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Session C: Conservative Judicial Activism

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Teresa Wynn Roseborough, Introduction:

Good afternoon everyone.

My name is Teresa Wynn Roseborough. I'm a partner in the firm of Sutherland, Asbill & Brennan, and a member of the Board of Directors of the American Constitution Society, and I can't tell you how amazing, how heartwarming, how inspiring, and invigorating it is, to see all of you here today. You know, we sent out invitations to this big event and I felt, when we started getting registrations, a little bit like the people on the website commercial, where slowly the numbers start clocking in, the people hitting

their website and ordering their goods, and they start cheering and they're very excited, and then the numbers keep going bigger and bigger and bigger, and they go, "Oh no."

And that's been our experience. You know, we had this rolling trickle, say, "Yup, people are going to show up. People are going to come. This is going to be good. This is going to be great. This is going to be overwhelming." You have made it overwhelming, and it has been just a great thing for us and a great thing for law.

It seems the charges of conservative judicial activism and liberal judicial activism are as ancient as reaction to the Solomonic decision to split the baby. In more modern times, however, charges of judicial activism have been used as a weapon, by conservative policy makers to attack judicial decisions with which they disagree, and have become a rallying cry for the entrenchment of conservative thinkers on the federal bench.

Indeed, one of the organizing principles of the Federalist Society was that it was emphatically the province of the judiciary to say what the law is, not what it should be. In context, accusing all non-conservative members of the judiciary is refusing to abide by the rule of law. Liberal and judicially activists have become virtually synonymous in the public policy debates. Judicial nominees are routinely asked to explain their views on judicial activism, arguably as a proxy for asking them whether they adhere to or reject prevailing conservative rulings, and for ferreting out candidates with latent liberal or progressive tendencies.

Recent scholarship, however, appears to recognize and ascendancy of conservative judicial activism. Nonetheless, there does not appear to have been any lessening of the conservative assaults on decisions enforcing the Bill of Rights, respecting the legislative power of Congress to pass legislation and protection of those rights, and providing equal access to the courts, as the product of judicial, of liberal judicial activism.

To discuss whether we are indeed seeing a new era of conservative judicial activism and its implications, we have with us, a distinguished panel of scholars. Their credentials are quite extensive, so please forgive me for just going over the highlights. I will introduce them in the order they are seated on our dais.

Professor William Marshall is the Kenan Professor of Law at the University of North Carolina School of Law, and as an aside I'll note, that's the best law school in the country. No hints about where I went. He is a graduate of the University of Pennsylvania and received his law degree from the University of Chicago. He served as a Deputy White House counsel and as Deputy Assistant to the President. He writes extensively in areas of media law, civil procedure, the 1st Amendment, and, in the rarified air of the law of the Presidency.

Alan Morrison is a graduate of Yale College and Harvard Law School, is the Director of the Public Citizen Litigation Group, and is one of our nation's most distinguished appellate advocates. From 1999 to 2000 he served as the President of the American Academy of Appellate Lawyers. He has argued more than 16 cases before the United State Supreme Court and been of counsel in more than 100 others. His cases have included some of the most seminal in the area of separation of powers including *I.N.S. v. Chadha* and *Bowsher v. Synar*. I think he got his ideas from separation of powers from his time in the Navy. Is that right?

Alan Morrison?:

Not quite.

Teresa Wynn Roseborough:

Judge David Tatel has served on the United States Court of Appeals for the D.C. Circuit since October of 1994. He's a graduate of the University of Michigan and received his law degree from the University of Chicago. Judge Tatel has served as the Director of the Chicago Lawyers Committee for Civil Rights Under Law and is Director of the National Lawyers Committee for Civil Rights Under Law. Just prior to joining the bench, he was a partner at the D.C. firm of Hogan and Hartson.

Judge Michael Luttig serves on the United States Court of Appeals for the Fourth Circuit and has served there since 1991. He received his undergraduate degree from Washington and Lee University and his law degree from the University of Virginia. He clerked for now Justice, then Judge Antonin Scalia, when Judge Scalia was a member of the D.C. Circuit, and for Chief Justice Warren Berger. He was in private practice for the firm of Davis, Polk and Wardell, before serving in the Bush Administration as

Assistant Attorney General in the Office of Legal Counsel and counselor to the Attorney General. Help me welcome, please, our panel.

Applause

We're gonna begin with opening remarks by our panelists, and then questions and dialogues amongst the members of the panel. Then we're gonna open the floor for your questions, and conclude by giving our panel some closing remarks. Thank you. Professor Marshall.

William Marshall:

Thanks Teresa. Thanks to the rest of the panel. Let me repeat the mantra of thanking Peter Rubin and A.C.S., for putting this all together. My job, Teresa asked me to sort of set the table for what this judicial activism panel is about and to, sort of, frame the issue. Erwin Chemerinsky did that for me. He told me he was on a debate recently with a conservative member of the Federalist Society – I guess that's a redundancy – and the question came up to look at the last term, and the judicial activism on the last term and the conservative, that Erwin was debating said, "Can you imagine that judicial activism that took place in *Lawrence v. Texas*?" And Erwin said, "What about the..." The conservative said, you know, "...disrupted the political world of the people of the state of Texas." And Erwin looked at him and said, "Well, what about the conservative activism that took place to disrupt the political will of the people of Michigan in the *Gratz* case? Or, that tried to upset their will with respect to *Grutter*?" And the answer from the conservative was, "No, no, that was applying high constitutional principle."

There lies part of the problem with the judicial activism debate, is that it seems to lie in the eyes of the beholder. For people who are not part of the Federalist camp, we have another problem, as Teresa alluded to, which is, for so long, the conservatives have taken the position that what liberals do is engaged is policy-based decisions effectuating their own particular predilections, whereas conservatives apply the real law. So what they do is not engage in activism. What they do is engage in high constitutional principle.

So what I decided to do was to try to do an analysis of that to see if that's true or not. And, although judicial activism is hard to define, I went through

a number of indices of what you might consider judicial activism, and I got these indices basically from conservative critiques.

The first one, and the one that Conservatives used to like all the time, was an econo-majoritarian critique, that anything that disrupts the political will of people, is activism. Now since they have engaged in striking down more federal laws in a short period of time than in our history, they moved off of that one as their basic definition, but that's where it all started. That's what Richard Posner says is activism, that's one of the indicia, that's one of the criterion.

The second one is non-originalism. Veering from, either the text or the history. That's activism.

A third you might call, precedential activism – overturning decisions, rejecting stare decisis.

A fourth, you might call, jurisdictional activism, which is broadening access to the court by broad standing decisions, etc.

A fifth is judicial creativity, creating doctrines out of thin air. *Griswold* has been criticized on that, I suppose, if you wanted to, you could criticize hybrid rights, by Justice Scalia, as an example of that.

Remedial activism, the taking over of institutions by the federal courts to initiate remedies, such as taking over prisons or school systems.

And finally, the most damning of all, partisan political activism, of just trying to engage, not in ideological decision-making, but in pure politics, favoring Republicans over Democrats.

So I went through all of these, and it seemed to me that if you look at all of them, conservatives violate all of them. I guess with the exception of remedial activism, because there really have been no institutions that conservatives have tried to take over yet, but the University of Michigan admissions office is next. So, we'll see what happens when they seek an injunction, trying to put that into receivership.

