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## **Revisiting Judicial Activism: The Right and Wrong Kinds**

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# Revisiting Judicial Activism: The Right and Wrong Kinds

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## I. Introduction

In May 2010, I published a prior version of this Issue Brief in which I tried to articulate a theory of appropriate and inappropriate judicial activism. I stated as my theory that it is most appropriate for the Court to engage in judicial activism when there is some reason to believe that our system of representative government has not worked and that the protections that the Constitution is supposed to afford are lacking. Three full terms of the Supreme Court have concluded since then, and I believe that my approach still holds. In that time we have seen judicial activism from the left and the right on the political spectrum, some of which seems justified, and some not.

The principal addition to this Issue Brief is the application of my theory to cases decided in the past three years. That analysis cannot stand on its own, and so I have retained, and slightly modified, the Introduction and Part I, which sets forth examples of judicial activism in the Warren, Burger, and Rehnquist-Roberts Courts. The main changes are in Part II, where I have added discussions of (1) the Affordable Care Act case, (2) the ruling setting aside the statutory formula for determining which jurisdictions must obtain pre-clearance of changes in their election rules under the Voting Rights Act, and (3) the ruling striking down the Defense of Marriage Act (DOMA) and the non-decision on the validity of California's Proposition 8 precluding same-sex marriages. To accommodate those additions, I have trimmed some discussions and eliminated a few examples along the way. My Conclusion, with some minor tweaks, remains unchanged, and was recently confirmed by Justice Ruth Bader Ginsburg who called the Roberts Court "one of the most activist courts in history."<sup>1</sup>

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In his confirmation hearing, Chief Justice John Roberts proclaimed that his job was like that of an umpire, just calling balls and strikes. Similarly, Justice Sonia Sotomayor told the Senate that her vision of a Justice was a person simply applying the facts to the law. Anyone who has paid the slightest attention to the workings of the Supreme Court knows that there is much more to being a Justice than the kind of mechanical approach those nominees suggested. Court watchers and many others know that this minimalist approach is designed to demonstrate that, whoever else might be called a judicial activist, that label cannot be applied to them.

So what is a judicial activist? That is not an easy question to answer because, unlike terms such as Democrat or Republican or liberal (progressive), moderate, or conservative, no one

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<sup>1</sup> Adam Liptak, *Court Is 'One of Most Activist,' Ginsburg Says, Vowing to Stay*, N.Y. TIMES, August 25, 2013, at A1.

proudly wears that mantel. Every judge proclaims that he or she is just following the law, even when the law is embodied in phrases like “due process,” “equal protection,” or “probable cause” that are hardly self-defining. But as this Issue Brief shows, every Justice who has been on the bench since 1954, whether generally thought of as liberal, conservative, or some place in between, has engaged in judicial activism. The important question is which instances of activism can be justified under a theory of what the Supreme Court should be doing.

The activist label gained prominence during the era of Chief Justice Earl Warren, but in many respects the *Lochner* era,<sup>2</sup> when the Court struck down most legislative efforts to deal with economic inequities and oppression of those with no power, is at least in a league with the Warren Court. And today, there are those who contend that the current Court, beginning with many decisions from the era when William Rehnquist was Chief Justice and continuing with his successor Chief Justice Roberts, also deserves that title.

A cynic might say that a judicial activist is any judge who issues a decision in conflict with the views of the person applying the label. A more nuanced definition would call a decision an activist one when it overturns the considered judgment of legislative or executive branch officers, with the prototypical case being one in which the Court declares a duly enacted statute unconstitutional. However, since *Marbury v. Madison*,<sup>3</sup> the Supreme Court has exercised that very power, first as applied to federal laws and then to those of the states. However, unless one is prepared to overrule *Marbury*, some amount of judicial activism is not only inevitable, but necessary if the Constitution is to remain the supreme law of the land. In almost all of the cases discussed below, there are also respectable arguments that the Court reached a result that was incorrect under the prevailing law. But getting the wrong answer is not what is generally meant by a charge of judicial activism.

Most of the outcries over judicial activism relate to decisions on the merits of a case, but there are also significant cases of what I will call “procedural activism.” For example, for years the states continued to apportion their legislatures and their congressional districts in ways that greatly favored rural voters over those who lived in the cities. Because any change had to come from a mal-apportioned legislature, nothing happened, and for many years the federal courts refused to become involved. Finally, in 1962, in *Baker v. Carr*,<sup>4</sup> the Court stepped in and subjected the process to constitutional scrutiny under the Equal Protection Clause. The activism there was not on the merits – the entire Court thought that these extreme gerrymanders were unconstitutional – but on whether the Court should remain on the sidelines.

A similar kind of procedural activism can be found in *Flast v. Cohen*,<sup>5</sup> in which the Court held that individual taxpayers had standing to challenge the use of federal funds that allegedly violated the Establishment Clause of the First Amendment. In doing so, *Flast* opened ever so slightly the taxpayer standing door that had been closed in *Frothingham v. Mellon*,<sup>6</sup> and that has

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<sup>2</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>3</sup> 5 U.S. 137 (1803).

<sup>4</sup> 369 U.S. 186 (1962).

<sup>5</sup> 392 U.S. 83 (1968).

<sup>6</sup> 262 U.S. 447 (1923).

subsequently remained closed except in the narrow set of cases covered by *Flast*. Then, on the other side of standing activism, the Court in *Raines v. Byrd*,<sup>7</sup> held unconstitutional the provision in the Line Item Veto Act that specifically conferred standing on Members of Congress to challenge the constitutionality of that very law, which, they contended, would interfere with their legislative powers.

