

Selective Judicial Activism

JUSTICE BRENNAN: LIBERAL CHAMPION. By Seth Stern & Stephen Wermiel.
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When the term “judicial activist” was first coined by Arthur Schlesinger, Jr. in 1947, it “did not have a derogatory connotation.”¹ By the time William J. Brennan, Jr. had completed his thirty-four years on the Supreme Court, the phrase had become a pejorative, implying the irresponsible exercise of judicial authority.

Critics on and off the Court have vilified Brennan and his liberal colleagues for their activism. In 1966, the political scientist Robert McCloskey accused Brennan and his fellow “judicial activists” of creating “Constitutional rules out of whole cloth.”² Judge Learned Hand complained that the “judicial activists” on the Supreme Court were acting like “a bevy of Platonic guardians.”³ Anthony Lewis reported that critics had vehemently attacked “judicial activists” like Brennan for “taking too much joy” in their own power and “trying too boldly to fix up the wrongs of our system.”⁴ And Justice Felix Frankfurter castigated the “judicial activists” for making decisions on the basis of ““their prejudices and their respective pasts and self-conscious desires to join Thomas Paine and T. Jefferson in the Valhalla of ‘liberty.’””⁵ To this day, no Supreme Court nominee—not Anthony Kennedy, not Ruth Bader Ginsburg, not John Roberts, not Elena Kagan—has dared to describe him or herself as a “judicial activist.” Such a self-characterization would certainly be the kiss of death for any nominee.

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1. SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 232 (2010).

2. *Id.* at 232–33 (quoting Robert G. McCloskey, *Reflections on the Warren Court*, 51 VA. L. REV. 1229, 1259 (1965)).

3. *Id.* at 231 (quoting LEARNED HAND, THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES 1958, at 73 (1958)).

4. *Id.* at 231 (quoting Anthony Lewis, *Supreme Court Moves Again to Exert Its Powerful Influence*, N.Y. TIMES, June 20, 1964, at E3).

5. *Id.* at 102 (quoting Melvin I. Urofsky, *Conflict Among the Brethren: Felix Frankfurter, William O. Douglas and the Clash of Personalities and Philosophies on the United States Supreme Court*, 1988 DUKE L.J. 71, 105 (1988)).

Is the pejorative “judicial activist” warranted? To answer that question, we must begin with the Court’s economic substantive due process decisions in cases like *Lochner v. New York*,⁶ half a century before William Brennan joined the Court. *Lochner* and its progeny, which held unconstitutional a broad range of progressive legislation regulating such matters as maximum hours and minimum wages, represented a highly controversial form of *conservative* judicial activism. Over time, *Lochner*, the *bête noire* of progressives of that era, came to be “one of the most condemned cases in United States history.”⁷

Critics of the *Lochner*-era jurisprudence took away two quite distinct lessons. Some, like Frankfurter, concluded that judicial activism was presumptively illegitimate and unwarranted. The only principled stance for a responsible Justice was one of judicial restraint. As Seth Stern and Stephen Wermiel aptly observe, “Frankfurter believed firmly that judges should act with restraint and largely defer to the elected branches.”⁸ Indeed, this was “something he had preached as a professor at a time when a conservative Supreme Court was overturning the progressive economic regulations . . . that he favored.”⁹ It was for this reason that Frankfurter was so condemning of his “judicial activist” colleagues on the Court.

Other critics of *Lochner*, like Hugo Black, William O. Douglas, and William Brennan, took away a very different lesson. In their view, *Lochner* was wrong not because judicial activism is wrong, but because *Lochner* was not an appropriate case for judicial activism. It was this view that Chief Justice Harlan Fiske Stone set forth in 1938 in his famous footnote 4 in *United States v. Carolene Products Co.*¹⁰ While burying the doctrine of economic substantive due process, Stone at the same time suggested that “[t]here may be narrower scope for operation of the presumption of constitutionality when legislation . . . restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation,” or when it discriminates “against discrete and insular minorities” in circumstances in which it is reasonable to infer that prejudice, intolerance, or indifference might seriously have curtailed “the operation of those political processes ordinarily to be relied upon to protect minorities”¹¹

It was this conception of *selective* judicial activism that shaped Brennan’s jurisprudence. It is important to emphasize that, Frankfurter to the contrary notwithstanding, this view of the judicial role is not necessarily the product of individual Justices’ personal “prejudices” and experiences.

