2002

Judicial Activism: The Good, the Bad, and the Ugly

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No matter how judges are selected, sooner or later some unfortunate candidate will be labeled a "judicial activist." One has to wonder: Does the term have any identifiable core meaning? Or is it just an all-purpose term of opprobrium, reflecting whatever brand of judicial behavior the speaker regards as particularly pernicious?

That is the question I will address at this Symposium. Implicit in the question are several important issues about the role of courts in our democratic society. I offer my comments somewhat tentatively, because I know that scholars whom I respect hold different views. At the least, I hope to clarify the various usages and provide a framework that will permit debate about the underlying issues to take place in a more coherent way.

I

The conventional way of presenting a thesis of this kind would be to take you through the various meanings endorsed by others and to explain why each of them is hopelessly flawed. At the end, triumphantly, I would offer my own perfectly crafted and calibrated definition.

In this instance, however, I think it will be more useful to put my cards on the table at the outset. I take my definition from Judge Richard Posner, whose book on the federal courts has a lengthy chapter on "federal judicial self-restraint," which he contrasts with "judicial activism."[1] Judge Posner describes activist decisions as those that expand judicial power over other branches of the national government or over state governments.[2] I would speak a bit more broadly and say that judicial activism is judicial review with an outcome adverse to the result reached through the political process.[3]

Several aspects of this definition deserve emphasis. First, although Judge Posner was examining the work of the federal courts (and particularly the United States Supreme Court), activism and restraint are also issues for state judicial systems. In fact, in recent years some of the boldest ventures in judicial activism have come in the decisions of state judges. Many of the examples are familiar:

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1. RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 314 (1996).

2. More accurately, Judge Posner describes "judicial self-restraint" as "the judge's trying to limit his court's power over other government institutions." POSNER, *supra* note 1, at 318. As I have indicated, "activism" and "self-restraint" are correlatives.

3. The political process includes not only acts of the legislature and the executive but also direct action by the electorate, such as state constitutional amendments and popular initiatives.

- State courts in California, Tennessee, Texas, and more than a dozen other states have struck down the state's system of financing education as violating state constitution equal protection clauses or other provisions of the state constitution.[4]

- Tort reform legislation in Ohio, Illinois, Oregon, and other states has been held unconstitutional by state courts.[5]

- The Vermont Supreme Court notoriously held that the state was "constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law." [6]

- The Florida Supreme Court invalidated an amendment to the state constitution that was designed to preserve the death penalty – an amendment that was approved by more than 70% of the voters.[7]

So activism, in the sense endorsed by Judge Posner, is a feature of state as well as federal judicial systems.

A second point about activism, as Judge Posner defines it, is that the definition is indifferent to whether the decisions are liberal or conservative in outome. We hear so much talk about "liberal activist judges" that we might conclude that activist decisions always promote outcomes on the liberal side of the political spectrum. That was generally true of Supreme Court in the 1960s under Earl Warren and it was also true, to a surprising degree, of the Court in the 1970s and early 1980s under Warren Burger.[8] Today, under Chief Justice Rehnquist, we have another activist Court, but most of its activism is on the conservative side.

Mention of the Rehnquist Court brings up a third point, and also a possible flaw, in Judge Posner's definition. Many of the most controversial decisions of the current Court have struck down Acts of Congress on the ground that they intruded on powers reserved to the states. These are certainly activist decisions if viewed from the perspective of the national government, but they may also have the effect of limiting judicial power over state governments.[9] However, the paradox is more apparent than real. The decisions do expand judicial authority over the allocation of power among governmental units, and they reverse the outcome of the political process. I have no doubt that Judge Posner would classify them as activist, and I do also.[10]

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4. *See* Erin E. Buzuvis, Note, *"A" for Effort: Evaluating Recent State Education Reform in Response to Judicial Demands for Equity and Adequacy,* 86 CORNELL L. REV. 644, 646 n.6 (2001).

5. *See* Mark Thompson, *Letting the Air Out of Tort Reform,* ABA J., May, 1997, at 64.

6. Baker v. State, 744 A.2d 864 (Vt. 1999).

7. Armstrong v. Harris, 773 So. 2d 7 (Fla. 2000).

8. For example, it was the Burger Court that established a woman's constitutional right to an abortion, *Roe v. Wade,* 410 U.S. 113 (1973); limited the circumstances under which the death penalty could be imposed, *Furman v. Georgia,* 408 U.S. 238 (1972); and allowed prisoners to sue for medical malpractice that manifests "deliberate indifference to serious medical needs," *Estelle v. Gamble,* 429 U.S. 97, 106 (1976).