And a partisan one I want to stay away from, because partisan, a charge of partisan activism is fairly hard to maintain. Certainly there was a charge of

that in *Bush v. Gore* and that's not the only case. The very important but under the table – below the line case, dealing with the census and the House of Representatives might be another one. But we'll leave those aside.

In the other five, the conservatives have a pretty clear record: they violate all of them. Now sometimes that's inevitable, because sometimes, for example, if you're going to uphold precedent, you might strike down a federal law. So by not engaging in one kind of activism, you might engage, you might end up engaging in another.

And sometimes it's justifiable on more theoretical grounds. For example, the counter-majoritarian activism has been defended by liberals, by pointing out that there are various marginalized elements in society that are not able to gain strength through the political process – this is the *Caroline Products* footnote. What you need is a judiciary that will protect minority rights. And I think you can make the argument that what the conservatives do in the federalism cases fits this model because, as Erwin pointed out in the last panel, nobody takes the states seriously anymore. They do, only as a rhetorical ploy to fight, to fight bills that they don't like, but when time comes to say, "Let's have a federal law on marriage," they'll do it.

So maybe it's appropriate, because there has been a breakdown of representatives, there has been a representative failure in these areas to protect them, but even if that's true in the Federalism cases, and I'm not suggesting that they're right on this basis, I'm suggesting only that a heightened judicial scrutiny may be acceptable here. It doesn't fit the models of the affirmative action cases or the gay rights cases, in which the conservatives have a tendency to do, is favor the politically powerful over the politically powerless. So it turns this whole notion of correcting for representative failure on its head.

A case that just came down this past term that really reflects this, although in dissent, is the IOLTA case, dealing with legal services. Legal services have been under attack by conservatives since the Reagan Administration. As a matter of fact, Richard Nixon vetoed Ronald Reagan's vetoing of the Legal Services Corporation in California when Richard Nixon was President. And this program was developed so that funding came out of trust fund accounts to provide some needed funding for legal services. It's a very difficult takings case, but the conservatives had no problem of suggesting that what 50 states had adopted to try to promote a funding mechanism for the poor,

was unconstitutional as a takings. Now that's judicial activism because there is no reason for the judiciary to have to step in. It's not like the poor have political power, relative to those of the more wealthy.

Originalism. Now they can say, "Alright, we've moved off of counter-majoritarian activism as our primary critique," say the conservatives. "Now, what we really want is originalism, or as the President might say, strict constructionalism." And the fact is the conservatives adhere very closely to originalism, except when they don't. The 11th Amendment cases have no tie-in to the text of the 11th Amendment. Whether you believe they're correct or not, you can't tie them in to the text of the 11th Amendment. So, the conservatives rely on history. The affirmative action cases have no relationship to history. So, they tie them in to text. It's a very selective kind of originalism: we'll pick the originalism that most suits our purposes.

In the other areas of activism, you have a similar dichotomy. I don't want to spend too much time on them, because I want comments from both the audience and certainly the other members of the panel, but jurisdictional activism, yes, the conservatives have cut back access to the court to the poor and minorities, they've expanded it for whites. So psychological injury is enough to trigger standing in *Shaw v. Reno*, but stigmatization is not enough to trigger standing in *Allen v. Wright*.

Precedential activism. We can criticize the overruling of *Bowers v. Hardwick*, it violated every principal of *stare decisis* saying that conservatives, except they were not hesitant to overrule *Booth v. Maryland* and *Gathers v. South Carolina*. Yet two years after the latter was decided, in *Payne v. Tennessee*, to decide that juries could consider victim impact statement in capital punishment cases. So it's a very interesting record.

Now I'm not going to defend liberal jurisprudence and say, "Liberal jurisprudence has never been activism." The point of my argument here is not that the conservatives are engaged in unbridled activism; it's that they are engaged in unbridled hypocrisy, and it's time for the truth to come out.

Applause

Alan Morrison:

I too, want to thank you for inviting me, and it's a pleasure to appear and see so many friendly faces in the audience. I want to start off with a definition, and that is, what do we mean by conservative activism? I suppose, in one sense, the topic could be an oxymoron, if by conservative activism we mean that people are – if a conservative judge is somebody who doesn't do things actively, then by definition, we can't have any conservative activists. Presumably, people will be talking about justices like Justice Harlan and Justice Frankfurter, might fall into that category.

But even then, we still must, as Bill said, think about activism in part is in the eye of the beholder. Perhaps in neutral terms, we could talk about activists as those who believe in a larger role for the judiciary. In one sense, it's hardly surprising the judges are activists. After all, they're called upon to do things. They're given this little toy called a case and they get to decide things, and it's much more fun to decide things affirmatively and move the law, then it is to say, "I'm sorry, that's none of our business, let somebody else worry about it." So it's hardly surprising that judges, whoever they are, are more inclined to do things rather than sit back and not decide, even though, that, of course, is a form of doing something.

Well, what do we mean, first, by conservatives? I suppose one could think of conservatives as people who are Republicans; people who voted for Ronald Reagan, George Bush; people who are believers in hard enforcement of the criminal law; people who do not believe in extensive civil rights. In the '60s, most of the judicial activists were people who were protecting the rights of minorities, and criminals and other disadvantaged persons.

That, of course, was not always the case. The original judicial activists, or at least in this century, were of course, the *Lochner* folks – the people who struck down all the minimum wage laws, all the child labor laws, all the women labor laws. Those were really judicial activists and they were all, of course, politically conservative. They overrode state statutes. They overrode federal statutes. There was no respect whatsoever for the will of the elected legislature. And of course, as bill mentioned, one of the great judicial activist cases, *Hans v. Louisiana*, the 11th Amendment case where the Supreme Court read "state" to mean "any state" and not just the state in which the statute in which the Constitution was written.

I want to look a little differently, the way Bill did at a bunch of different constitutional areas and I want to ask not whether there's judicial activism,

because I think the answer is, there surely is. The question is, is it justified, and under what theories might it be justified?

Let's begin with the Commerce Clause cases: *Lopez* and *Morrison* – that's the other Morrison, that's not me. He was the one who was allegedly raping the students at Virginia Polytechnic Institute. In any event, the Supreme Court was faced with the question, "Are there any limits to the Commerce Clause?" – first in *Lopez*, and then in *Morrison* – and the court said, "Yes, there are." That Article I is a grant of power if you believe that the powers granted to Congress are limited, there has to be some limitation. The question of whether the limitations were appropriately applied in that case is a different question. But if you think that Article I is a grant of limited powers under the Commerce Clause, then it's hard to say that at least some degree of judicial activism is unjustified in that context, unless you're prepared to say there is nothing that Congress can't do, as long as it labels it "interstate commerce."

It's also important for the Court to step in because it is inevitable that Congress is going to be tempted to overreach. It is given something to do: make laws. And therefore, it's handed problems, and the answer is, let's make laws. And even if it isn't anything thing that we have the authority to do, it's not an area for us, if we've got the power, let's do it, so let's do it under the Commerce Clause. We see it now. We see it now in the attempts to federalize every single aspect of tort law. We see it in the attempt to eliminate all authority of the states to pass gun control laws that provide for money damages, which Congress is prepared to wipe out under the Commerce Clause.

And even if you can believe this, Congress is about to pass a law that says any person who, in or affecting interstate commerce, shall perform a partial birth abortion, shall be guilty of a federal felony. I wonder what the Commerce Clause connection is in that case. Maybe we'll have an opportunity to find out. If the Court does not step in the Commerce Clause, they'll be nothing for the states to do, and it's hard to know how a state, wanting to pass its own laws and enforce them, can be able to defend itself in this area.