Most of the remainder of this Issue Brief focuses on cases in which the Court reached the merits, and it proceeds in two parts. In Part I, I describe a representative sample of the most prominent activist cases in each of three eras beginning in the second half of the 20<sup>th</sup> Century, but do not discuss whether they constitute examples of appropriate or inappropriate judicial activism. First, this Brief begins with the Warren Court, which was charged with being dominated by liberal judicial activists, largely because the results were supported by those who are considered political liberals. Next was the era of Chief Justice Warren Burger, where cases dealing with the death penalty and separation of powers raise judicial activism concerns. I call this the period of “mixed judicial activism” for two reasons: (1) the Justices in this period included holdovers from the Warren Court, as well as those who came to dominate the more conservative Court that followed it; and (2) some of the results pleased liberals, others were favored by conservatives, and others were seen as largely non-ideological. For the third era, I combine cases from when William Rehnquist and John Roberts served as Chief Justices, where the outcomes were generally favored by conservatives. I recognize that the time periods overlap and the labels are over-simplified, but in the end this division seemed a useful way to present the cases from which a theory of judicial activism could be analyzed.

To remove the suspense, and to allow the reader to assess my theory as this paper proceeds, here it is in a nutshell: it is most appropriate for the judiciary to be active and to overturn legislative decisions when there is some reason to believe that our system of representative government has not worked and that the protections that the Constitution is supposed to afford are lacking. The most common circumstance of appropriate intervention is to safeguard rights of a racial or other minority that were not adequately represented in the political process. The other important situation to which this theory applies arises when the structural protections afforded by the Constitution’s specific guarantees of separation of powers or federalism have broken down because of an imbalance in legislative powers.

Whether this theory holds water can only be tested by examining controversial cases actually decided by the Court. That is the function of Part II, where I apply the theory to the major categories of cases discussed in Part I and make an assessment of whether the activism of the Court was justified in them.

This Issue Brief is admittedly not a full treatment of judicial activism, in part because the term has many potential meanings.<sup>8</sup> I have chosen to focus only on rulings that declare either a state or federal statute unconstitutional. I also do not discuss judicial activism in statutory interpretation and, with the exception of campaign finance cases, I generally steer clear of First Amendment cases based on freedom of speech, in part because that topic would require a

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<sup>7</sup> 521 U.S. 811 (1997).

<sup>8</sup> See, e.g., William Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 COLO. L. REV. 1217 (2002).

separate Issue Brief and perhaps its own theory. Finally, I do not rate or rank Justices in terms of the degree to which they adhere to the theory propounded here. Rather, my larger point is that all Justices are activists from time to time, with greater or lesser justification in different cases. My hope for this Issue Brief is that it will cause the term judicial activism to be used less as a form of slander and that, when used, will be applied with greater nuance than has been true to date.

## II. Judicial Activism – Some Representative Cases

### A. The Warren Era of Liberal Activism

The five cases that combined to produce the unanimous opinion in *Brown v. Board of Education*<sup>9</sup> overturned state laws that specifically prohibited black and white children from attending school together. The laws were clear, their intent was unmistakable, and they were supported by a majority of citizens in their jurisdictions, yet the Court held that they violated the Equal Protection Clause of the Constitution. Although indisputably controversial at the time, no person who has been nominated for the Supreme Court since, including the late Robert Bork, has said that he or she would reverse *Brown*. And even the most vociferous of the anti-activists do not include *Brown* in their litany of judicial misdeeds.

Prior to *Brown*, the Court decided a number of cases in which it ruled that activities such as the Pledge of Allegiance<sup>10</sup> and prayer in a variety of forms regularly conducted in public schools,<sup>11</sup> violated the First Amendment rights of students who did not wish to participate in them and did not wish to be singled out for their non-participation. These rulings continued in the Warren Court in *Engel v. Vitale*<sup>12</sup> and *Abington Township v. Schempp*,<sup>13</sup> resulting in mounting criticism of the Court. Whether the activity at issue was the product of a law or just an official school policy made no difference to the Court, any more than did the fact that the vast majority of students and parents raised no objection to it.

As noted above, the Warren Court decided in *Baker v. Carr*<sup>14</sup> that claims of inequality in numerical representation in state legislatures and Congress were justiciable. Thereafter, in *Wesberry v. Saunders*<sup>15</sup>, the Court applied that ruling to congressional representation, finding the challenged districts to violate what came to be known as the principal of “one person, one vote,”<sup>16</sup> a result that was rather expected given the population-based approach for the House of Representatives prescribed in Article I, § 2, clause 3 of the Constitution. However, when the issue of the make-up of state legislatures came to the Court in *Reynolds v. Sims*,<sup>17</sup> the Court not

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<sup>9</sup> 347 U.S. 483 (1954).

<sup>10</sup> *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

<sup>11</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

<sup>12</sup> 370 U.S. 421 (1962) (outlawing the widespread practice of beginning the school day with a non-denominational prayer).

<sup>13</sup> 374 U.S. 203 (1963) (prohibiting the reading of the Bible at the opening of the school day).

<sup>14</sup> 369 U.S. 186 (1962).

<sup>15</sup> 376 U.S. 1 (1964).

<sup>16</sup> *Id.* at 18.

<sup>17</sup> 377 U.S. 533 (1964).

only held that “one man, one vote” applied to the legislative body analogous to the U.S. House of Representatives, but also to the body most like the U.S. Senate. In doing so, the Court rejected all claims of allocation based on any principle other than population, although it did allow some limited flexibility for factors such as maintaining the integrity of political subdivisions.