9. Thus, when the Court held that Congress could not abrogate state sovereign immunity under the Age Discrimination in Employment Act, it severely curtailed the extent to which federal courts would be second-guessing state agency employment decisions.

10. In the 1960s, Richard Nixon used the term "strict construction" as a synonym for what Judge Posner would call "judicial self-restraint." *See* JAMES F. SIMON, IN HIS OWN IMAGE: THE SUPREME COURT IN RICHARD NIXON'S AMERICA 8-9 (1973). This was somewhat ironic, because the phrase originated as a way of describing judges who "strictly" (i.e. narrowly) construed the powers of the national government. *See, e.g.,* Newberry v. United States, 256 U.S. 232, 281 (1921) (Pitney, J., concurring in judgment but rejecting Court's holding of unconstitutionality) (noting "deplorable result of strict construction"). Strict construction thus often translated into judicial activism, for a narrow reading of national powers would readily result in holding an Act of Congress unconstitutional. *See* Archibald Cox, *The Role of the Supreme Court: Judicial Activism or Self-Restraint,* 47 MD. L. REV. 125-26 (1987). For further discussion, *see infra* Part V.

II

Let us look now at some of the other ways in which the term "activism" has been used. It would be tedious to go through all of the permutations, so I will confine myself to four. The first is exemplified by a comment made by a member of Congress at a House hearing a few years ago. Here's what the Congressman said:

> [T]he ultimate act of judicial activism is standing in a courtroom and having a judge look down at you and call you "'nigger" and tell you that your client's opinions in a case don't mean anything because your client happens to be black, or tell the bailiff not to call you and tell you that your case is coming up for trial and start the trial without you being there, simply because you represent an interest that the judge is out of step with. That is the ultimate act of judicial activism—acts which I have seen in my practice of law.[11]

We can all agree that the behavior described by the Congressman is appalling. But if we attach the label "activism" to that conduct, we drain the term of all meaning. We can sympathize with the Congressman's anger, but we should not allow it to distort our thinking.

In the same vein, but less extreme, is a comment a few years ago in the New York Review of Books. The author referred to a judge "whose decision made begging (a practice as old as recorded history) definitively illegal in the subways." He then added: "Talk about judicial activism."[12]

The first point about this comment is that the author criticizes *the judge* for making begging "definitively illegal in the subways." Of course it was the city's legislative body that made begging illegal; what the judge did was to allow the political process to work its will. The upshot is that the author has attached the label "judicial activism" to behavior that – in Judge Posner's terms at least (and also mine) – is an example of judicial self-restraint, the very opposite of activism.

Perhaps we should not hold members of Congress and book reviewers to rigorous definitions, so let's move on to the academy. Consider these examples:

> Further supporting this institutional view of slow change is the realization that a Court can be characterized as "activist" after overruling six precedents in a recent year.[13]

> Lucas v. South Carolina Coastal Council is an activist decision because the Court created a new rule of law. In the process, it badly distorted precedent.[14]

> Although [Justice Joseph R. Grodin] served on the California Supreme Court during the tenure of Chief Justice Rose Bird, when one might have expected the frequent revisiting of settled law, Justice Grodin's labor and employment decisions do not fit the mold of an activist engaged in judicial overreaching. In fact,

11. *Hearing on H.R. 1252, the Judicial Reform Act of 1997, Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary,* 105th Cong. 32 (1997) (statement of Rep. Mel Watt).

12. JAMES LARDNER, CAN YOU BELIEVE THE NEW YORK MIRACLE, NEW YORK REVIEW OF BOOKS, Aug. 14, 1997, at 54.

13. Erik Anderson, *Constitutionalizing Chevron: Filling Up on Interpretive Equality,* 42 B.C. L. REV. 349, 350 n.6 (2001).