Then we come to the 10th Amendment and we have a similar kind of question, as in *New York against the United States*, where the federal government mandated that the State of New York take upon itself, the

responsibility of dealing with nuclear waste. Is this the kind of case where the court ought to be concerned that the Congress was forcing something down the states' throats, as the courts said, as it was? I'm not sure. It's hard to know why the states, after all, equally represented in the Senate, by two Senators, should feel so defenseless and unable to protect themselves in a – their own rights.

There is, of course, the possibility that Congress may want to pass a law itself, take the credit for all the good things, and put all the responsibility for dealing with the hard problems on the states. If you think that's a justification for the 10th Amendment, then maybe you can see this as a justifiable example of judicial activism. But it's hard to see how that applied to the Brady Bill, where the burdens on the states were very minimal for a very short period of time. Again, this is an issue that may come back again when Congress contends to be very active.

The 11th Amendment, I won't turn back to, except to say, that as bad as the 11th Amendment cases are in and of themselves, a case called *Alden v. Maine*, in which the court admits that it can't find any words to deal with the problem because the case is in the state courts and the 11th Amendment only deals with federal courts. The Supreme Court says, "Well, sovereign immunity, it's an inherent part of our Constitution. You can't sue in the state courts and Congress' power to the contrary is unconstitutional." If that were, of course, the case, it's hard to know why we needed an 11th Amendment to begin with, but I suppose that's a detail that others will have to worry about.

All right, turning now to the 14th Amendment, Section 5, is there any justification for the courts striking down the laws there? It seems to me, one has to distinguish two separate aspects. Number one: cases like Morrison, where the second justification in the Violence Against Women Act was that Section 5 of the 14th Amendment allowed Congress to pass laws to protect the rights of women. The difficulty for the court, and for the defenders of the law was, that Section 5 refers to actions by the state, and the actions there were against private individuals. And so, if you believe that there are any structural limitations to Section 5, meaning that it applies literally only when states do things, it's hard to see that the court was improperly stepping in to that part of controversy.

On the other hand, when you get to the next round of Section 5 cases, involving age discrimination, involving discrimination against handicapped,

where there is clear that the state is involved, it's hard to know on what basis other than judicial activism, and a disagreement with the will of the Congress, where, after all, the states are fully represented. It's hard to understand on what basis the courts should be stepping in that case. There's no need for judicial activism and it's very hard to justify.

The last area I want to talk about is substantive due process. Most of us thought substantive due process was over. Of course, it is not over, and we see it coming up all the time. I'm sure that some of the conservatives would say that *Lawrence* is a substantive due process case like *Roe* was a substantive due process case. But let's confine it if we can, initially, to the economic area, and this last year, following up a series of cases, the Supreme Court ruled that the punitive damages award imposed in the *State Farm* case was unconstitutional. That it violated substantive due process. And the second thing it said, quite remarkably, was that a ratio of punitive damages of more than – to actual damages – of more than ten-to-one, shall be constitutionally suspect.

When I read that I get out my copy of the Constitution and I looked around for the ten-to-one ratio. And I didn't see it any place. It struck me as being rather odd. And then I read a column by a true conservative, George Will, who said it was a great opinion. The only trouble was, it should have been written by a state legislature and not by the United States Supreme Court, and on that, he's absolutely right. But if you're worried that the Supreme Court is getting too activist on these matters, just think about what they did in the "Three Strikes and You're Out" cases, where two men had stolen, in one case, \$135 worth of video tapes and another case, about \$1,200 worth of golf clubs that he'd stuck in his trousers and tried to walk out of the golf shop and not get caught – a real high risk criminal.

The Supreme Court, by a vote of five to four said, "Oh no. We can't get involved in second guessing the state legislatures on that. That's their job." And somebody said, "The only reason they did it was because it was a recidivist." And the court said, "Well that's perfectly okay." And then three weeks later, in the *State Farm* case, when the punishment against the defendant was justified on the grounds that he was a recidivist, three of the justices said, "Oh, you can't do that. That would be unconstitutional to treat him as a recidivist. You've got to take the facts only in this case." Now, the great irony in these cases is that two of the justices are, in fact, true conservatives on both of these issues. They are Justices Scalia and Thomas.

They dissented both in the punitive damages cases and in the “Three Strikes and You’re Out” cases, saying the court had no business getting into either.

The Liberal branch of the court, generally, was in favor of activism. All of them voted in favor of the punitive damages being struck down, and all of them voted in favor of striking down the “Three Strikes and You’re Out” cases. Three Justices were in the middle – O’Connor, Rehnquist and Kennedy – and they were in favor of judicial activism when it helped large corporations who couldn’t afford to hire decent defense counsel to represent them in punitive damages cases.

Laughter

Couldn’t hire expert witnesses. Had no way of bringing money in to try the cases, who were, therefore, the downtrodden of the world, they needed protection. But those poor guys who were victims of the “Three Strikes” law, they didn’t need any protection. They could be taken care of by the people of the State of California.

Let me just try to summarize my theory of, not of judicial activism, but of when it is justified. And let me do it in two phrases. The first phrase is that the court should protect underdogs and not overdogs. It’s good to protect the “Three Strikes” people. It’s not necessary to protect State Farm.

The second, the courts should worry about when there are structural impediments that lead you to think that somehow, an interest that ought to be taken into account, in the political process, is not being taken into account. And in that kind of a situation, the court, not necessarily ought to step in, but at least ought to be a lot more cautious about staying out. If there’s no reason to doubt that the system is working, then the court ought to say, “Probably not,” and leave it alone. If they were to follow those two maxims, then we would truly have conservative judicial activists. Thank you very much.

Applause

Teresa Wynn Roseborough:

Judge Tatel.

Judge David Tatel:

Alan and Bill focused on this issue from the rarified perspective of the United States Supreme Court. I want to give you some thoughts about this issue of judicial activism from the perspective of someone who hangs out in the inferior courts. And I also have a thought or two about the role of public commentary on this question of judicial activism. Whether my views about this issue from the perspective of the Courts of Appeals is at all relevant to the Supreme Court, I suppose, will ultimately depend on whether or not you think the Supreme Court is a court.

Let me begin by explaining that like many people who comment on this question, I have mixed feelings about the term “judicial activist.” And especially the way in which it is commonly used. Judges are properly criticized if they use their power to pursue personal policy agendas. On the other hand, unthinking accusations of judicial activism are poisoning our legal culture, giving rise to the destructive and misleading perceptions that judging is nothing more than partisan politics by another name.

I am especially concerned by the fact that as Justice Ginsburg observed in her confirmations hearings, judicial activism is – and these are her words – “a label too often pressed into service by critics of Court results, rather than the legitimacy of court decisions. Also, reflexively attacking a court’s conclusion, simply because it coincides with the political leanings of the court’s members, or the presidents who appointed them ignores that just as paranoids sometimes have real enemies, so called conservative decisions by so called conservative panels and so called liberal decisions by liberal panels, can be completely correct.”

In my view, it’s far more important to ask whether a decision’s outcome was the product of sound judicial methodology. That is, whether the court followed the basic rules of judging, that distinguish life tenure judges from elected and appointed policy makers. Is a decision consistent with precedent? That is, does a decision follow precedent? Or, if not, does it either explain why a controlling case law does not apply or forthrightly overrule it? On principle grounds, is a decision faithful to current institutional and statutory text and to the intent of the drafters? Does it appropriately defer to the policy judgments of Congress, administrative agencies and states? Does it apply the proper standard of review to lower court fact findings? Are the issues it raises generally limited to those raised

by the parties? Does it avoid unnecessary dictum? And finally, are its results openly and rationally explained?