The sexual privacy cases, beginning with the overturning of a ban on the use of contraceptives,<sup>18</sup> was followed by the Burger-era ruling in *Roe v. Wade*,<sup>19</sup> that dramatically limited the ability of the government to ban abortions. That led eventually to the 2003 decision in *Lawrence v. Texas*,<sup>20</sup> striking down all anti-sodomy laws. These cases have proved troubling due in no small part to the fact that some scholars who support their substantive outcomes have nonetheless criticized the rulings because of what they perceive as the Court’s inappropriateness in acting like a legislature in effectively creating a federal code of abortion, as well as objecting to some of the legal arguments used to support the decisions.

Another area where many members of the public became upset at what they saw as the activism of the Warren Court was with respect to the rights of persons accused of crimes. There were two different features of the Court’s role that troubled its critics. First, the Court applied the Bill of Rights, which literally covers only conduct by the federal government, to actions by state and local officials, by arguing that these protections were extended to the states through the Due Process Clause of the Fourteenth Amendment, which expressly applies to the states. This doctrine, known as incorporation, had been initially utilized in the 1920s without great controversy to safeguard the guarantee of freedom of speech in the First Amendment.<sup>21</sup> However, the extension of virtually all of the protections available in the other amendments to those accused of crimes was seen as a major expansion by the Court. Second, the Court broadened the substantive protections afforded by the Fourth Amendment (the prohibition against unreasonable searches and seizures),<sup>22</sup> the Fifth Amendment (the ban on coerced confessions),<sup>23</sup> and the Sixth Amendment (guaranteeing the right to counsel),<sup>24</sup> and it enforced those protections by forbidding the states from introducing evidence that was obtained in violation of them, even when it resulted in freeing a probably guilty person.

## B. The Burger Era of Mixed Activism

Supreme Court decisions involving the death penalty are often seen as an example of liberal judicial activism, because those that changed the law did so by limiting its availability as a punishment. The Warren Court did not issue any significant rulings on capital punishment, but four of its members were still on the Burger Court in 1972 when it temporarily halted the use of the death penalty in *Furman v. Georgia*.<sup>25</sup> Four years later, the Court held that subsequent changes in the manner in which it was applied satisfied the objections of at least a majority of the

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<sup>18</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>19</sup> 410 U.S. 113 (1973); *see also* *Doe v. Bolton*, 410 U.S. 179 (1973).

<sup>20</sup> 539 U.S. 558 (2003).

<sup>21</sup> *Gitlow v. New York*, 268 U.S. 652 (1925).

<sup>22</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>23</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>24</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>25</sup> 408 U.S. 238 (1972).

Court so that the states could constitutionally execute some, if not most, persons sentenced to death.<sup>26</sup> Thereafter, some limitations were imposed, the principal one being that a death sentence was not permitted except where the murder of another person was the basis of the penalty.<sup>27</sup> However, it was not until the Rehnquist era that the Court held that it was unconstitutional to execute persons who are mentally retarded<sup>28</sup> or who were under the age of 18 at the time that they committed the crime.<sup>29</sup>

The Burger Court was also very active in the field of separation of powers as it struck down a significant number of statutes passed by Congress and in most cases signed by the President. In *Buckley v. Valeo*,<sup>30</sup> the Court held that the manner by which Congress directed the selection of members of the newly-created Federal Election Commission was inconsistent with the Appointments Clause. Thereafter, the Court ruled in *INS v. Chadha*,<sup>31</sup> that the legislative veto, which had been included in over 200 laws passed by Congress, was a violation of the constitutional doctrine of separation of powers because it gave Congress power to act in a manner not provided for in the Constitution, in that case to order an alien deported after immigration officials concluded that the law entitled him to remain in this country. And on his final day in office, Chief Justice Burger authored the opinion in *Bowsher v. Synar*,<sup>32</sup> holding that Congress violated principles of separation of powers when it assigned executive powers to the Comptroller General because he was subject to removal by Congress and not the President. These cases continued into the Rehnquist era. Thus, when Congress finally agreed to cede to the President the right to sign a bill into law, and then reject certain spending and tax provisions of which he disapproved, the Court held in *Clinton v. City of New York*<sup>33</sup> that the Line Item Veto Act was unconstitutional because the Constitution requires the President either to sign or veto an entire bill, and does not allow him to pick and choose among its provisions, even when authorized by Congress to do so.

### C. The Rehnquist/Roberts Era of Conservative Activism

Surely the most dramatic example of conservative judicial intervention during the time of Chief Justice Rehnquist was the decision that halted the recount in Florida and assured George W. Bush's election as President in 2000. In the case's three separate rulings, there are examples of both procedural and substantive activism. As to the former, the Court's initial (unanimous) decision, which was issued while the recount was still underway, told the Florida Supreme Court that the United States Constitution required that the Florida court rulings had to be based on existing state law and that the Court stood ready to enforce that requirement.<sup>34</sup> Next, after the Florida courts had issued another decision, the Court, this time by a vote of 5-4, ordered the

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<sup>26</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976).

<sup>27</sup> *Coker v. Georgia*, 433 U.S. 584 (1977); *see also Kennedy v. Louisiana*, 554 U.S. 407 (2008) (re-affirming *Coker* as applied to rape of an 8 year old girl).

<sup>28</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>29</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>30</sup> 424 U.S. 1 (1976).

<sup>31</sup> 462 U.S. 919 (1983).

<sup>32</sup> 478 U.S. 714 (1986).

<sup>33</sup> 524 U.S. 417 (1998).