14. Donald H. Ziegler, *The New Activist Court,* 45 AM. U. L. REV. 1367, 1370 (1996).

> in twenty-three reported labor and employment law decisions, Justice Grodin wrote just once to overrule precedent and just once more to disapprove it.[15]

These scholars are using the term "activism" to refer to a predilection for overruling precedent or changing the law established by prior decisions.[16] Now consider this variation, from an op-ed piece by Professor Chemerinsky: "the Reagan and Bush Justices are engaged in aggressive conservative judicial activism, overruling more than half a century of precedents *and* invalidating important federal statutes."[17]

In a similar vein, Professor David O'Brien has referred to Justices who "appear to share a conservative vision that opposes liberal legalism and lends itself to judicial activism – activism whether in terms of overturning precedents *or* second-guessing elected representatives and the democratic process."[18] And Judge (and former professor) Stephen Williams has written of a revived federalism that would require "some 'activism' by the Supreme Court (in the senses *both* of overturning precedents and of countermanding the political branches)."[19]

I suggest to you that it cannot be right to use the same term to describe a decision that overrules precedent and also a decision that rejects the outcome reached by the political process. It is true that both can raise issues about the role of courts and the operation of judicial review. But they are entirely different phenomena. And I hope it is self-evident that the question "When should a court overrule one of its own decisions?" is not the same question as "When should a court hold a statute or executive regulation or popular initiative unconstitutional?" The two categories of decisions would be measured against different benchmarks, and the mode of analysis should also be different.[20]

Lumping the two meanings together also produces anomalous results. For example, Justice Clarence Thomas has urged the Supreme Court to reconsider and perhaps overrule some of its precedents that recognize prisoners' rights under the Eighth Amendment.[21] Suppose that later this Term the Court is asked to strike down a state statute that is alleged to violate the principles established by those cases. Are we going to say that the Court is engaging in activism if it overrules the precedents – but that the decision is also activist if the Court adheres to its precedents and holds the statute unconstitutional? Surely that cannot be right.

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15. Christopher Cameron, *No Ordinary Joe: Joseph R. Grodin and His Influence on California's Law of the Workplace,* 52 HASTINGS L.J. 253, 272 (2001).

16. The quoted comment about *Lucas v. South Carolina Coastal Council* is perhaps in a slightly different mold, but "creat[ing] a new rule of law" is more akin to overruling precedent than to negating the outcomes reached by the political branches.

17. Erwin Chemerinsky, *Commentary, Perspective on Justice,* LOS ANGELES TIMES, May 18, 2000, at B-11 (emphasis added). In fairness to Professor Chemerinsky, the reference to "activism" may be based solely on the Justices' action in invalidating federal statutes; if so, this would be consistent with Judge Posner's definition. However, the writers quoted in the text that follows plainly use the term to refer to decisions that overrule precedents as well as to decisions that overturn the results of the political process.

18. David O'Brien, *Charting the Rehnquist Court's Course: How the Center Holds, Folds, and Shifts,* 40 N.Y. L. SCH. L REV. 981, 988 (1996) (emphasis added).

19. Stephen Williams, *Unconstitutional Conditions Through a Libertarian Prism,* 1994 PUB. INT. L. REV. 159 (emphasis added) (Book Review, RICHARD A. EPSTEIN, BARGAINING WITH THE STATE, 1993).

20. This is not to say that the two kinds of decisions have nothing in common. *See infra* Part VI.

21. *See, e.g.,* Farmer v. Brennan, 511 U.S. 825, 861-62 (1994) (Thomas, J., concurring in judgment).

Unfortunately, there is no label in common use that describes the judge who has a predilection for overruling precedent. The best I have come up with is to say that such a judge is a "judicial radical," and that a disregard for precedent is "judicial radicalism." I'm not satisfied with this terminology, and if someone can come up with a better one, I hope you will let me know. But on one point I do speak with confidence: overturning the results of the political process and overruling a court's own decisions are two entirely different kinds of judicial behavior. If we wish to have an intelligent discussion of the role of courts, we must keep the two distinct.

III

Thus far I have been looking at what might be called casual uses of the term "activism." But of course I am not the first scholar to attempt to define the phenomenon systematically. There are two efforts that are of particular interest because, in different ways, they contrast sharply with the approach I am putting forward here.

Several years ago, two political scientists published a book with the title "Supreme Court Activism and Restraint."[22] Among the contributors was one of the participants in this conference, Professor Lino Graglia, who authored an essay defending judicial restraint. Another contributor, Professor Bradley Canon, offered an elaborate framework for the analysis of judicial activism.[23] He described six dimensions which he suggested should be taken into account. One of these, "majoritarianism," is essentially the equivalent of the unitary definition championed by Judge Posner. Another is "interpretive stability," which includes consideration of the judges' "alteration" of prior decisions. Still another is "interpretive fidelity," which Professor Canon defines as "the degree to which constitutional provisions are interpreted contrary to the clear intentions of their drafters or the clear implications of the language used." Professor Canon applied his framework to some prominent Supreme Court decisions and came up with "case activism scores" ranging from zero to 0.83.