Focusing on methodology rather than results is particularly important when analyzing the products of an appeals court, where I work. Though the Supreme Court often rules on broad constitutional principles, most cases we appeals court judges face, though they may involve novel fact patterns or difficult legal issues, can be decided using principles drawn from Supreme Court or circuit precedent, statutory text, agency regulations and so forth. Put another way, most of our cases have a right answer – one the judges, using rigorous judicial methodology can agree on, notwithstanding that they may have very different policy views about the case.

Of course, judicial methodology, no matter how rigorous, can never completely standardize the decision-making. Interpreting precedent and statutory text requires judgment, and there will always be room for reasonable judges to disagree. But in my experience, these basic rules, if conscientiously followed, maximize the extent to which decisions by life tenured judges from across the political spectrum are driven, not by personal policy agendas, but by the application of legal principal to establish fact. And even when these rules fail to banish ideology from judicial decision-making, they still serve an important function. They draw central controversies to the forefront of judicial opinions, rather than burying them in substantive preferences... excuse me, rather than burying substantive preferences behind walls of distorted precedent, invented facts, and shifting standards of review.

Let me give you two examples, which I think nicely illustrate the inappropriateness of results-oriented assessment – positive or negative – of judicial decisions. Just under a year ago, in a case called *United States v. Fell*, a Vermont district judge declared the Federal Death Penalty Act unconstitutional. Because of that result, and because the judge is a Clinton appointee, it wasn't long before we heard the charge "judicial activist." The attorney general spokesperson told reporters that, and this is a quote, "Today's decision underscores the importance of confirming President Bush's nominees to the federal bench; well-qualified men and women who will apply the laws that Congress has passed, in accordance with Supreme Court precedent. In our system of government," the spokesperson explained, "it is the legislature, elected by the American people, which determines the proper punishment for federal crimes. Not lone members of the federal

judiciary.” The spokesperson concluded, “Congress passed the Death Penalty Act to save lives, and the Supreme Court of the United States has repeatedly said the death penalty does not violate the Constitution.”

The careful reading of the district judge’s decision, with attention to its methodology, not just its results, reveals something quite different. The defendant had objected to the admission of hearsay evidence, to establish an aggravating factor in the sentencing phase of his capital case. Though the Federal Death Penalty Act clearly authorizes use of such evidence, the district court concluded that doing so would violate the due process and confrontation clauses in the Constitution. He based this conclusion on two recent Supreme Court decisions – both issued after passage of the Death Penalty Act – *Apprendi v. New Jersey*, then *Ring v. Arizona*. Those cases teach that statutory aggravating factors are more akin to elements of the offense, then to sentencing factors.

Though *Apprendi* and *Ring* held only that juries—not judges—must determine the existence of such factors, the district judge reasoned that if the choice of decision maker in both the sentencing and guilt stages, must satisfy constitutionally imposed procedural standards, then the evidentiary rules in both stages must also meet constitutional standards.

Of course, I would never express any view about whether this decision is or is not correct. That’s up to the Second Circuit, and perhaps the Supreme Court. For purposes of our topic here, though, it’s enough to say that contrary to the implications of the Justice Department statement, the district court decision in *Fell*, repudiates no clearly controlling precedent, but simply analyzes whether the Supreme Court’s resolution on one legal issue also resolves a distinct but related issue. That’s judging. Suggesting that such decisions are activist or somehow illegitimate, without any specific methodological objection, erodes public confidence and the integrity of our judicial system.

In contrast, consider the Fifth Circuit’s recent decision in *United States v. Emerson*, which one columnist, normally a critic of liberal judicial activism, described as a “remarkably detailed and persuasive analysis, holding” that’s his word, “that the 2nd Amendment guarantees not just the right of states to maintain militias, but also the right of individuals to bear arms, whether or not they belong to the state militia.” The court’s 2nd Amendment discussion is certainly detailed. It runs for 56 of the opinion’s 60 pages. But it’s not a

holding. As the concurrence rather devastatingly pointed out, the 2nd Amendment discussion is pure dictum addressing a constitutional issue entirely unnecessary to resolving the controversy before the court.

The *Emerson* defendant had challenged the federal statute that prohibits possession of certain firearms by persons subject to court orders, restraining them from threatening an intimate partner or child of an intimate partner. Conceding that the statute applied to him, the defendant claimed it had violated his 2nd Amendment right to bear arms. The court could easily have resolved the case by beginning with the point it reserved for the 42nd page of its opinion, namely, that the statute narrowly tailored limitation of arms possession is obviously permissible under any plausible interpretation of the 2nd Amendment. After all, as the court itself pointed out, the statute regulates only persons that a court has previously found to represent a real danger to someone else.

Instead, the court chose to wade into the extremely controversial minefield of 2nd Amendment analysis – an area even the Supreme Court has resolutely refused to enter. The columnist may well be correct that the court’s 2nd Amendment analysis is persuasive. I express no opinion on that matter. I simply point out that celebrating the decision’s result in calling a holding obscures the extent to which this court arrived at that result, by abandoning one of the key principles of judging – of judicial restraint, that distinguishes judging from policy makers.

Applause

Judge J. Michael Luttig:

Let me first say that I’m honored to be here today. Thank you, Peter Rubin, for thinking of me. At least that’s my view as of the moment. And thank you A.C.S., for your very kind invitation. I congratulate you on this already successful inaugural convention and wish you many more. I will cut straight to the chase because our time is short, and I expect the real value will come in the exchange that follows the panel’s discussion.

There are a myriad of definitions of judicial activism, and we wouldn’t have time to discuss even a fraction of them, at least in a meaningful way, in the span of time that we’ve set aside. But I believe that all of the various definitions come down to this: Judicial activism, properly defined, is simply

the substitution of a judge's personal predilections for law, whatever form that substitution takes. That is, judicial activism exists whenever the judicial officer gives effect to his view of what law ought to be, rather than what law actually is.

This said, permit me to advance for consideration the following view, which I would like to believe would be unexceptionable and consensus, but which I recognize will probably be neither, and indeed is rejected, even by many of my own colleagues on the federal bench. Judicial activism, by whomever it is practiced, is to be condemned. Assuming *arguendo*, as is often simplistically and misleadingly suggested, that the affinities of the so called "conservative jurists" run toward big business, law enforcement, the prosecutor, or the government in general, then it is no more legitimate for that jurist to infuse into the law his personal affinity for these institutional entities, than it is for the so called "liberal jurist" to infuse into the law what is no less often simplistically and misleadingly suggested is his different affinity for the individual plaintiffs who claim to have been harmed at the hand of these institutional defendants.

The conservative jurist who advocates infusing his personal views into law ought to admit outright that such is open confirmation of the legitimacy of the charge against his jurisprudence, that it is no different from the liberal activism that he criticizes, except in his pursuit of a different set of political objectives. Of course, so also should the liberal jurist be prepared to admit that the introduction of his different subjective dispositions into the same calculus, also to be activism. And it should not matter to either jurist, that his activism is employed in moderation. The conservative and liberal jurist alike should regard activism in moderation as no more defensible than activism in excess, and the attempted defense of such as folly.