<sup>34</sup> *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70 (2000).

recount stopped until the Court could hear the appeal by candidate Bush.<sup>35</sup> And third, after finding (7-2) that the recount procedures violated the Equal Protection Clause, the same 5-4 majority stopped the recount entirely.<sup>36</sup> In addition, three Justices would have found that the Florida Supreme Court had so far deviated from the existing dictates of that state's election laws in its order relating to the recount, that it had violated the constitutional provision that had been the focus of the first round in the Supreme Court.<sup>37</sup> Despite, or perhaps because of, its unique significance to the outcome of the 2000 election, none of the rulings in *Bush v. Gore* has been followed to justify constitutional rulings in election law or other equal protection cases.

Notwithstanding *Bush v. Gore*, political conservatives today generally oppose an expanded role for the federal government, including the federal courts. Beginning in 1938 the Court began upholding New Deal legislation, instead of striking it down. Since then, Congress has increasingly relied on the Commerce Clause to sustain power in areas that once had been thought the exclusive province of the states. That trend continued unabated until 1995 when the Court in *United States v. Lopez*,<sup>38</sup> held that the federal law that made it a crime to have a gun in, or in close proximity to, a school exceeded Congress' power under the Commerce Clause. A similar fate befell the Violence Against Women Act in *United States v. Morrison*,<sup>39</sup> when the Court found that Congress had no authority to outlaw violent acts against women where there was no direct connection to interstate commerce. The Court seemed to back off somewhat from this approach when, in *Gonzales v. Raich*,<sup>40</sup> it upheld the power of Congress to use the Commerce Clause to extend the prohibition against the sale of marijuana to individuals who grow it for their personal use, in that case to relieve pain that responded only to marijuana.

The attack on Congress' reliance on the Commerce Clause continued in *Natl. Fed'n of Indep. Bus. v. Sebelius*,<sup>41</sup> in which five Justices concluded that the individual mandate in the Affordable Care Act could not be sustained under that constitutional provision because they concluded that Congress was attempting to regulate "inactivity" – the failure to obtain health insurance – whereas its power only extended to regulation of "activity." Nonetheless, the mandate was sustained as a proper exercise of the taxing power, with the Chief Justice writing the opinion that was joined by the four dissenting Justices on the Commerce Clause portion. I leave for Part II the issue of whether finding the Commerce Clause to be insufficient to sustain the mandate is an example of appropriate judicial activism, but the Chief Justice's insistence on opining on the Commerce Clause issue, when he also concluded that the mandate could be upheld on another basis, is at least a form of procedural activism by reaching out to pass on a question of constitutional law that did not affect the outcome of the case before the Court. It is too early to know for certain, but given the uniqueness of the mandate and the clear commercial aspects of most areas of congressional regulation, the impact of this ruling is likely to be rather modest, making it all the stranger that the Chief Justice joined it.

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<sup>35</sup> *Bush v. Gore*, 531 U.S. 1046 (2000).

<sup>36</sup> *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>37</sup> *Id.* at 111-122.

<sup>38</sup> 514 U.S. 549 (1995).

<sup>39</sup> 529 U.S. 598 (2000).

<sup>40</sup> 545 U.S. 1 (2005).

<sup>41</sup> 132 S. Ct. 2566 (2012).



Other efforts by the Court to limit federal power based on other parts of the Constitution have had more lasting impacts. In one set of rulings, the Court expanded its interpretation of the Eleventh Amendment, which prohibits certain kinds of lawsuits against states in federal courts. In doing so, it overrode the power of Congress under the Commerce Clause and other parts of the Constitution to enact laws enabling private parties to sue states, including state universities and other state-created institutions that are not part of the state governance structure, for money damages for violating federal laws.<sup>42</sup> In one case, *Alden v. Maine*,<sup>43</sup> it found that an Eleventh Amendment-like immunity applied to cases based on federal law that were filed in state court, even though the Amendment speaks only of federal courts. In two other significant cases, the Court reached similar results, using the Tenth Amendment to limit in one case, the power of Congress to require states to engage in certain conduct regarding the disposal of nuclear waste materials<sup>44</sup> and to control the sale of firearms in the other.<sup>45</sup> And when Congress tried to rely on its remedial authority under section 5 of the Fourteenth Amendment to apply the Violence Against Women Act against non-state defendants, the Court rejected that argument, narrowly construing that power and declaring the law unconstitutional.<sup>46</sup>

Two recent decisions of the Roberts Court overturned federal statutes based on constitutional infirmities in the manner in which Congress exercised its powers. The first involved another provision of the Affordable Care Act, in which Congress offered states the opportunity to expand the coverage of state Medicaid programs, with the federal government paying at least 90% of the added cost. If a state chose not to accept the offer, it would have lost all of its existing Medicaid funding, a condition that seven Justices found unacceptable for Congress to impose on the states.<sup>47</sup> Again, as with the mandate, a majority of the Court, in an opinion written by the Chief Justice, found the condition to be severable from the expansion, allowing the expansion to continue on an optional basis.

There was no saving the law in another major Roberts Court decision striking down a federal statute. In *Shelby County, Ala. v. Holder*,<sup>48</sup> the Court held that Congress had exceeded its powers in creating the formula determining which states and local jurisdictions have to obtain pre-clearance of changes in their elections laws and rules. The 5-4 majority opinion written by the Chief Justice overturned Congress's nearly-unanimous 2006 judgment re-enacting that formula because, the Court said, Congress had failed to take into account substantial changes in the ability of African-Americans and other minorities to exercise the right to vote in an effective manner. The majority was willing to second-guess Congress, despite the Fifteenth Amendment, which outlaws racial discrimination in voting and gives Congress the express power "to enforce this provision by appropriate legislation."