I respect this effort to dissect and quantify, but in the end I don't think it can succeed. I doubt that people with widely different views about the role of courts could agree on the relative weight to be given to the six "dimensions," let alone the absolute values to be assigned in the evaluation of particular cases.

More recently, Professor Nelson Lund of George Mason Law School offered a definition in a single sentence: "By judicial activism, I simply mean the practice of judges substituting their own policy views for the law."[24]

Professor Lund is not alone in defining judicial activism in this way. Judge Laurence Silberman has offered an almost-identical definition, but in greater detail. He said:

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22. STEPHEN C. HALPERN & CHARLES LAMB, SUPREME COURT ACTIVISM AND RESTRAINT (1982).

23. Bradley C. Canon, *A Framework for the Analysis of Judicial Activism*, in HALPERN & LAMB, *supra* note 22, at 385.

24. Professor Lund spoke at a conference that was broadcast on C-Span. The discussion here is based on e-mail correspondence with Professor Lund. I am grateful to Professor Lund for authorizing use of this material here.

> Judicial activism simply means policymaking in the guise of interpreting and applying law. Policy issues are those questions of public concern on which the body politic or political institutions have free range of choice. When legislatures or constitutional conventions make law, they resolve certain policy issues and crystallize the majority view into rules. Of course, these rules are not on equal footing: constitutional rules trump statutory rules. What is true for both is that, if a judge exercises policy choice when deciding what these rules mean, that is judicial activism.[25]

Professor Lund's straightforward characterization (even with the gloss provided by Judge Silberman) avoids the complexity of the multi-factor analytical framework in the Canon paper, but I think it has two flaws that make it a good deal less useful than the one endorsed by Judge Posner. It lacks a limiting focus, and it incorporates a significant normative component.

As to the limiting focus: Those who talk about judicial activism generally are not interested in the universe of judicial decisions; they are interested in decisions that rule on constitutional challenges to statutes, executive decisions, and other products of the political process. In short, the focus is on the exercise of judicial review. I think we are more likely to have a fruitful debate if we acknowledge that fact and define the category accordingly.

But I fear that Professor Lund's formulation blurs the issues even more. I asked Professor Lund if he would classify as activist a decision that upheld a statute that was plainly unconstitutional. (Put aside, for the moment, how one would make that determination.) Professor Lund responded: "That would definitely be judicial activism as I understand it. In fact, in some ways it seems worse for a judge to ignore the most fundamental laws that the people have adopted than to ignore the less fundamental laws that the people's representatives have adopted."

I agree with Professor Lund that a judge who ignores the Constitution should be condemned even more strongly than a judge who over-reads the Constitution in order to impose his own policy views on the political branches. But I do not think it is useful to use the same term to refer to both phenomena.

I say that in part for the same reason that I object to lumping together the rejection of precedent and the rejection of legislation. But there is also a deeper reason, and that brings me to the second flaw I see in Professor Lund's definition, and Judge Silberman's as well. (It may also be present, to a lesser extent, in Professor Canon's multi-factor framework.) I do not think any judge would ever acknowledge that he or she has *substituted* his or her policy view for "the law." Nor would a judge acknowledge making policy "in the *guise* of interpreting and applying the law."

Necessarily, therefore, the label disputes the judge's own characterization of his or her decision. This means that the definition includes a normative component, and that an activist decision constitutes, almost by definition, a misuse of the judge's authority.

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25. Laurence H. Silberman, *Will Lawyering Strangle Democratic Capitalism? A Retrospective,* 21 HARV. J. L. & PUB. POL. 607, 618 (1998).

I think it is preferable to separate the descriptive from the normative. There are at least three reasons for this. First, by defining the phenomenon in objective terms, we gain the opportunity – and indeed are compelled – to be explicitly and candidly normative when we evaluate particular examples. This can be particularly beneficial at the stage of choosing the individuals who will serve on the bench, whether through elections (including retention elections) or through a process of appointment.