Nor should activism be viewed by either jurist as justifiable for the reason that it is employed in pursuit of the particular objects for which he has affinity, whatever those objects be. Indeed, each, the conservative and the liberal jurists, should believe it most important that he restrain himself precisely when the objects of his affinity are before him. He should believe that his activism is not justified by the ends it seeks to secure, any more than another's activism can be justified by the different ends that it seeks to secure.

There is no such thing as good or justifiable judicial activism. All activism is in defiance of law - law, that is, defined as the politics of the People, not the politics of un-elected, life-tenured federal judges. The conservative jurist, as the liberal jurist, should defend with every ounce of his judicial might, the imperative that the party who comes before him entitled under law to prevail, must prevail, and that neither the plaintiff's nor the defendant's likelihood of prevailing should be dependant in any way at all upon the personal predilections of the particular judges assigned to his case, however laudable those predilections might be.

He should not decide for the institutional entity and against the individual, or for the individual against the institutional, because of any affinity for either, but rather only because that decision is required of him by law. Just as he should not decide for, or against, any litigant because of any personal view as to the wisdom or desirability of the particular statute, or other authority, that in that particular case, he's interpreting and applying.

The conservative jurist and the liberal jurist, equally, should believe that to embrace a jurisprudence that recognizes a role for the purely personal view of the judge and the decision-making process, even one that pledges intelligence and moderation in its performance, and claims virtue as its object, is nothing more than to engage the judicial activist possessed of a different political or social agenda on the latter's own terms.

Both the conservative and the liberal jurist should believe that this is an engagement that cannot be won by one or the other, and ought not be won by either. For if either jurist so disposed is victorious in such an engagement, then law will have become nothing beyond the wield of raw power by whomever happens at the time to have greater numbers on the federal courts.

Listen carefully to this, if to nothing else that I have to say. If, as has been asserted, a judge's personal dispositions may properly become a consideration in the decision of specific cases before the court; and if, as has been asserted, the liberal jurists' sympathies most naturally extend to individual plaintiffs, and the conservative jurists' sympathies most naturally extend to the institutional entities of society; and if the numbers of liberal jurists at the time exceed the numbers of conservative jurists; then plaintiffs, rather than society's institutional entities, will prevail in the courts.

If, on the other hand, at any given time, the numbers of conservative jurists exceed the numbers of liberal jurists, then the collective entities of society, rather than the individual plaintiffs, will prevail in the nation's courts. But, whether the result be one or the other, it will be so, not because of law, but in repudiation of law. Live by the sword. Die by the sword.

If one is unwilling to die by the sword he wields himself, then he should accept that which the activist rejects – that law is an institution, separate and apart from politics. And that those charged with the sacred responsibility of its interpretation must forsake their personal politics the moment they put on the judicial robe. For only through the complete forsaking of personal politics will the judicial result reached be the expression, not of the politics of the particular judge, but of the politics of the People, from whom the judge derives his power. Acceptance of this rule of law as so defined, it should go without saying, entails acceptance by the jurist that these principles are as important a restraint upon him, as he argues they ought be upon others.

As a consequence, he should understand, he cannot even the score for what he perceives to be the wrongs of the past, and at the same time remain faithful to these principles by which he is externally bound, internally binds himself, and by which he expects those of different political mind also to be bound. He should accept the limitation that these principles place on his loaned power, if for no other reason than out of the simple conviction that requiter would be a betrayal of both.

I believe that these are the principles to which all jurists, however they are labeled, or label themselves, should adhere, if the law is to be anything different than, if it is to be anything beyond, mere partisan politics. If these simple principles are followed, I believe that raw partisan politics and the complete politicization of the law that it threatens will suffer defeat as it ought, and the rule of law will prevail as it ought. And if at the end, such proves to be the product, then for all its rancor, the debate that we are currently having over the courts and over law itself will have been worth the considerable price it will have exacted.

Thus stated, the fair question arises of how do we first, detect, and then, having detected, purge, judicial activism from the decision-making process? As we open our discussion, let me suggest this, which we can explore in greater detail: At the end of the day, other than conscience, it is only

intellectual honesty and intellectual rigor, and the accountability that these render possible, that can restrain a judiciary that serves for life, and at the pleasure of no one. And it is precisely because the intellectual honesty and analytical scrupulousness of conventional jurisprudence, and the resulting accountability, do serve as a bridle upon the courts, that honesty and scrupulousness have been eschewed in many quarters, in favor of the intellectually lazier and jurisprudentially misbegotten enterprise of decision by personal policy preference.

If we were to restore intellectual honesty and analytical rigor to judicial decision-making, as well as to the public dialogue over the courts and over law, I believe we would find that the differences among us are not as great as the current polarizing rhetoric suggests. Indeed, through an honest and good faith dialogue, I suspect we might even bring truce to the destructive political war that is being waged over the courts and stem the further politicization of law, which already must be counted as among this war's heavy costs.

Again, thank you for having me here today. I look forward to the discussion.

Applause

(Video edit)

William Marshall:

If you think about it together, I think you'd begin to dissect this. Judge Luttig is one of the most brilliant jurists in the country, no doubt about it. But how do you apply what he says to *Adarand Construction*, which is the case striking down minority contracting. There isn't an argument in the world that originalism, as it is understood, would strike down federal preferences. There isn't one argument to be made. When that case was decided, the court, not only was not only anti-originalists, it overturned a precedent directly on point, *FCC v. Metro Broadcasting*. It allowed a white plaintiff to sue in circumstances where they had not allowed minority plaintiffs to sue because they didn't demand a causal type connection between the relief being sought and the person bringing the case. And it overturned a decision of an elected branch.

I don't know how a conservative applying the kind of methodology that we just heard discussed, can support a case like that, and yet I hear that that is one of the great decisions of conservative jurisprudence. And if you apply Alan's analysis to it, it becomes even more difficult, because I think Alan makes a very valid point that where judicial upset of majoritarian action takes place, or when disadvantaged or minority political groups are harmed through the political process, but here the minority groups were helped by the political process, so a double burden was placed on them.

First of all, they had to somehow get a majority of people to come over to their side and help their interest – which, by the way, I think is the interest of everybody – but in terms of the political warfare, they had to do that. And then after they did that, they get their actions struck down. I don't know how a conservative jurisprudence, under any definition, can defend that decision.

Teresa Wynn Roseborough:

Al.

Alan Morrison:

I want to take a slightly different tact and question about Judge Luttig's analysis, and my problem is, trying to decide, or find a case in which a judge has ever said, "I'm disregarding the law and I'm enacting my personal preferences." Judges point to something that they call law. They find some words in a statute or a Constitution all the time.

Perhaps one of the most activist judges of all times, Justice Douglas, used to dissent in tax cases, and he would write the words, "I dissent, period." And not say another word about it. It's hard to see that's the active judging, as Judge Tatel would call it. I'm sure he thought that it was okay because it was clear from his prior opinions that he meant that the tax payers should win in all close cases and maybe that's a form of judging. Maybe he just thinks the tax payers should win as a matter of politics, and maybe somebody would say, that's the rare case where you can say, there's nothing but political preferences there.

But all the cases that I've seen, the judges argue at great length, and rely on cases and principles that are, in their view, law. The question in, can we simply say, when somebody says, "I'm following the law," that that's the

end of our discussion, that they're no longer activists? I think we have to go a little further, and it's very difficult to know when somebody is and is not an activist, and I actually, as I tried to say, I'm not sure that we should... that that's the right inquiry. The question is, under what circumstances is judicial activism more, and in which circumstances, less justified?

