisputed that if the Court had not stepped in, the offending jurisdictions would not have abolished school segregation on their own. Even if all the blacks in those states had voted to elect legislators pledged to end segregation (which most of them could not have done because of discriminatory voting laws), those votes coupled with the modest number of white voters who would have supported that change would never have come close to altering the law. Thus, it was the Court or no one, in an area of law where the Constitution included specific protections for racial minorities, albeit not ones speaking directly to school segregation.

Two decades later, the situation was reversed, and whites were asking the Court to step in to prevent what they called reverse discrimination by government entities that were favoring black applicants over them. These were not instances where black majorities were protecting members of their race the way that the South protected white school children before *Brown*. Rather, these cases mainly involved majority white-controlled entities that were trying to make up for decades or more of discrimination. Whether such efforts were misguided or inartfully done, there was no basis to conclude that there were structural flaws in the process that led to the under-representation of the white majority. The only way in which it might have been argued that democracy was being undermined was that some, but not all, of these minority preferences were done outside the public view, by unelected and arguably unaccountable state officials, as evidenced by the fact that the details of these practices only became known after litigation had been brought. Thus, under one theory of democratic accountability, the Court might be suspicious of decisions advantaging one group at the expense of another made in secret outside the legislative arena, although that was not the basis on which the Court stepped in to set aside those efforts at affirmative action. More importantly, however, the Seattle and Louisville school cases involved open processes, in which the entire communities were involved in decisions that evolved over time and attempted to be as responsive as possible to all affected parties. Given the hard choices that had to be made to balance all the relevant interests, it is difficult to conclude that the invocation of a principle of color-blindness that a majority of the Court found in the Equal Protection Clause was little more than a substitution of its judgment for that of the local officials and citizens.

A second area of judicial activism in the Warren Court era was protection of the rights of those accused of crimes. Many in that group were minorities, but neither the excesses on which the Court focused, nor the nature of its rulings, were so limited. On the other hand, while defendants in criminal cases are, like all citizens, represented by their elected officials, they are not part of an organized group (and surely have no lobbying presence) and, at least in the United States, people get elected by being tough on crime, not on protecting the rights of the accused. While it is legitimate to object to some of the specific rulings, there is a strong argument that unless the Court enforced the Bill of Rights for those charged with crimes, no other entity would do so. That is especially

so where the death penalty was being used to punish those who crimes were very serious, but not of the kind that differentiated them from others whose lives were spared for reasons unrelated to the specifics of their offense or criminal history.

Much the same analysis supports the Court's intervention in the school prayer cases. Indeed, the number of children or parents who would object, let alone actively oppose religious practices in public schools was very small. If they had attempted to make their voices heard in the legislature (or school board), they would certainly have been defeated, for they are one kind of discrete and insular minority that the First Amendment's Establishment Clause was intended to protect.

The sexual privacy cases raise somewhat different considerations or, at the very least, are more complicated. The laws on contraceptives and abortions were based in part on the strongly held religious views of segments (sometimes majorities) in some, but not all States. For some of these laws, the States that still had them were in an ever decreasing minority, and there was reason to believe that they were rarely, if ever, enforced. Indeed, in the contraceptive cases, the claims were brought to avoid prosecutions that did not seem very likely, and there was no indication that legislative change was out of the question, although surely not without difficulty.

For the abortion laws, the picture was less favorable for change. Most States had some laws, and while there had been some movement in some places, resistance was high, and in many cases unlikely to happen outside of court. Moreover, the women who needed abortions were often young and unsophisticated in influencing public policy, and almost invariably wanted to be out of the public eye, as shown by the fact that the lead plaintiffs in the cases that struck down most limits on abortion were Jane Roe and Mary Doe. Even doctors who were willing to perform them were not numerous, and organizations like Planned Parenthood had strong supporters, but not in great numbers. At least as to those laws that banned all abortions, with no or very limited exceptions (such as only to save the life of the mother), the case for intervention was a reasonable one, but was made more problematic both by the limited basis in the Constitution for the ruling and by the scope of the decision that not only struck down the absolute bans, but, in effect, set up a regulatory regime to cover all abortions.

The same-sex sodomy case, *Lawrence v. Texas,* involved a set of circumstances different from the other sexual privacy cases in terms of the justifications for judicial activism. By 2006, just 13 States still had sodomy laws, with only four applying them only to same-sex conduct.[57] At the time it seemed unlikely that those States that retained those laws would change them. Moreover, gays and lesbians have always been the kind of minority that the Constitution has sought to protect, and in this case, Texas had chosen to enforce its criminal law against two consenting males. Coupled with the fact that, as dissenting Justice Clarence Thomas put it, despite his view that the law was

[57] 579 U.S. at 573.

constitutional, he would have voted against it because it was "uncommonly silly,"[58] the Court's judicial activism in setting aside the conviction seems justified.