6. 198 U.S. 45 (1905).

7. BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 23 (1980).

8. STERN & WERMIEL, *supra* note 1, at 101.

9. *Id.*

10. 304 U.S. 144 (1938).

11. *Id.* at 152–53 n.4.

Rather, it is deeply rooted in the original understanding of the purpose of judicial review in our system of constitutional governance.

The Framers of our Constitution wrestled with the problem of how to cabin the dangers of an overbearing or intolerant majority. For example, those who initially opposed a bill of rights argued that such a list of rights would serve little, if any, practical purpose, for in a self-governing society the majority could simply disregard whatever rights might be “guaranteed” in the Constitution. In the face of strenuous objections from the Anti-Federalists during the ratification debates, however, it became necessary to reconsider the issue.

On December 20, 1787, Thomas Jefferson wrote James Madison from Paris that, after reviewing the proposed Constitution, he regretted “the omission of a bill of rights.”¹² In response, Madison expressed doubt that a bill of rights would “provide any check on the passions and interests of the popular majorities.”¹³ He maintained that “experience proves the inefficacy of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State” that already had a bill of rights.¹⁴ In such circumstances, he asked, “What use . . . can a bill of rights serve in popular Governments?”¹⁵

Jefferson replied, “Your thoughts on the subject of the Declaration of rights” fail to address one consideration “which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent . . . merits great confidence for their learning & integrity.”¹⁶ This exchange apparently carried some weight with Madison. On June 8, 1789, Madison proposed a bill of rights to the House of Representatives. At the outset, he reminded his colleagues that “the greatest danger” to liberty was found “in the body of the people, operating by the majority against the minority.”¹⁷ Echoing Jefferson’s letter, he stated the position for judicial review, contending that if these rights are:

incorporated into the constitution, independent tribunals of justice will consider themselves . . . the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every

12. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *reprinted in* JACK N. RAKOVE, *DECLARING RIGHTS: A BRIEF HISTORY WITH DOCUMENTS* 154, 156 (1998).

13. RAKOVE, *supra* note 12, at 159.

14. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* RAKOVE, *supra* note 12, at 160, 161.

15. *Id.* at 162.

16. Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), *reprinted in* RAKOVE, *supra* note 12, at 165, 165.

17. James Madison, Speech to the House of Representatives (June 8, 1789), *reprinted in* RAKOVE, *supra* note 12 at 170, 177.

encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.¹⁸

This reliance on judges, whose lifetime tenure would hopefully insulate them from the need to curry favor with the governing majority, was central to the Framers' understanding. Alexander Hamilton, for example, strongly endorsed judicial review as obvious and uncontroversial. The "independence of the judges," he reasoned, is "requisite to guard the Constitution and the rights of individuals from the effects of those ill humours, which . . . sometimes disseminate among the people themselves" Judges, he insisted, have a duty to resist invasions of constitutional rights even if they are "instigated by the major voice of the community."¹⁹

It was this "originalist" conception of judicial review that informed Justice Brennan's selective judicial activism. As a rule, he gave a great deal of deference to the elected branches of government—except when he felt such deference would effectively abdicate the responsibility the Framers had imposed upon the Judiciary to serve as an essential check against the inherent dangers of democratic majoritarianism. He therefore invoked activist judicial review primarily in two situations: (1) when the governing majority systematically disregarded the interests of a historically underrepresented group (such as blacks, ethnic minorities, political dissidents, religious dissenters, women, and persons accused of crime), and (2) when there was a risk that a governing majority was using its authority to stifle its critics, entrench the status quo, and/or perpetuate its own political power.