Second, when we limit the term "activism" to a phenomenon that is defined objectively, it becomes much easier to identify judges who may indeed be, in Professor Lund's words, "substituting their own policy views for the law." If a judge is frequently activist in support of political liberalism, but practices self-restraint when the challenger is on the conservative side, we have to wonder whether the judge is following the law or his own policy preferences.

Finally – and this is perhaps the converse of the preceding reason – equating "activism" with judicial overreaching has the effect (not intended, I'm sure) of discrediting judicial review in those instances where it is salutary and legitimate. I assume everyone here agrees that *Marbury v. Madison* and *Martin v. Hunter's Lessee* are part of our system;[26] that the political process does not always stay within constitutional boundaries; and that there are times when judicial intervention is appropriate and indeed necessary. We should avoid terminology that suggests otherwise.

IV

These last comments might seem like a natural lead-in to the next part of my talk: distinguishing between the good and the bad in judicial activism. That is indeed where I'm heading, but I also promised you the "ugly" side of judicial activism, and I'd like to deal with that first.

Actually, I have to admit that the characterization is something of a misnomer (for purposes of getting a catchy title), because this digression is about another phenomenon that – like overruling – should be kept distinct from judicial activism. I'm referring to judicial decisions that expand judicial power over activities in the private sector. Once again Judge Posner has a helpful discussion, and even a label; he refers to this as judicial intrusiveness.[27]

An intrusive decision is a decision that shifts power, not from politically responsive branches of government to the judiciary, but from private individuals and entities to the government – in particular, the judicial branch. The Warren Court exemplified judicial intrusiveness for its decisions that expanded the reach of the antitrust laws.[28] The Burger Court behaved in a similar fashion in many of its decisions on employment discrimination.

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26. Professor Graglia may not agree with this point. *See* Lino Graglia, *Judicial Review, Wrong in Principle, A Disaster in Practice*, 21 MISS. C. L. REV. 243 (2002).

27. *See* POSNER, *supra* note 1.

28. Recall Justice Stewart's famous comment in dissent: "The sole consistency I can find is that in litigation under § 7 [of the Clayton Act], the Government always wins." United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting). Perhaps the most remarkable example is *Utah Pub. Serv. Comm'n v. El Paso Natural Gas Co.*, 395 U.S. 464 (1969), in which the Court ordered a divesture even though all of the parties to the case – including the United States – agreed that the case should be dismissed on other terms.

Judicial intrusiveness takes different forms in state and in federal courts. Federal courts expand their power over private individuals through expansive interpretation of statutes (or occasionally executive regulations). State courts sometimes rely on statutes, but more often their intrusive decisions are based on common law principles.

Not everyone will see judicial intrusiveness – even if overdone – as something we should worry about. After all, except in matters relating to sex and procreation, legislatures have almost unlimited power to regulate behavior in the private sector. Judicial decisions based on statutory interpretation or on application of common law principles can always be overruled by the legislature. Therefore (the argument goes) we needn't be overly concerned about judicial intrusiveness, because if the courts go too far the legislature can always correct them.

I think that that comfortable assumption rests on a naïve view of the political process. Almost invariably, intrusive judicial decisions, while restricting freedom of action by one class of individuals, create new rights – or at least new opportunities – for another class. As long as that other class has representatives in the legislature – and it generally will have – that makes it very difficult to overturn the judicial ruling even if majority might support it. It's much easier to block legislation than to enact it. And even if there is no opposition, inertia and the press of other business will stand in the way.

One example that comes to mind is a decision that – contrary to the general run – could probably be classified as both activist and intrusive. In 1984, the Supreme Court held in a case called *Pulliam v. Allen* that judicial immunity did not bar an award of attorneys fees against state judges under the federal civil rights statutes. State judges naturally asked Congress to reverse the decision. There was no real opposition to the proposal, and the bar association supported it, but getting it through both Houses was by no means easy. The Senate Judiciary Committee favorably reported bills in the 100th, 101st, and 102nd Congresses, but only on the fourth try was the legislation approved – as part of an omnibus package of judiciary measures.

For myself, I would like to minimize intrusive decisions through adoption of a "clear statement" requirement similar to the one the Supreme Court now follows in determining whether Congress has abrogated state sovereign immunity.[29] I would like to see the courts – or better yet, Congress itself – say that no statute should be read as imposing a new obligation on a class of individuals unless the language in the statute is clear and specific enough that it would have alerted members of the class to the nature of the obligation they would soon be facing.[30]

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29. *See* Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985).