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<sup>42</sup> *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1979).

<sup>43</sup> 527 U.S. 706 (1999).

<sup>44</sup> *New York v. United States*, 505 U.S. 144 (1992).

<sup>45</sup> *Printz v. United States*, 521 U.S. 898 (1997).

<sup>46</sup> *United States v. Morrison*, 529 U.S. 598 (2000); *Kimmel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

<sup>47</sup> *Natl. Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

<sup>48</sup> 133 S.Ct. 2612 (2013).

In the area of campaign finance reform, in which both Congress and the states have attempted to place limits on the influence of money in elections, the Court has placed major roadblocks in their way. This began in 1976 with *Buckley* where, in addition to its Appointments Clause ruling, the Court also struck down the limits on the amounts that candidates could spend of their own money to run for office, the caps on the total amount from all sources that a candidate could spend, and the limit that an individual could spend – independently of a candidate – to support or oppose a candidate for elected office.<sup>49</sup> Although *Buckley* upheld the government’s right to limits on how much an individual may contribute to a candidate for office, the Court in subsequent cases has made it more difficult to sustain some lower limits based on a concern that restricting the size of contributions too far makes it too difficult for candidates to run for office, especially when they are opposing an incumbent.<sup>50</sup> On the other hand, the Court in *Caperton v. A. T. Massey Coal Co.*,<sup>51</sup> overturned a state supreme court ruling as a violation of due process, where a judge who successfully ran in an election for a seat on that court had been the beneficiary of more than \$3 million in election-related support from the president of one of the parties, and then had cast the deciding vote in favor of that party.

The award for the most activist ruling in this area goes to the majority in *Citizens United* where the Court held that for-profit corporations have a First Amendment right to make independent expenditures to support or oppose a candidate for office. The decision overturned a law that had been in effect since 1947 that specifically forbade corporations and unions from using their treasuries to make independent expenditures in federal elections, as well as numerous state laws that applied to all kinds of elections, including those for state court judges.<sup>52</sup> Two years later, the Court effectively closed the door on public financing of elections as a means of softening the impact of *Citizens United*, by ruling that Arizona’s law that provided additional funding to candidates who chose public financing if their opponent and his or her supporters significantly out-spent the candidate, violated the First Amendment.<sup>53</sup>

The Roberts Court also intervened to upset decisions made by state and local officials who were trying to deal with the difficult remedial problems that remained when the formal segregation that preceded *Brown* had ended. The efforts of the Seattle and Louisville public schools to assure a modest level of integration and equal opportunities for all students were found constitutionally infirm in *Parents Involved in Community Schools v. Seattle School Board No. 1*,<sup>54</sup> with at least four Justices prepared to hold that any race-conscious method of assigning students violated Equal Protection. Similar rulings were also made in other areas involving laws that set aside a certain percentage of government contract work for historically disadvantaged minorities<sup>55</sup> or gave a modest assist to minorities seeking admission to a state university.<sup>56</sup>

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<sup>49</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976).

<sup>50</sup> *Randall v. Sorrell*, 548 U.S. 230 (2006).

<sup>51</sup> 556 U.S. 868 (2009).

<sup>52</sup> *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

<sup>53</sup> *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011).

<sup>54</sup> 551 U.S. 701 (2007).

<sup>55</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

<sup>56</sup> *Gratz v. Bollinger*, 539 U.S. 244 (2003).

The most recent area where the Court reached an arguably activist result, which liberals decried and conservatives applauded, was in *District of Columbia v. Heller*.<sup>57</sup> There the Court struck down a law that banned the private possession of handguns, including in the home, on the ground that the statute violated an individual right to bear arms contained in the Second Amendment. And in *McDonald v. City of Chicago*,<sup>58</sup> the Court extended that ruling to apply to all state and local laws regulating the use of firearms.

Another example of “conservative judicial activism” can be found in the dissent of Chief Justice Roberts, joined by Justices Scalia and Alito in *Armour v. City of Indianapolis*.<sup>59</sup> The majority upheld the City’s statutory scheme providing for more favorable treatment for small taxpayers who had not paid their assessments in full, whereas the dissent would have found the law to violate the equal protection rights of those mainly more wealthy taxpayers who had fully paid their assessments.

Even in the Roberts Court, the conservatives are not always able to prevent liberal judicial activism, most recently in *United States v. Windsor*.<sup>60</sup> There the 5-4 majority, led by Justice Kennedy, relying on both due process and equal protection rationales, set aside DOMA, which denied same-sex couples who were legally married under state law the rights (and obligations) that opposite-sex married couples had under more than 1100 federal laws.

### III. A Theory of Appropriate Judicial Activism

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

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

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<sup>57</sup> 554 U.S. 570 (2008).

<sup>58</sup> 130 S. Ct. 3020 (2010).

<sup>59</sup> 132 S. Ct. 2073 (2012).

<sup>60</sup> 133 S. Ct. 2675 (2013).

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

One part of the answer is found in famous footnote 4 in *Carolene Products*, where the Court embraced the notion of judicial activism (although not in those terms) to protect the rights of discrete and insular minorities.<sup>61</sup> Justice Brennan, in his opinion in *Kramer v. Union Free School District*,<sup>62</sup> made a similar point in advocating a heightened standard of review (which often is the technique used to effectuate judicial activism). In rejecting deference to the legislature, the *Kramer* Court observed that a relaxed standard is “based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.”<sup>63</sup> Thus, when there is reason to believe that the normal functioning of government has broken down and the rights of the challengers were not protected, often because they were not adequately represented in the legislature for one reason or another, the case for judicial intervention is much stronger.