Judge David Tatel:

I want to respond to what Alan just said, but I worry that my response... His answer to my response might be, which...

Alan Morrison:

I haven't heard your response yet...

Judge David Tatel:

...but I'm gonna tell you what you're gonna say.

Laughter

You're gonna say...

Alan Morrison:

You're a very smart man, you know that.

Judge David Tatel:

He's looking at this from where he sits – on an appeals court – my answer to your question, and as I said, I'm not sure how helpful it is at the Supreme Court, but it should be, is that, at the appeals court level, I think you're not correct. Judges, you're right, do not say, "I'm deciding this case because I want the plaintiffs to win," or "because I want the corporate defendant to win." But if you look carefully at a case, if you examine the opinion and read the briefs and understand the record, and if you apply the proper standards of judicial methodology to it, that is, the rules under which we operate, you can, most of the time, make a judgment about whether the opinion is rationally correct.

That is, is this a right opinion based on the legal principles by which judges make decisions? And when they aren't, the only conclusion must be that the judge either misinterpreted precedent, or disregarded the record or distorted the record, or substituted his or her judgment for the agency's decision in order to reach a particular result. I think Alan, if you and I sat down with a large number of appellate decisions, we could do that. We could identify those cases that are activist and those that are not, by the integrity with which they follow the rules of judging.

Alan Morrison:

Yes, I think that's right, and I agree with you that most cases, there is a right answer. And that's why, in most, certainly in the D.C. circles that I'm most familiar with, most of the cases are decided unanimously...

Judge David Tatel:

I thought you were going to say most of them were decided correctly.

Alan Morrison:

I didn't say that.

Judge David Tatel:

You said there's always a correct answer.

Laughter

Alan Morrison:

Statistically, I could say they're decided unanimously, without normatively making a judgment, I can't decide if it is correct.

Teresa Wynn Roseborough:

Well, Judge Luttig, one says that they can tell when personal predilections have invaded a decision and Alan says you can't. What do you think?

Judge J. Michael Luttig:

Well if you can listen carefully listen to both, they're both correct. If the presumption as to what I was saying was that we simply accept the representation by the judge, that he is indeed following the law, then Alan's obviously correct, that's meaningless. That's why we have to look for something more and I will remain open as long as I'm on the bench, but this preliminary thought that I tease out at the end of my statement, is the best that I've come up with to date, which is, intellectual honesty and analytical rigor are the only checks on judicial power. If you think about it, you can do nothing to the federal judge who sits for life. He can, assuming Alan's correct, and I don't doubt it, he can simply say, "I would reverse, period," in every case. You can do nothing to him at all. He serves for life. And I dare say, as indefensible as that would be, it would not be bad behavior within the meaning of the Constitution.

Now, I think that within the federal courts, there is an inexcusable lack of analysis and reasoning. First, and I believe that the reasoning and analysis that does appear, when it does is inexcusably shallow. I would like to believe that all of us in this room can yet sit down and review two legal documents addressing the identical issue, and come to a conclusion as to whether one or the other is more persuasive. As I say to my clerks at times, given the nature of the issues that we have before us, it will often be the case that the issue is fifty-one percent - forty-nine. But unlike the rest of the population, it falls to us actually to decide and put our name on it. And so we do the best we can.

But, and this is where I may differ slightly from David in terms of what the implication of the statement was, which is, if a product is analytically indefensible – hypothetically at every level imaginable – I am not prepared to conclude, and I don't suggest here, that that means at work necessarily, is judicial activism. It could be sheer incompetence.

Laughter

All I suggest is that when the analysis doesn't hold water, that it is at least fertile field to begin the search for judicial activism. And if it cannot be ascribed to incompetence or laziness, then at least it can be critiqued as a plausible exercise of judicial activism.

Teresa Wynn Roseborough:

I'm gonna give some time for questions from our audience, and there's a couple of microphones available. I'm gonna ask you to stand up and if you wait till a microphone gets to you before you start to speak, that'd be great. Let's start at this corner of the room, and then I'll work my way across and then try to come back the other way.

Audience Member 1:

...I appreciate your coming here... very courageous and...

Judge J. Michael Luttig:

Or sheer stupidity...

Audience Member 1:

The question I have, and I'd appreciate the absolutist position that you seem to be taking on judicial activism. If you are taking an absolutist position as you are, help me understand how you'd vote on *Brown v. Board of Education* in 1954.

Judge J. Michael Luttig:

I'm not like Judge Tatel, I'm not going to get into particular cases, although I don't hesitate to embrace that decision as a decision that is right and should be followed. I will not be coy about that. But, what we are ignoring in the discussion thus far, which all of us panelists understand, in which, until you read the literature, is difficult to appreciate, is the difficulty in the terminology here. Not only on the term "conservative," but on the term "activism." And so for instance, at least on the surface here, the suggestion has appeared from our discussion, but only because it hasn't been finely tuned yet, that if one overrules precedent, it's judicial activism. If one fails to read the language of the statute, it's judicial activism.

But, and correct me if I'm wrong Professor Marshall, as I read your article, at the outset of that article, you acknowledge that that's not the case. That there may well be instances in which the overruling of precedent is entirely warranted and does not, in any sense, mark judicial activism. So, until you get into the details of what we mean, the definitional problems of judicial activism, and I assume all of us are facile enough to take whatever

definitions you want to use. You just tell me what the definition is, give me the case, and I'll tell you whether that's judicial activism under that definition. But until we actually have a definition that we all agree upon, at least to work with, then analyzing particular cases is of no value. And that's the only objection I have to Professor Marshall's presentation, is that he didn't have the opportunity or the time to explain those proper analytical caveats that he lays out at the beginning of his article.

Audience Member 2:

I've been a trial judge for about 22 years, I came here totally confident that I'd post on my wall anything that Judge Tatel said about judging and follow them. With greater respect, I wasn't that sure I could say the same about Judge Luttig. But, that prompts me to ask Judge Tatel, why I shouldn't post on my wall everything that Judge Luttig has said about judging and put more...??...where he disagreed about Judge Luttig about what he said?

Judge David Tatel:

That's a really good point, because, at bottom, I think Judge Luttig and I agree on this issue completely. He approached it from the point of view of... He said judicial activism, he defines as a situation where a judge uses his or her authority to reach a result that's driven by the judge's personal views. I started from the proposition that the responsibility of a judge is to follow the rules of judicial methodology as a way of avoiding decisions that are controlled by personal preferences. I think we're saying exactly the same thing. Do you disagree?

Judge J. Michael Luttig:

No. I agree fully. And I think it's fascinating to see what, just in order to be provocative, appears to be the difference between the sitting federal judges and the professors who critique the federal judges.

Laughter

Alan Morrison:

Well, we have one unfair advantage, and that is, we can actually express our views about particular cases that are judicially, allegedly judicially activist,

and if I asked you, for example, what you think of Alden against Maine, you would probably demure on that, right?

Judge J. Michael Luttig:

Most assuredly.

Alan Morrison:

Yes, sir.

Laughter

And that's the point, I think. The point is that until you get into the specifics, you can't really argue about it. At this level of generality, nobody says there are judicial activists. They're following the law. Nobody says they're putting their personal preferences... They're following the law.

Judge J. Michael Luttig:

That's not right though, Alan. The...