30. Consider, for example, the courts' interpretation of Title VII of the Civil Rights Act of 1964, which makes it unlawful for an "employer" to "discriminate" on the basis of race or sex "with respect to ... terms ... of employment," as making employers liable, under certain circumstances, for the existence of a "hostile environment" in the workplace. *See* Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986); Brooks v. City of San Mateo, 229 F.3d 917, 925-26 (9th Cir. 2000) (treating as an open question "whether a single instance of sexual harassment [could] be sufficient to establish a hostile work environment"). The law generated by these decisions effected a substantial alteration in employers' obligations, without debate or vote in Congress. For a brief account of the development of the doctrine, *see* ELLEN FRANKEL PAUL, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE LAW & POL. REV. 333 (1990).

Only if that test is satisfied can we be confident that the new obligation has truly been imposed by the people's representatives and not by the judges.[31] Further, by resolving ambiguities in regulatory statutes in favor of the status quo, the Court would allow the better-equipped political process to determine the nature and extent of change as well as the limits of the new obligation.[32]

To be consistent and even-handed, I would like to see the same rule of construction apply to claims that an Act of Congress has taken away rights enjoyed by a class of individuals under state law.[33]

Of course, nothing like that is going to happen, so I will end this detour into the realm of judicial intrusiveness and return to my principal topic, judicial activism.

V

I have argued that the term "judicial activism" should be used descriptively, to refer to decisions that expand judicial power at the expense of institutions that operate through the political process.[34] The principal advantage of this approach, I have suggested, is that it permits a more useful discussion of when activism is legitimate and when it is not. It was my intention to turn at this point to articulating criteria for making that distinction.

Having now reviewed Professor Canon's work, with its careful and comprehensive delineation of six "dimensions" of activism, I am much less confident that an analytical approach to the normative component can be pursued successfully. Perhaps one can say – as Professor Canon does – that one particular decision is *more* activist than some other. But that is very different from saying that either decision is illegitimate or unjustified or "bad" in some other sense.

I also have some doubts as to whether this kind of analysis will alter anyone's evaluation of particular activist rulings. I'm sure that many people in this room

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31. More than 50 years ago, Justice Felix Frankfurter warned that "[j]udicial expansion of meaning beyond the limits indicated . . . enlists too heavily the private social and economic views of the judges." Felix Frankfurter, *Foreword: Symposium on Statutory Construction*, 3 VAND. L. REV. 365, 368 (1950). Nowhere is this danger greater than when the "[j]udicial expansion of meaning" allows a branch of the government – and in particular the judiciary itself – to regulate private behavior that would otherwise remain free of governmental control.

Admittedly, the line between imposing a new obligation and construing an existing obligation will not always be self-evident. But the fact that some instances of judicial creation of new duties will be difficult to identify until it is too late does not mean that the effort is not worthwhile. In any event, what I am suggesting is not so much a rule as an attitude or mood. *Cf.* Universal Camera Co. v. NLRB, 340 U.S. 474, 487 (1950) ("Congress [in amending the provisions governing judicial review of NLRB decisions] expressed a mood. . . . As legislation that mood must be respected, even though it can only serve as a standard for judgment and not as a body of rigid rules assuring sameness of applications").

32. For this same reason, some courts have declined to impose new obligations through the vehicle of modifying common-law rules, even when the rules appear to have outlived their usefulness. *See, e.g.*, Murphy v. American Home Prods. Corp., 448 N.E.2d 86, 89-90 (N.Y. 1983).

33. This latter suggestion has also been made by Professor Cass Sunstein. *See* Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 469 (1989) (endorsing "an interpretive principle requiring a clear statement before judges will find federal preemption of state law."). Perhaps the principle should be limited to "field[s] which the States have traditionally occupied." *See* United States v. Locke, 529 U.S. 89, 108 (2000) (distinguishing between such fields and "area[s] where there has been a history of significant federal presence").

34. It may well be that the word "activism" has become so hopelessly compromised that we should abandon it altogether and substitute another word for the phenomenon I have described. Earlier in this article I referred to "intervention" by judges. Perhaps we should describe decisions that expand judicial power over the political process as "interventionist."

think that "policymaking in the guise of interpreting and applying law" is exactly what the Supreme Court was doing in its abortion decisions. Others – probably not the same people – hold the same view of the Court's decisions on state sovereign immunity. No analysis of activism in the abstract is likely to change these views.