The separation of powers cases involve different considerations because there is no one, either as a class or otherwise, that is likely to be a pre-determined loser in most separation of powers battles. To be sure, in *Chadha* the only people who could be harmed by the legislative veto were immigrants who were seeking an exception from deportation, and in the line item veto case, those who were harmed were those whose funding was denied by the President. But the legislative veto operated broadly across the Government, and it was only by chance (and because Mr. Chadha had standing to contest it) that the victim of the veto that went to the Court was a member of a discrete minority. Similarly, the City of New York, which was the plaintiff in the case that set aside the line item veto, surely does not fall into the *Carolene Products* category, nor would the vast majority of others whose funding might have been subjected to a line tem veto, particularly since they had enough clout to persuade Congress to insert the line item that was the subject of a presidential veto.

However, the Appointments Clause problem in *Buckley* and the legislative veto generally are attributable to another imbalance: both provisions increased the power of Congress generally (and not just those in the majority) at the expense of the Executive. Moreover, Congress was able to gain that advantage because those provisions were a relatively minor part of a much larger law that the President could not easily veto for that reason alone. And if they were upheld, Congress would have had every incentive to include similar provisions in most other laws granting executive power, at essentially no cost in its bargaining with the President or with others in Congress, since every member could be seen to benefit personally from their inclusion. Thus, the ability of those devices to alter other structural protections that secure liberty and protect other values in the Constitution arguably made it essential for the Court to step in.

A similar analysis can be used to explain the willingness of the Court in *Marbury* to find the law at issue there unconstitutional, although the Court did not explain its intervention in this way. Congress had assigned the Court original jurisdiction over a category of cases that was not provided for in the Constitution. This was not a case of congressional self-aggrandizement, since Congress could have instead assigned the cases to lower federal courts. Although the burden on the Court was hardly significant, if the Court did not say that Congress had exceeded its power, there would be nothing to prevent Congress from assigning other cases, or for that matter, non-judicial duties to the Court, that were inconsistent with its limited role provided by the Framers. Furthermore, if the Court did not take a stand, no other part of the Government would be likely to do so.

Caperton is another case where necessity was an appropriate basis for judicial intervention. More than 30 States conduct elections for judges, including for the State's

[58] 579 U.S. at 605.

highest court. Many of those races involve substantial amounts of money spent by persons with a direct interest in the outcome of cases before the court, as was true in *Caperton* where a $50 million judgment hung in the balance. The judges who ran for office and sat on such cases could easily have issued rules precluding their participation in cases where a party had provided substantial financial support for their election, but they had not done so, nor were they considered likely to change their practices because they directly affected their ability to remain in office. Moreover, considerations of separation of powers at the state level are thought to limit the ability of legislatures to pass detailed rules regulating the conduct of judges. Thus, if the Supreme Court had not invoked Due Process to disqualify the affected judge, the practice of sitting on cases involving significant campaign contributors would have continued. This was also a case in which none of the Justices defended the practice, the only issue was whether the Court should have intervened in light of the admitted line-drawing difficulties that would arise in future cases.

The line item veto presented a different situation for judicial intervention because the veto power was one that the President wanted and was finally able to persuade Congress to give to him, not as part of other legislation as a tradeoff, but in an independent statute that Congress could have voted down with no collateral costs. Thus, the line item veto is not a case of one branch aggrandizing itself at the expense of the other, but of an inter-branch agreement to alter the power structure. In that respect, it is like *Mistretta v. United States*,[59] in which the Court upheld Congress' decision, supported by the President and not opposed by the Judiciary, to have federal judges as members of the Sentencing Commission that was given the authority to issue binding sentencing guidelines for the federal courts. Nonetheless, a six-person majority in *Clinton v. City of New York* – comprised of liberals and conservatives, as well as strict constructionists and pragmatists – struck down the line item veto.[60] That result may be justifiable in part because the majority saw the veto as a clear attempt to do indirectly that which everyone agreed could not be done directly, because the Presentment Clause requires the President to sign or veto a bill as a whole, and not pick and choose among its parts. That step may have seemed quite modest in light of the Court's earlier decision in the legislative veto case where the laws that were struck down there also had the acquiescence of both political branches, albeit not in a stand alone form.

From an activism perspective, the portion of the *Reynolds* holding that extended one man, one vote to the more populous state legislative body was only a small step from the justiciability decision in *Baker*, as applied on the merits to congressional districts in *Wesberry*. But extending that to both houses of all state legislatures was surely an act of insisting that the Court was the truer judge of democracy than were the authors of the

[59] 488 U.S. 361 (1989).