Because Brennan played so central a role in crafting many of the key decisions of the Warren Court, it may be useful to note just a few of those decisions to illustrate my point. Consider, for example, *Brown v. Board of Education*,²⁰ which prohibited racial segregation in public schools; *Loving v. Virginia*,²¹ which invalidated laws forbidding interracial marriage; *Engel v. Vitale*,²² which prohibited school prayer; *Goldberg v. Kelly*,²³ which guaranteed a hearing before an individual's welfare benefits could be terminated; *Reynolds v. Sims*,²⁴ which guaranteed "one person, one vote"; *Miranda v. Arizona*,²⁵ which gave effect to the prohibition of compelled self-incrimination; *Gideon v. Wainwright*,²⁶ which guaranteed all persons accused of crime the right to effective assistance of counsel; *New York Times v.*

18. *Id.* at 179.

19. THE FEDERALIST NO. 78 (Alexander Hamilton).

20. 347 U.S. 483 (1954).

21. 388 U.S. 1 (1967).

22. 370 U.S. 421 (1962).

23. 397 U.S. 254 (1970).

24. 377 U.S. 533 (1964).

25. 384 U.S. 436 (1966).

26. 372 U.S. 335 (1963).

Sullivan,²⁷ which limited the ability of public officials to use libel actions to silence their critics; and *Elfbrandt v. Russell*,²⁸ which protected the First Amendment rights of members of the Communist Party. Each of these decisions clearly reflected the central purpose of judicial review—to guard against the greatest dangers of majoritarian abuse.²⁹

By definition, antimajoritarian decisions generally do not sit well with the majority. It is therefore hardly surprising that this jurisprudence excited biting criticism, especially in the political arena, where candidates curry favor with that very same majority. By the late 1960s, Richard Nixon was able to make the Court's "judicial activism" a significant issue in national politics. During his nomination acceptance speech in 1968, for example, he insisted that the Court had "gone too far in weakening the peace forces as against the criminal forces in this country and we must act to restore that balance."³⁰ Nixon decried the activism of the Warren Court and pledged to appoint "strict constructionists" rather than "judicial activists" to the Court. In the discourse of the time, a strict constructionist was a judge committed to judicial restraint. In a few short years, Nixon appointed Warren Burger, Harry Blackmun, Lewis Powell, and William Rehnquist to the Court. Although these Justices varied over time in their adherence to "strict constructionism," their presence quickly transformed the Court, leaving Justice Brennan in the minority for the rest of his tenure.

The change in the Court's role since 1968 has been dramatic. In the twenty-five years between 1968 and 1993, shortly after Brennan left the Court, Republican presidents made *twelve* consecutive appointments to the Supreme Court. According to research by Lee Epstein, William Landes, and Richard Posner, in 1968 the average voting record of the five most liberal Justices (Marshall, Douglas, Brennan, Fortas, and Warren) in civil liberties cases was .185. (This is on a scale in which .000 is the most liberal and 1.000 is the most conservative.) The swing Justice was Earl Warren, whose voting record was .263.³¹ By 1993, after twelve consecutive Republican

27. 376 U.S. 254 (1964).

28. 384 U.S. 11 (1966).

29. Many of these decisions reflected, indirectly if not directly, the "gravitational pull" of the quest for racial justice and equality. See Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. (forthcoming 2011) (manuscript at 9–27) (on file with Texas Law Review) (arguing that race exercised a strong influence on the Warren Court's federalism, separation of powers, and First Amendment jurisprudence); HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* 4 (1965) (arguing that recent constitutional decisions relating to race and free speech challenge the law's prior conceptions of racial equality).

30. Richard M. Nixon, Presidential Nomination Acceptance Speech (Aug. 8, 1968) (transcript available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25968>).