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

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

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<sup>61</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>62</sup> 395 U.S. 621 (1969).

<sup>63</sup> *Id.* at 628.

Years later, the situation was reversed, and whites were asking the Court to step in to prevent what they called reverse discrimination by government entities that were favoring black applicants over them. These were not instances where black majorities were protecting members of their race the way that the South protected white school children before *Brown*. Rather, these cases mainly involved majority white- controlled entities that were trying to make up for decades or more of discrimination.<sup>64</sup> Whether such efforts were misguided or inartfully done, there was no basis to conclude that there were structural flaws in the process that led to the underrepresentation of the white majority. The only way in which it might have been argued that democracy was being undermined was that some, but not all, of these minority preferences were done outside the public view, by unelected and arguably unaccountable state officials, as evidenced by the fact that the details of these practices only became known after litigation had been brought. Thus, under one theory of democratic accountability, the Court might be suspicious of decisions advantaging one group at the expense of another, made in secret outside the legislative arena, although that was not the basis on which the Court stepped in to set aside those efforts at affirmative action. More importantly, however, the Seattle and Louisville school cases involved open processes, in which the entire communities were involved in decisions that evolved over time and attempted to be as responsive as possible to all affected parties. Given the hard choices that had to be made to balance all the relevant interests, it is difficult to conclude that the invocation of a principle of colorblindness that a majority of the Court there found in the Equal Protection Clause was little more than a substitution of its judgment for that of the local officials and citizens.

As discussed above, a second area of judicial activism in the Warren Court era was protection of the rights of those accused of crimes. Many in that group were minorities, but neither the excesses on which the Court focused, nor the nature of its rulings, were so limited. On the other hand, while defendants in criminal cases are, like all citizens, represented by their elected officials, they are not part of an organized group (and surely have no lobbying presence) and, at least in the United States, candidates win elections by being tough on crime, not on protecting the rights of the accused. While it is legitimate to object to some of the specific rulings, there is a strong argument that unless the Court enforced the Bill of Rights for those charged with crimes, no other entity would do so. That is especially so where the death penalty was being used to punish those whose crimes were very serious, but not of the kind that differentiated them from others whose lives were spared for reasons unrelated to the specifics of their offense or criminal history.

Much the same analysis supports the Court's intervention in the school prayer cases. Indeed, the number of children or parents who objected, let alone actively opposed religious practices in public schools, was very small. If they had attempted to make their voices heard in the legislature (or school board), they would certainly have been defeated. Starting with the premise that the First Amendment's Establishment Clause was intended to protect against government intrusion of religion on the unwilling, those students seem like the kind of discrete minority that activism should protect.

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<sup>64</sup> *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Adarand Constructors, Inc., v. Peña*, 515 U.S. 200 (1995).

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

For the abortion laws, the legislative picture was less favorable. Most states had laws significantly restricting the availability of abortions, and while there had been some movement in some places, resistance was high, and in many cases unlikely to happen outside of court. Moreover, the women who needed abortions were often young and unsophisticated in influencing public policy, and almost invariably wanted to be out of the public eye, as shown by the fact that the lead plaintiffs in the cases that struck down the limits on abortion were Jane Roe and Mary Doe. Even doctors who were willing to perform abortions were not numerous, and organizations like Planned Parenthood had strong supporters, but not in great numbers. At least as to those laws that banned all abortions, with no or very limited exceptions (such as only to save the life of the mother), the case for intervention was a reasonable one. The actual decision was seen as problematic both by the limited textual basis in the Constitution for the ruling and by the scope of the decision that not only struck down the absolute bans, but, in effect, set up a regulatory regime to cover all abortions.<sup>65</sup>

The same-sex sodomy case, *Lawrence v. Texas*,<sup>66</sup> involved a set of circumstances different from the other sexual privacy cases in terms of the justifications for judicial activism. By 2006, just 13 states still had sodomy laws, with only four applying them only to same-sex conduct.<sup>67</sup> But it seemed unlikely that those states that retained those laws would change them. Moreover, gays and lesbians have always been the kind of minority that the Constitution has sought to protect, and in this case, Texas had chosen to enforce its criminal law against two consenting males. Coupled with the fact that, as dissenting Justice Clarence Thomas put it, despite his view that the law was constitutional, he would have voted against it because it was “uncommonly silly,”<sup>68</sup> the Court’s judicial activism in setting aside the conviction seems justified.

The separation of powers cases involve different considerations because there is no one, either as a class or otherwise, that is likely to be a pre-determined loser in most separation of powers battles. To be sure, in *Chadha* the only people who could be harmed by the legislative veto were immigrants who were seeking an exception from deportation, and in the line item veto case, those who were harmed were those whose funding was denied by the President. But the legislative veto operated broadly across the government, and it was only by chance (and because

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<sup>65</sup> Recent scholarship has undermined previously made claims that positive change in abortion laws was well underway, and hence that Roe was unnecessary for that reason. See LINDA GREENHOUSE & REVA SIEGEL, BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT’S RULING (2010).

<sup>66</sup> 539 U.S. 558 (2003).

<sup>67</sup> *Id.* at 573.

<sup>68</sup> *Id.* at 605.

Mr. Chadha had standing to contest it) that the victim of the veto that went to the Court was a member of a discrete minority. Similarly, the City of New York, which was the plaintiff in the case that set aside the line item veto, does not fall into the *Carolene Products* category, nor would the vast majority of others whose funding might have been subjected to a line item veto, particularly since they had enough clout to persuade Congress to insert the line item that was the subject of a presidential veto.