[60] 524 U.S. 517 (1998) (Chief Justice Rehnquist and Justices Stevens, Kennedy, Souter, Thomas, & Ginsburg voted to overturn the law, and Justices O'Connor, Scalia, & Breyer would have upheld it). A similar split between Justices generally labeled as liberals and conservatives was found in Texas v. Johnson, 491 U.S. 397 (1989), where Justice Scalia voted to strike down on free speech grounds the statute making flag-burning a crime, and Justice Stevens voted to uphold it.

numerous state constitutions and statutes that contained rather different principles for allocating seats in one of the legislative bodies. Indeed, *Reynolds* also cannot be justified under the lock-in theory that persuaded the Court in *Baker* because the most recent change to the upper house in Colorado had been approved by a state-wide referendum.

Turning to conservative judicial activism under the Commerce Clause, it is the structural analysis that makes the intervention justified. Once the Court blessed the expanded powers of Congress under the Commerce Clause, the natural inclination, for which there is no obvious counter-balance, was for Congress to assume the job of solving all of the Nation's problems, using as expansive a reading of the Commerce Clause to do so. Thus, if guns in the schools were a problem, or there was increased violence against women, Congress could feel good about stepping in and providing federal solutions. Even though the national government was supposed to be limited in its powers, the States, either on their own or through their two Senators, were unlikely to object so long as the federal role supplemented state law and did not take away any state powers. Assuming that the reach of the Commerce Clause is broad, but not without some boundaries, the Court was probably justified to step in in those cases, especially where the Government was unable to point to any other example where the commerce power would not be exceeded under the theory advanced to support the guns in the schools or the violence against women laws.

The Eleventh Amendment and Section 5 of the Fourteenth Amendment interventions are less justified because the entities that they are protecting – the States – not only have the incentives to protect themselves, but they have the ability to do so directly and through their Senators to make their voices heard in what will often be a unified manner, despite other differences among them. In a battle, for example, between States rights and patent rights, there would seem to be no reason to believe that a fairer resolution would occur in the judicial branch than in Congress because of some structural or other imbalance. Similarly, if the States cannot persuade either House of Congress or the President that it is bad policy to apply age discrimination laws to them and to make them pay money damages when those laws are violated, why should the States be able to call on the Court to rescue them? Again, if the Constitution were clear, which no one suggests it is in these situations, the result perhaps should be different. But as it stands, these examples of judicial activism seem unwarranted.

In the campaign finance area, the Court's conservative activism seems justified in some cases, but decidedly not in others. On the one hand, the decision to closely scrutinize spending ceilings by candidates as well as individuals is justifiable, if not compelled, by the concern that they may have been enacted by legislatures more concerned with protecting their members from challenges than from other purposes put forward to support them. So long as the Court continues to uphold statutory limits on the amounts that individuals may contribute to candidates, political committees, and parties, the Court's intervention will not have destroyed the anti-corruption check that Congress sought to achieve with contribution limits. Furthermore, as a practical matter, contribution limits in effect create a supply side cap on what can be spent because of the real world limits on what can be raised. The fact that these rulings have been joined by

both liberals and conservatives relieves some unease about what is surely a form of second-guessing the political branches.

On the other hand, the decision in *Citizens United* that eliminated all restrictions on for-profit corporations making independent expenditures in elections for all three branches of government cannot be justified under any theory of intervention, unless one believes (as perhaps the majority did) that the First Amendment was so clear that it admitted no other outcome. Surely, for-profit corporations are not the kind of minority that is frozen out of the political process, nor have they been asking, without success, for Congress and the legislatures of the 26 States that had similar laws to change them so that they could participate more fully in elections. The law at issue in *Citizens United* allowed corporations to form, administer, and pay for many of the operating expenses of their own political committees that can solicit from corporate officers and stockholders. Thus, under any theory of necessity that would justify judicial activism, this case does not come close to satisfying it. Moreover, there are no structural impediments to change that stood in the way of amending the law – other than a clear disagreement by a majority of both Houses of Congress that our electoral processes needed more money from business corporations. Although this Issue Brief generally stays away from predictions about future judicial activism, it is hard to refrain from opining that the Court will soon strike down the bans on corporations making direct contributions as well as independent expenditures, although hopefully not taking down all contributions limits with them. Thus, on a scale of 1 to 10 in judicial activism, *Citizens United* is probably a 9, if not higher, and that is without considering the many ways that the Court could have avoided deciding this issue in that case and left it for another day when it was squarely presented and had been fully addressed in the lower courts.[61]

Before turning to *Heller*, it might be useful to contrast *Citizens United* with another case in which the Court received substantial criticism for its ruling, *Kelo v. City of New London*.[62] The City of New London decided to develop property in an effort to revitalize the downtown area and thereby reduce unemployment and augment tax revenues. To carry out its plan, it exercised its statutory powers of eminent domain over 11 houses in the area, whose owners declined to accept the City's offer to purchase, not because the price was inadequate, but because they did not want to move. When the City went to court, the homeowners resisted on the ground that the use to which their land was to be put was not a "public purpose" for which a taking was proper under the Constitution. The Supreme Court disagreed (5-4), and the immediate public reaction was by and large in favor of the homeowners and against the City, especially among those who call themselves conservatives.