31. See LEE EPSTEIN, WILLIAM M. LANDES AND RICHARD A. POSNER, *ARE JUDGES REALISTS? AN EMPIRICAL STUDY* tbl.3-2 (forthcoming HARV. L. REV. 2011); see also Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, 2010 SUP. CT. REV. (forthcoming 2011) (manuscript at 21) (on file with Texas Law Review).

appointments, the average voting record of the five most conservative Justices (Thomas, Rehnquist, Scalia, O'Connor, and Kennedy) was .798, and the swing Justice, Anthony Kennedy, had a voting record of .695.³² Thus, the Court majority was roughly as conservative in 1993 as it had been liberal in 1968. Even more striking, by 1993 the "liberals" on the Court were almost as conservative as the "conservatives" on the Court in 1968.³³

But what does "conservative" mean in the modern era? In Nixon's time, the term meant a Justice committed to judicial restraint. But beginning with the Reagan era, this began to change. Justices like Antonin Scalia, Clarence Thomas, John Roberts, and Samuel Alito are anything but restrained. Rather, like Justice Brennan, they employ a form of *selective* judicial activism. On the one hand, it seems clear that these Justices would have joined few, if any, of the Warren Court decisions I mentioned earlier. On the other hand, though, despite all the conservative rhetoric about "strict constructionism," "originalism," "judicial restraint," and "call[ing] balls and strikes,"³⁴ these conservative Justices have been just as activist as their liberal predecessors, but in a wholly different set of cases.

In a series of unmistakably activist decisions, the conservative Justices have held unconstitutional affirmative action programs,³⁵ gun control regulations,³⁶ limitations on the authority of corporations to spend at will in the political process,³⁷ restrictions on commercial advertising,³⁸ laws prohibiting groups like the Boy Scouts from discriminating on the basis of sexual orientation,³⁹ federal legislation regulating guns, age discrimination,

32. EPSTEIN ET AL., *supra* note 31.

33. The four conservatives in 1968 (Harlan, White, Stewart, and Black) had an average voting record of .521, whereas the four liberals in 1993 (Stevens, Souter, Blackmun, and White) had an average voting record of .436. See EPSTEIN, LANDES & POSNER, *supra* note 31, at tbl.3-2.

34. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., Supreme Court C.J. Nominee).

35. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747–78 (2007) (holding unconstitutional an affirmative action program that took race into account when determining school placement).

36. See *McDonald v. City of Chi.*, 130 S. Ct. 3020, 3050 (2010) (holding that the Second Amendment is applicable to the states and remanding the case for further proceedings); *D.C. v. Heller*, 554 U.S. 570, 595, 635 (2008) (holding that D.C.'s ban on handgun possession in the home violated the individual right to bear arms conferred by the Second Amendment).

37. See *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 913 (2010) (holding that "[t]he First Amendment does not permit Congress to make . . . categorical distinctions based on the corporate identity of the speaker and the content of the political speech").

38. See *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 376–77 (2002) ("If the Government's failure to justify its decision to regulate speech were not enough to convince us that the FDAMA's advertising provisions were unconstitutional, the amount of beneficial speech prohibited by the FDAMA would be . . . [W]e affirm the . . . judgment that the speech-related provisions . . . are unconstitutional.").

39. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 661 (2000) (overturning application of a state public accommodations law that would have prohibited discrimination based on sexual orientation).

the environment, and violence against women,⁴⁰ and policies of the State of Florida relating to the outcome of the 2000 presidential election.⁴¹

Nothing about this jurisprudence smacks of “judicial restraint.” To the contrary, it has about it the distinctive air of Platonic guardianship. The challenge is to figure out what theory of judicial review or constitutional law drives this particular form of activism. Although one can readily discern the specific conception of judicial review that undergirds Justice Brennan’s use of judicial activism, which is clearly rooted in the concerns of Jefferson, Madison, and Hamilton, no similar principle of judicial review or constitutional methodology explains the jurisprudence of contemporary conservative judicial activists. To understand Brennan’s theory of activist judicial review, all one needs to do is to look at the *results* and then ask, “Why these cases and not others?” If one attempts the same inquiry of the decisions of the current conservative Justices, however, no principled explanation emerges for their version of selective activism. Rather, to return to Justice Frankfurter’s ill-tempered observation, the selective activism of Justices like Scalia, Thomas, Roberts, and Alito seems to be born out of ““their prejudices and their respective pasts and self-conscious desires to join [Ronald Reagan and George W. Bush] in the Valhalla of ‘liberty.’””⁴² The point, in other words, is that judicial activism itself is neither inherently good nor inherently bad. It is a legitimate and essential method of constitutional interpretation when used in *appropriate* circumstances.