Nevertheless, I have committed myself to the effort, and because we care so much about our courts and the legitimacy of their decisions, there has to be some value in trying to identify criteria that will enable us to distinguish between "the good" and "the bad" in judicial activism. So I'll go ahead, but briefly. And I'll confine myself to the work of the United States Supreme Court.

The first criterion, of course, is how closely the ruling adheres to the constitutional text. That might seem like no more than stating the obvious, but it carries us further than you might think. For example, the Supreme Court recently heard oral argument on whether the First Amendment protects "virtual child pornography." Whatever the answer to that question, the Constitution does protect freedom of speech.[35] It does not protect "privacy." A decision that holds that a statute violates "the right to privacy" must take a step that is not required when a decision finds an impairment of the right to free speech.[36]

At this point you might ask: What about the Supreme Court's decisions on state sovereign immunity? These do not purport to be grounded in text, but instead invoke Chief Justice Hughes' observation that "Behind the words of the constitutional provisions are postulates which limit and control."[37] One response might be that "inference from structure," as the late Professor Charles Black labeled it,[38] has been an accepted tool of constitutional interpretation since the days of Chief Justice Marshall. But in the end I would have to say that an activist decision resting on "postulates" or "presuppositions," as the Court's sovereign immunity decisions do, is, for that reason alone, more suspect than one grounded in text.

At the same time, from a textualist perspective there is an important distinction between activist decisions that limit the power of the national government and activist decisions that limit the power of state governments. Ordinarily, judges can restrict state power *only* by holding that some provision of the Constitution prohibits – however indirectly or imprecisely – the conduct in question.[39] But when an exercise of federal power is challenged, the courts can also find that the statute or regulation is invalid because nothing in the Constitution authorizes it. The primacy of text takes on a very different coloration when the judges must find relevant constitutional language not to strike down a law but to uphold it.[40]

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35. I assume that no one is prepared to dispute that works depicting children engaged in sexual activity fall within the category of "speech."

36. A controversial example is, of course, *Roe v. Wade,* 410 U.S. 113 (1973), in which the Supreme Court found that "[t]his right of privacy ... is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153.

37. Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934), quoted in Alden v. Maine, 527 U.S. 706, 729 (1999).

38. CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

39. *See, e.g.,* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) (holding that Qualifications Clauses of the Constitution preclude states from imposing additional requirements for service in Congress).

40. By the same token, one must be careful in speaking of "unenumerated rights" against the federal government. Certainly examples of the phenomenon can be found. Thus, the Supreme Court has held that the due process clause of the Fifth Amendment protects against a denial of equal protection by the United States. *See, e.g.,* Califano v. Westcott, 443 U.S. 76 (1979). But activist decisions may also rely, in a sense, on rejection of a government claim of unenumerated powers. *See, e.g.,* U.S. ex rel Toth v. Quarles, 350 U.S. 11 (1955) (holding that Congress lacks power under Article I to subject a civilian ex-serviceman to trial by court-martial).

A second criterion is history. I have in mind here a bit of dictum from Justice Holmes – not as often quoted as some of his other observations: "If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it."[41] Now, it is probably not often that a challenged practice will have two hundred years of history behind it, but the longer the history, and the closer you can bring it to the era that produced the constitutional text, the more difficult it is to justify a court decision that overturns the practice.[42]

The third criterion is the extent to which the court has imposed affirmative obligations on the political branches. It is a familiar observation that our Constitution is a "charter of negative liberties."[43] The First Amendment, the Eighth Amendment, the Fourteenth Amendment – pretty much all of the constitutional provisions that are the basis of judicial review today – are couched as prohibitions. When a court takes prohibitory language and interprets it as requiring governments to carry out policy in a particular way, that too is necessarily suspect. And the greater the specificity of the judicial decree, the harder it is to argue that the requirement is anything but "policymaking in the guise of interpreting and applying" the Constitution.[44]

VI

This brings me almost full circle, for the final criterion I'll discuss is consistency with precedent. I have emphasized that overruling precedent is something quite different from overturning the results of the political process, and I don't retreat from that proposition. But respect for precedent and respect for the political process do have something very important in common, and that is humility.

A sense of humility would remind a judge that members of Congress, state legislators, and other political officials have taken an oath to support the Constitution, and that in our governmental system a judge should be slow to reject the judgments they have made. But a sense of humility would also tell the judge that his predecessors on the bench were attempting, in their own way, to conscientiously apply the commands of the Constitution, and that he should also be slow to repudiate their conclusions.