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

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

*Caperton* is another case where necessity was an appropriate basis for judicial intervention. More than 30 states conduct elections for judges, including for their highest court. Many of those races involve substantial amounts of money spent by persons with a direct interest in the outcome of cases before the court, as was true in *Caperton* where a \$50 million judgment hung in the balance. The judges who ran for office and sat on such cases could easily have issued rules precluding their participation in cases where a party had provided substantial financial support for their election. They had not done so, nor were they likely to change their practices because additional restrictions would directly affect their ability to retain their elected offices. Moreover, considerations of separation of powers at the state level are thought to limit the ability of some state legislatures to pass detailed rules regulating the conduct of judges. Thus, if the Supreme Court had not invoked due process to disqualify the affected judge, the practice of sitting on cases involving significant campaign contributors would have continued. This was also a case in which none of the Justices defended the practice: the only issue was whether the Court should have intervened in light of the admitted line-drawing difficulties that would arise in future cases.

The line item veto presented a different situation for judicial intervention because the veto power was one that the President wanted and was finally able to persuade Congress to give to him, not as part of other legislation in a tradeoff, but in an independent statute that Congress could have voted down with no collateral costs. Thus, the line item veto is not a case of one branch aggrandizing itself over the objection of the other, but of an inter-branch agreement to alter the power structure. Nonetheless, a six person majority in *Clinton v. City of New York* – comprised of liberals and conservatives, as well as strict constructionists and pragmatists – struck down the line item veto.<sup>69</sup> The Presentment Clause requires the President to sign or veto a bill as a whole, and not pick and choose among its parts. Thus, the result in *City of New York* may be justifiable because the majority saw the law as a clear attempt to do indirectly that which everyone agreed could not be done directly. And, if the Court did not step in, there was no one else to stop an arrangement that had the potential to alter the constitutional checks and balances in a significant way.

From an activism perspective, the portion of *Reynolds* that extended one man, one vote to the more populous state legislative body was only a small step from the justiciability decision in *Baker*, as applied on the merits to congressional districts in *Wesberry*. But extending that to both houses of all state legislatures was surely an act of insisting that the Court was the truer judge of democracy than were the authors of the numerous state constitutions and statutes that contained rather different principles for allocating seats in one of their legislative bodies. Nor can *Reynolds* be justified under the lock-in theory that persuaded the Court in *Baker* because the law governing the composition of the upper house in Colorado had been recently approved by a state-wide referendum.

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

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<sup>69</sup> 524 U.S. 517 (1998) (Chief Justice Rehnquist and Justices Stevens, Kennedy, Souter, Thomas, & Ginsburg voted to overturn the law; Justices O'Connor, Scalia, & Breyer would have upheld it). A similar split between Justices generally labeled as liberals and conservatives was found in *Texas v. Johnson*, 491 U.S. 397 (1989), where Justice Scalia invoked the First Amendment to strike down the statute making flag-burning a crime, and Justice Stevens voted to uphold it.



The Commerce Clause ruling on the Affordable Care Act raises different issues relating to the roles of Congress and the Court. Congress did not simply supplement state authority in the health care field, but overrode it by requiring virtually everyone to buy (obtain) health insurance or pay a penalty (tax) if they did not. But unlike cases in which states were indifferent to federal laws supplementing state laws, the states here, as well as their very vocal and in many cases powerful citizens and corporations, were fully able to assert their objections, but were out-voted in Congress. Thus, the majority could justifiably be accused of judicial activism in bailing out the states on a Commerce Clause argument that they were unable to persuade Congress to accept. Moreover, this is a situation in which no state acting alone could solve the problem of uninsured individuals who would inevitably need medical services and in which everyone agreed that Congress could have adopted a Medicare-for-all plan that would have been *more* invasive of the rights of states than the plan that was enacted.

One other factor should have, but did not, give the Court pause before finding that Congress had exceeded its Commerce Clause power. There was no doubt that Congress could have used the same powers that it exercised to create Medicare to achieve the same mandates, but neither it nor the President had the will to proceed in that manner. Moreover, no state had the power to enact such a comprehensive solution to our health care problems. But if limits on the Commerce Clause are intended to restrict federal power, it is a little odd, if not disingenuous, to object on federalism grounds to a law that Congress plainly could have enacted using another of its constitutional tools in Article I, Section 8, especially when that alternative would be more intrusive of the rights of states and individuals than the law that was actually passed.

The interventions under the Eleventh Amendment and Section 5 of the Fourteenth Amendment, however, are unjustified because the entities that they are protecting – the states – not only have the incentives to protect themselves, but have the ability to do so directly and through their senators. Indeed, if the issue were truly one of states' rights, or the overreaching of Congress, the states were perfectly capable of presenting a unified front on that matter of principle, even when they have significant differences on matters of substance. In a battle, for example, between states' rights and patient rights, there would seem to be no reason to believe that a fairer resolution would occur in the judicial branch than in Congress because of some structural or other imbalance. Similarly, if the states cannot persuade either house of Congress or the President that it is bad policy to apply age discrimination laws to them and to make them pay money damages when those laws are violated, the states should not be able to call on the Court to rescue them.