Alan Morrison:

Who said that? Which judge has ever said that, "I am embolding my personal preferences over the law?"

Judge J. Michael Luttig:

I'm saying professors are telling us that we should be judicial activists and be candid in our admission of that.

Alan Morrison:

No, I didn't say that.

William Marshall:

No, I don't think so. I'm not saying that.

Alan Morrison:

I think we're saying that you are, in some respects, and we're trying to make a normative discussion as to when that's more and less appropriate.

Judge J. Michael Luttig:

Do we have a consensus on the panel, then, that judicial activism is at all times indefensible.

Alan Morrison:

No.

William Marshall:

Of course it is because...

Laughter

Alan Morrison:

All right. You want controversy? We got controversy.

William Marshall:

Of course it is because of the way you defined it. You defined it as a judge putting his personal political predilections into a decision.

Judge J. Michael Luttig:

I was only reading the fine print of your article...

Laughter

...which is to say that merely identifying the seven sins, as you call it, tells us nothing in truth about whether the breach of those constitutes judicial activism.

William Marshall:

Well, there is a footnote that I had in there, but I do want to agree with you on one thing. There is no better definition of academic than irrelevance, and you are not irrelevant. The judges who actually issue the power... But, because it's defined the way of political preference, yes, it's illegitimate to do that. Now, you can make up a theory, or develop a theory, as Alan did, as to when it's appropriate to engage in greater types of scrutiny on particular kinds of provisions, and I think Alan's theory is not written in the Constitution, that you take a look at laws which harm minority groups more closely than you look at laws which seem to harm majority. But it's a legitimate judicial philosophy to do that and you can glean that from the principle of the Constitution.

Now other people can disagree with that. Now, I'm not sure that Alan is engaging in the insertion of political preference on that. He's coming up with a way of viewing things. And I think that...

Judge J. Michael Luttig:

I agree but...??...call that judicial activism. I don't see it that way, although I understand that that could be encompassed within one of the seven sins, as being such.

William Marshall:

Okay, now the problem that you get though, is if you have different ways, different jurisprudential methodologies of looking at the Constitution. You could have two judges – this is, I think, Alan's point – who both do not think they are inserting their political preference, but come out to different results. And the problem... Part of that is subconscious. Part of it is you don't even sometimes realize, I think, that you're coming to a particular result because of your internal political preferences. But we need to sort of, I think, it's not just a matter of articulating what judicial activism is, it's sort of developing a way of looking at the law in a broader sense, because if we work with the definition of “don't insert your political preference,” then Alan's exactly right. Nobody's ever gonna say that they're inserting their political preference.

Alan Morrison:

Take Lawrence against Texas. Does anybody doubt that the personal preferences of every Justice on the Supreme Court had something to do with the way they came out of that case? Does that mean it's a lawless case? That it's pure judicial activism? I don't know, but we can't... I sometimes say this in jest to my students, you have to remember that judges are human beings too, and that they are influenced by the same kind of things that other human beings are influenced. And you cannot divorce people's personal preferences from the way they've lived their lives, completely. You can try, but you cannot do it completely, and I'm sure Judge Tatel's gonna disagree with me.

Judge David Tatel:

No. Only partially.

Alan Morrison:

Good.

Laughter

Alan Morrison:

Better than I usually do.

Judge David Tatel:

Are you finished?

Alan Morrison:

Yeah. I'm done.

Judge David Tatel:

One way to think about this from the question of personal preferences, because Alan's exactly right, I mean, when I look at a case for the first time, I have a reaction to it. You know, I mean, I come... I have a particular background. I see the world in a particular way, and when I see... I mean, take, for example an employment discrimination case. I have an instinct about the case when I look at it. And if I were, you know, just a policy maker, I'd go with that instinct. But, the process of deciding one of these

cases, of applying, of figuring out what the law is, applying it to the facts of the case, of using the proper standards of review and presumptions, and trying to explain the result rationally and convincingly, often brings you out in a different place. And that's what these rules are all about.

Now, you're absolutely right, Alan. At some points, in some cases, probably these decisions are ultimately determined by the preferences of the judges. But, there isn't enough either public examination of judicial methodology or of rigorous judicial methodology itself in the courts, to satisfy me that we've done everything we can to reduce those cases that are, in fact, driven by personal preferences, to the absolute minimum.

Alan Morrison:

I wouldn't even say driven. At least, influenced. Driven may be... I don't know. Anyway.

Teresa Wynn Roseborough:

If you have a question there, I'm going go ahead and invite you as the next questioner, so the microphone can be getting to you.

Audience Member 3:

I wonder if perhaps, my question is that these comments reminded me of Justice Scalia's opinion in the *Republican Party of Minnesota v. White* case, limiting what candidates for judicial office, if elected, campaigns can say about these issues. And what Scalia argument, in the majority, said was what do we mean when we say we should be impartial. Well, surely what we cannot mean is that they have no preconceptions about how certain legal questions ought to come out, because the only way you could have somebody put on the bench who has no preconceptions about legal issues would be to have somebody who is completely incompetent. There's no such thing as a *tabula rosa*. I was wondering ...How can one distinguish between those kind of preconceptions or ideas that might distinguish, you know, somebody who follows a certain school, a certain theory of how one should go about a jury and Constitution versus another theory or constitutional interpretation for mere political preferences? Is there a distinction? Is one of those to be avoided and the other not? How do you deal with that sort of issue?

Judge J. Michael Luttig:

The existence of the dichotomy itself to me is the simplest thing in the world, both intellectually and in fact. As Judge Tatel says, you have a body of rules and laws. You may, in fact, you can analyze those rules and laws independent of your personal predilections, whatever they are. You can also then, honestly and candidly, confront your personal predilections on the issue, and then intellectually ask yourself, “Can I square those with these rules and the conclusions that seem to follow from them?”

I, myself, don’t have much difficulty doing that, and I mock my clerks when they profess to have difficulty at that, because to me, if you do, then you haven’t acknowledged that the first principle that I allude to, which is, there is something separate and apart, politics and law. They are not one in the same. And as David’s saying, and I paraphrase, that there is both more and less to the judicial role than anyone who’s not in the courts, would ever believe. There is more to it, than is often suggested by just the political rhetoric that we sit down, and up or down, as to what we believe. Judges actually... They begin and end with rules, and that’s what we do and talk about it, and often times, frankly, it’s not exciting. It’s not nearly as exciting as talking about the result, which is one of the problems we have.

In the media, it’s perfectly understandable because how do you discuss the analysis and the reasoning first, in a short article, but second, in an article that often times has to be written and published within an hour and a half of its release, to meet the deadline. So I can’t fault it. But that doesn’t mean that we shouldn’t recognize the consequences of the incessant talk about results, to the complete exclusion of any talk about the reasoning. Because remember, I recently said in – and my law clerks are here, they can correct me as they often do – in, I think, the beginning of the *Hamdi* decision, in which I dissented from our court’s denial of rehearing *en-banc*, as should be the case under a rule of law, the rules set forth here will have implications for cases down the road. And if you speak only in terms of result, that’s just not the case.

Teresa Wynn Roseborough:

I have a questioner already identified in the middle here, and I want to go ahead and select someone in this corner of the room. The gentleman there on

the far end and that'll probably have to be our last question. We'll start with you.