[61] The Court's willingness to step into the state law of punitive damages to create constitutional protections, mainly for well-heeled corporations in cases such as State Farm Mutual Auto Ins. v. Campbell, 538 U.S. 408 (2003), is subject to many of the same criticisms that apply to *Citizens United.* However, like *City of New York*, 524 U.S. 417, the cases do not line up along the usual liberal-conservative divide, as Justices Scalia and Thomas have opposed these efforts, while some of the liberal Justices have gone along with them.

[62] 545 U.S. 469 (2005).

If the definition of a judicial activist is a judge who overturns the judgments of duly elected officials, then this is a clearly *not* a case of judicial activism because the majority allowed the decisions made by elected officials to stand. Moreover, the decision to permit the use of eminent domain for these general purposes, as well as their specific use in this case, was controlled by applicable state law, and these uses were specifically approved by state and local officials. As the majority opinion made clear, the taking was proper only because the state had specifically authorized it for this very purpose. If Connecticut citizens and lawmakers think this is unwise, said the majority, they can change it tomorrow. Furthermore, there is no indication that this is a situation in which a majority was taking advantage of a minority, particularly because the City was required to pay fair value for all the property that was condemned. Indeed, if the Court had gone the other way, *that* would have been an example of extreme judicial activism, unless one thinks that the "public purpose" language in the Fifth Amendment is so clear as to leave no room for doubt that it precludes this kind of taking.

Finally, there is the Court's decision in *Heller* that the Second Amendment creates an individual right to bear arms, unrelated to any connection with a militia, and that the law in question violated that right. On the first part of the case, I do not see the decision to be an example of judicial activism. Surely, the Court had to decide the meaning of the Second Amendment when the plaintiff had applied for a gun permit and was denied it based solely on a law that the plaintiff alleged was unconstitutional, relying on specific language in the Constitution that was directed at Government control over firearms. The Court can be faulted for having reached the wrong result on the meaning of the Second Amendment, just as one can disagree with the Chief Justice Marshall's reading in *Marbury* of the limits on the original jurisdiction of the Supreme Court in Article III, but those are disputes on the merits of words in the Constitution that are directly relevant to the outcome of a case properly before the Court.

However, the second part of *Heller* is in a different category. The issue there was whether the District's law interfered with the right to bear arms, as the majority had defined it. Although the court of appeals and the parties did discuss that question, the main focus in the case was the basic interpretive question about the Second Amendment. The District Court had dismissed the complaint without reaching the second question, and there was no evidence offered on the actual operation of the law, including two provisions that seemed to impose further use restrictions on anyone who possessed a handgun. Nonetheless, the majority simply declared that this law went too far and declined to give any weight to the fact that the law applied in an urban setting, where handguns and crime were a serious problem, and that the elected representatives had concluded that the ban was essential for public safety. Neither the plaintiffs nor their supporters, such as the National Rifle Association and other pro-gun groups, claimed that they were powerless, although they sought to portray themselves, probably correctly, as in a small minority of District of Columbia residents who opposed the law. Moreover, given the power of Congress to impose virtually any condition on the District, including the ability to override any law that the District passes, even one like this that had been on the books for over 30 years, the Court should have at least paused and asked why

plaintiffs had not gone to Congress asking it to soften the law, before coming to Court and asking the judiciary to second-guess the judgment of the elected officials in the District. And if the plaintiffs were truly afraid because they could not have a handgun in their home, they could have moved a few miles into Virginia or Maryland where similar laws are not in effect. The bottom line for those conservatives who decry judicial activism in general is that they should have been quite troubled by the lack of deference that the Court showed to the elected officials who had enacted the law set aside in *Heller*, and yet only a few expressed opposition, almost certainly because the majority of anti-activists liked the result that the Court reached in *Heller*.

IV. Conclusion

There are some who say that judicial activism, like beauty, is in the eye of the beholder. I disagree. I also disagree with those who imply that any decision with which they disagree is an example of judicial activism, or that a Court is acting improperly in a case in which it overturns a judgment of elected officials. The Constitution is an important protection, but it is not something that should be employed in every disagreement about the advisability of a law. This Issue Brief attempts to establish some principles for when judicial activism is and is not appropriate. For those who disagree, I await their responses, hopefully with examples on both sides of the controversy.