The problem, of course, is that, too often, these reminders will pull in opposite directions. After decades of activist decisions, there can hardly be a single constitutional claim that will not have at least respectable support in Supreme Court precedent. What should a judge (or Justice) do in a new case when precedent points to an activist ruling, but all other criteria – whatever they might be – suggest that the political process should prevail?

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41. Jackman v. Rosenbaum Co., 260 U.S. 22, 30-31 (1922).

42. *See* Burnham v. Superior Court, 495 U.S. 604, 619 (1990) (plurality opinion); *but see* Shaffer v. Heitner, 433 U.S. 186, 211-12 (1977).

43. Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) (Posner, J.).

44. For recent examples, see Lewis v. Casey, 518 U.S. 343, 362 (1996) (reversing district court order as "the ne plus ultra of ... a court's 'in the name of the Constitution, becom[ing] enmeshed in the minutiae of prison operations'"); Missouri v. Jenkins, 515 U.S. 70 (1995) (reversing expansive district court remedial order in school desegregation case).

I wish I had an answer to that dilemma, but I do not, or at least not a complete answer. A partial answer can be found in the common-law view of precedent. A precedent is not an artifact, with qualities and dimensions that are forever fixed. There is room for movement. Even the worst of activist decisions can be cabined over time.[45] On the other hand, if a decision is not cabined over time, perhaps it was not so bad after all.[46]

Some of you will hear in these words an echo of the writings of the great scholar of the common law, Karl Llewellyn. That is no accident. The genius of the common law tradition is to recognize that the wisdom of generations is a surer guide than the wisdom of the judges who sit on a particular court at a particular moment. Whether *Roe v. Wade* or *United States v. Lopez* is the activist decision that arouses your ire, it should be some consolation to know that the process of the case law system is, in Llewellyn's words, a process of "trial, *and then correction.*"[47]

VII

To sum up, I'd like to leave you with these points.

First, if we're going to have useful discussions of judicial activism, we should define the phenomenon objectively, and use the term exclusively to refer to decisions that expand the power of the judiciary over political institutions.

Second, we should not use the term to refer to decisions that overrule a court's own precedents. Overruling may be right or wrong, but as a category it is quite distinct from rejecting the results of the political process.

Third, we may want to give more attention to the phenomenon of judicial intrusiveness – decisions that expand the power of courts over otherwise private decisionmaking.

Fourth, although we may not be able to agree on whether particular activist decisions are good or bad, we may be able to agree on the criteria for making that evaluation and how they should be used.

Fifth, constitutional law is case law, and case law brings into play the traditions of the common law and a flexible view of precedent.

That leads to my final point. In offering this analysis, I have no doubt revealed myself as someone with a generally conservative approach to legal issues. I will not dispute that characterization. But I also believe that there is another aspect of the law, particularly constitutional law, that transcends conventional liberal-conservative divisions, and I want to close by calling your attention to the eloquent articulation of that element by a jurist known to many of you here, former Chief Judge Charles Clark of the Fifth Circuit. Judge Clark reminded us that courts do not just decide cases or announce rules; they also engage in "moral persuasion through

45. For a recent example of the "cabining" process, see Correctional Services Corp. v. Malesko, 122 S. Ct. 515 (2001); *see also id.* at 523-24 (Scalia, J., concurring) (acknowledging that "a broad interpretation" of the rationale of an activist precedent "would ... logically produce its application to the circumstances of this case," but rejecting that interpretation).

46. The longer a particular interpretation has held sway, the more difficult it will be to argue that text, history, and other criteria refute that conclusion in a way that leaves no room for doubt.

47. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 397 (1960) (emphasis added). *See also* Arthur D. Hellman, *Never the Same River Twice: The Empirics and Epistemology of Intercircuit Conflicts*, 63 U. PITT. L. REV. (forthcoming 2001).

[the] forceful, articulate declaration and justification of legal principle."[48] That is exactly what the common law tradition calls for, and as long as courts set their sights by that tradition, even the worst of judicial activism may become less frightening.

48. Charles Clark, *Foreword: The Role of the United States Court of Appeals for the Fifth Circuit in the Civil Rights Movement,* 16 MISS. C. L. REV. 271, 271 (1996).