In the campaign finance area, the Court's conservative activism seems justified in some cases, but decidedly not in others. On the one hand, the decision to overturn spending ceilings by candidates is justifiable, if not compelled, by the concern that those limits may have been enacted by incumbent legislators more concerned with protecting their jobs from challengers than in achieving other goals that supposedly justify those laws. As long as the Court continues to uphold statutory limits on the amounts that individuals may contribute to candidates, political committees, and parties, the Court's intervention on spending limits will not destroy the anti-corruption check that Congress sought to achieve with contribution limits. Furthermore, as a practical matter, contribution limits create a supply-side cap on what can be spent because of the real world limits on how much can be raised. The fact that these rulings have been joined by

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

On the other hand, the decision in *Citizens United* that eliminated all restrictions on for-profit corporations making independent expenditures in all elections cannot be justified under any theory of necessity. Surely, for-profit corporations are not the kind of minority that is frozen out of the political process, nor have they been asking, without success, for Congress and the legislatures of the 26 states that had similar laws to change them so that they could participate more fully in elections. The law at issue in *Citizens United* still allowed corporations to form, administer, and pay for many of the operating expenses of their own political committees that can solicit from corporate officers and stockholders. Moreover, there are no structural impediments to change that stood in the way of amending the law – other than a clear disagreement by a majority of both Houses of Congress that our electoral processes needed more money from business corporations. Thus, on a scale of 1 to 10 in unjustified judicial activism, *Citizens United* is probably a 9, if not higher, and that is without considering the many ways that the Court could have avoided deciding this issue in that case and left it for another day when it was squarely presented and had been fully addressed in the lower courts.

Many of those who support the decision in *Citizens United* criticize the Court for its ruling in *Kelo v. City of New London*.<sup>70</sup> The City there decided to develop property in an effort to revitalize the downtown area and thereby reduce unemployment and augment tax revenues. To carry out its plan, it exercised its statutory powers of eminent domain over 11 houses whose owners declined to accept the City's offer to purchase, not because the price was inadequate, but because they did not want to move. When the City went to court, the homeowners resisted on the ground that the use to which their land was to be put was not a "public purpose" for which a taking was proper under the Constitution. The Supreme Court disagreed (5-4), and the immediate public reaction was by and large in favor of the homeowners and against the City, especially among those who call themselves conservatives.

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

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<sup>70</sup> 545 U.S. 469 (2005).

To some, the Court's decision in *Heller* that the Second Amendment creates an individual right to bear arms, unrelated to any connection with a militia, and that the law in question violated that right is a prime example of judicial activism. On the main issue, I disagree. Surely, the Court had to decide the meaning of the Second Amendment when the plaintiff had applied for a gun permit and was denied it based solely on a law that the plaintiff alleged was unconstitutional, relying on specific language in the Constitution that was directed at government control over firearms. The Court can be faulted for having misinterpreted the Second Amendment, but that is a dispute on the merits, and no one should be called a judicial activist over a difference of opinion alone.

However, the second part of *Heller* is in a different category. The issue there was whether the District's laws interfered with the right to bear arms, as the majority had defined it. Although the court of appeals and the parties did discuss that question, the main focus in the case had been the basic interpretive question about the Second Amendment. The District Court had dismissed the complaint without reaching the second question, and there was no evidence offered on the actual operation of the laws, including two provisions that seemed to impose further use restrictions on anyone who possessed any firearm. Nonetheless, the majority simply declared that this law went too far and declined to give any weight to the fact that the ban applied in an urban setting, where handguns and crime were a serious problem, and that the elected representatives had concluded that the ban was essential for public safety. Neither the plaintiffs nor their supporters, such as the National Rifle Association and other pro-gun groups, claimed that they were powerless, although they sought to portray themselves, probably correctly, as part of a small minority of District of Columbia residents who opposed the law. Moreover, given the power of Congress to impose virtually any condition on the District, including the ability to override any law that the District passed, the Court should have at least paused and asked why plaintiffs had not gone to Congress asking it to soften the law, before coming to Court and asking the judiciary to second-guess the judgment of the elected officials in the District. The bottom line for those conservatives who generally decry judicial activism is that they should have been quite troubled by the lack of deference that the Court showed to the elected officials who had enacted the law set aside in *Heller*, and yet only a few expressed opposition, almost certainly because the majority of self-described anti-activists liked the result that the Court reached there.

Finally, the decision in *Windsor* is an example of "liberal judicial activism," but was it appropriate?<sup>71</sup> The plaintiffs and the United States argued that gays and lesbians were the kind of disfavored minority that should be accorded special protections when challenging laws that disfavored them. The majority did not go that far, but the same history of discrimination that would support heightened scrutiny, as well as the very high hurdle that would have had to be overcome to repeal DOMA, coupled with the minimal federal interest in treating same-sex married couples less favorably than others, justified the Court in striking down this law. The fact that a number of states had eliminated the differing treatment of same and opposite-sex marriages and

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<sup>71</sup> I leave aside the issue of whether there was Article III standing to appeal where the defendant agreed with the plaintiff that the law was unconstitutional, and three dissenters argued that the Court improperly reached out to decide the merits. Although I believe that the majority was correct on that score, if there was "activism," it was of a different kind than I have addressed here because there was no legislative judgment on the issue of standing, and the House, as a participant, urged the Court to reach the merits.

that Congress had repealed Don't Ask Don't Tell suggested that gays and lesbians were much less disfavored than once was true. Indeed, those changes may have been partially responsible for the Court's unwillingness to reach the merits of California's Proposition 8 that made marriage unavailable to same-sex couples, where that ruling would be likely to affect every state and not just California. But on balance, the Court's modest activism on DOMA seems appropriate, as does its decision to put off to another day the validity of state laws barring same-sex marriages.

#### IV. Conclusion

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