Audience Member 4:

This question goes to Professor Morrison's point that judges never say that they're being activists. If I remember correctly, then Chief Judge Wilkinson concurred in the *Morrison* decision in the Fourth Circuit case, kind of opens some striking language, discussing, or deciding the case...??...**judicial activism**...and I was wondering if you think that that might be a fair characterization of the movement generally, and if so, what are they doing about the fact that that language appeared in...??...a decision of a judge...that a judge would be honest about that or is that something that's troubling?

William Marshall?:

I know the case...

Teresa Wynn Roseborough:

Briefly.

Judge J. Michael Luttig:

It's *Morrison* in our court.

William Marshall:

Yeah, when he talks about the legitimacy of judicial activism.

Alan Morrison:

Oh yes. Of the lower court opinion in the Morrison case.

William Marshall:

Do you want to comment on it, the question went to you.

Alan Morrison:

No. I think that, and I didn't mean to say that my view about judicial activists is limited only to situations involving minorities and individuals against the state, that there are other kind of structural impediments or reasons to worry about self-aggrandizement of power of Congress under the Commerce Clause or other situations in which you find some structural defect that, to my view, justifies a judge in being more scrupulous in examining the situation to see whether democracy is not working the way the Constitution's set up to be. And if you're doing that, it seems to be perfectly defensible, doing that and trying to define the areas in which it is more and less appropriate for a judge to do that, rather than simply saying, "I never do it, but here I'm voting this way rather than the other way."

Judge J. Michael Luttig:

I want to be fair to my friend, Judge Wilkinson—and I authored the majority in that case, as you may know, and he'd concurred in that opinion—I think, and at least I understood him to be saying nothing more nor less, than what is suggested in the literature, which is that, if a court overturns an act as unconstitutional, that is an act of judicial activism, without prescription, whether good or bad, it's just a fact. I personally don't share that view and I take it that neither of our professors, and I doubt that Judge Tatel does either.

Teresa Wynn Roseborough:

Okay, we have our last question on the far right there.

Audience Member 5:

I had a question. I know that Professor Morrison mentioned when he was discussing sovereign immunity and 11th Amendment law, that the Supreme Court styled, almost 115-year precedent in *Hans v. Louisiana*, as an example of conservative judicial activism, because the court, by extending the 11th Amendment, whose actual wording at any strict construction or judicial restraint interpretation of that wording could never lead to the internalization the court gave it in extending the 11th Amendment to the state of the resident of the claimant or plaintiff, as well as to other states of the union.

I just want to ask, what is the reaction of Professor Morrison and other panel members to, the decision by Justice Thomas last term, in the *South Carolina*

Ports Authority v. Federal Maritime Commission, that now extended the immunity under the 11th Amendment, not just to actions in federal court, or exercise of jurisdiction by federal courts, but through the exercise of the jurisdiction by federal administrative regulatory tribunals and bodies as well. That goes far beyond the worry of the 11th Amendment or any construction or strict construction interpretation of that amendment.

Teresa Wynn Roseborough:

That is such a good question. I'm gonna ask each panel to take a crack at it and then incorporate your closing remarks in your response to that question. They can do it. Professor Morrison.

Alan Morrison:

I agree that it's judicial activism, but I think the antecedent question was that the court's decision in years before that, to say that the Commerce Clause note was trumped by the 11th Amendment. That was in my view, an act of judicial activism, and that, of course, led to this – and this is even further down the road – again, no structural impediment, no reason to believe that the states were incapable of protecting themselves in the courts or in federal administrative agencies. And so I view that as a pure results-oriented decision.

Teresa Wynn Roseborough:

Professor Marshall.

William Marshall:

Believe it or not, I'm not sure that I do. I think that it follows some precedent. It expands on precedent. I agree a lot with what was said here, to incorporate my closing remarks in terms of the integrity of judicial decision-making. The point that I'm trying to make is anybody who wants to get expansive on implied rights in the Constitution, such as the rights of states not to be sued, doesn't have the same kind of credibility, as far as I'm concerned, to get very harsh when other people find rights that they find objectionable, in cases such as *Lawrence v. Texas*. This, I think, is exactly what Judge Luttig said earlier, in that, if you're going to live by the sword, you can die by the sword. And the point that I was making, is that the

conservatives have been using this sword for a long, long time, to claim that what the liberals have been doing is engaging in judicial activism. It's high time to take a look at what they're doing on it, and it's time for them to fall on their sword.

Applause

Teresa Wynn Roseborough:

Judge Tatel.

Judge David Tatel:

I guess in the end, I would just say this. I think that the accusations of judicial activism are used ... they're used inappropriately by many people, and I think they're used largely to, as a subterfuge for objecting to the results of a decision. Now, I think there is, defined by, because I think Judge Luttig and I agree about the definition of judicial activism, I think there is judicial activism, if judicial activism is defined as judges' decisions driven or influenced largely by their personal preferences. I think there's actually a lot less of it than one would think from the press, which is the point I want to end with. Not just the press, but the political branches of government also.

There is too much, I think, criticism of judicial decisions based only on their results. I've given you two examples today of results-oriented assessment of judicial decisions, that I think simply feeds the popular perception that judges are just policy makers, but they happen to have lifetime jobs. I think much of that criticism is inaccurate. Some of it is, but probably for the wrong reasons. And it's contributed to, not just by politicians and columnists, but my least favorite kinds of newspaper articles are articles about our cases which say, on the panel was judges "A" and "B" who were appointed by President "X" and Judge "C" was appointed by President "Y". I mean that just, I think, feeds the public perception that judges are essentially pursuing the policy agendas of the presidents who appointed them. And I love to keep the articles that do that because so many times, the results are completely different than one would have predicted by who the appointed presidents were.

That's really my only point in the end, is that this question of what is judicial activism and what isn't, is much more complex than the public debate

reflects. Figuring out whether a decision is a legitimate act of judging – which to me is a much more appropriate question to ask – is a difficult sophisticated task that takes careful analysis of the case, and of the record, and of the briefs, and there are many, many decisions that are legitimate acts of judging. There are some that aren't. Maybe it's because they're motivated by the judges' personal preferences, or maybe it's because of incompetence. But the point is that the question is a lot more complex, I think, than the public and policy debate in this country reflects.

Teresa Wynn Roseborough:

Judge Luttig, you get the last words.

Judge J. Michael Luttig:

As my remarks, I hope, made clear, to the extent that there is conservative judicial hypocrisy, it should be roundly condemned, just as to the extent there's conservative judicial activism, it should be condemned. As to Judge Tatel's comments, I agree that there is probably less judicial activism, as he and I had defined it, than the media suggests. But I fear that there may be more than he would wish to recognize. And I believe that vigilance is required by all of us as judges, regardless of prior political strife.

And finally, I would just say, I think that there are consequences, hard to detect, of the polarized debate, the labeling of judges as conservative and liberal, and then finally, the labeling of them or the association of those judges with their appointing presidents. I actually believe that in the aggregate, those three things, for lack of a better word, have the risk of channeling the judicial officer, when he is ultimately confirmed, into the same kind of polarization that the rhetoric and the labels suggests. And not to put too fine a point on it, I think we risk that when, after vicious confirmation hearings in which these labels are thrown around without definition, we risk that the judicial employee, regardless of their conscientiousness, will fall into the belief that he or she should vote a particular way, because that is the political platform of the appointing president. And when that occurs, there will, indeed, be no difference, none at all, between politics and law.

Teresa Wynn Roseborough:

Judge Luttig, Judge Tatel, Mr. Morrison, Professor Marshall, you have been incredible. Thank you so much.

Applause