I sometimes wonder what constitutional law might look like today if Justices with the same vision as Justice Brennan had remained a majority on the Supreme Court over the past forty years. It is not so difficult to imagine such a state of affairs. Had Hubert Humphrey defeated Richard Nixon, Jimmy Carter defeated Ronald Reagan, or Al Gore defeated George W. Bush, the path of constitutional law might have been very different. What is more difficult to imagine is how constitutional law might have evolved in that counterfactual universe. It has been so long since there has been a liberal majority on the Court that it is difficult even to conceive what a liberal jurisprudence might look like today.

40. See *Printz v. United States*, 521 U.S. 898, 933 (1997) (holding that “[t]he mandatory obligation imposed on CLEOs to perform background checks on prospective handgun purchasers plainly runs afoul of [the law]”); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000) (holding “that the [Age Discrimination in Employment Act] is not a valid exercise of Congress’ power”); *Solid Waste Agency v. United States Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001) (holding a federal law claiming jurisdiction over ponds and mudflats was unconstitutional); *United States v. Morrison*, 529 U.S. 598, 627 (2000) (holding that a federal law dealing with violence against women was not constitutional).

41. See *Bush v. Gore*, 531 U.S. 98, 103 (2000) (invalidating Florida’s “use of standardless manual recounts” as violative of the “Equal Protection and Due Process Clauses”).

42. STERN & WERMIEL, *supra* note 1, at 102 (quoting Melvin I. Urofsky, *Conflict Among the Brethren: Felix Frankfurter, William O. Douglas and the Clash of Personalities and Philosophies on the United States Supreme Court*, 1988 DUKE L.J. 71, 105).

Here are some possibilities: the counterfactual Court might have held, not that affirmative action is unconstitutional, but that it is sometimes constitutionally required; it might have held, not that cigarette companies have a constitutional right to shill their products to children,⁴³ but that children have a constitutional right to an adequate and equal education;⁴⁴ it might have held not that silence constitutes waiver of the right to remain silent,⁴⁵ but that individuals accused of a crime have a constitutional right to DNA testing; it might have held, not that the government can constitutionally ban partial birth abortions,⁴⁶ but that it cannot constitutionally ban stem-cell research in order to enforce the faith-based beliefs of the religious right; it might have held, not that corporations have a constitutional right to spend millions to buy the elected representatives of their choice,⁴⁷ but that public officials cannot constitutionally use partisan gerrymandering to ensure their perpetuation in power;⁴⁸ it might have held, not that the Boy Scouts have a constitutional right to discriminate against gays and lesbians,⁴⁹ but that gays and lesbians have a constitutional right to marry.

Constitutional interpretation is not a mechanical, value-free enterprise. It requires judges to exercise judgment. It calls upon them to consider text, history, precedent, values, and ever-changing social and cultural conditions. It requires restraint, wisdom, empathy,⁵⁰ and intelligence. Perhaps above all, it requires a recognition of the Judiciary's unique strengths and weaknesses and a deep and accurate understanding of our nation's most fundamental constitutional aspirations.

43. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 566 (2001) (holding that regulations on tobacco advertising violate the First Amendment because they fail *Central Hudson's* four-part analysis).

44. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54–55 (1973) (holding that the Texas system of financing public education rationally furthers a legitimate state purpose or interest and therefore satisfies the Equal Protection Clause).

45. See *Berghuis v. Thompson*, 130 S. Ct. 2250, 2264 (2010) (holding that unless a suspect explicitly invoked his *Miranda* rights he waived them by making voluntary statements and that police did not have to obtain a waiver of the suspect's *Miranda* rights before interrogating him).

46. See *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (holding that the Partial-Birth Abortion Ban Act of 2003 was not unconstitutional on its face).

47. See *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 913 (2010) (holding that "[t]he First Amendment does not permit Congress to make . . . categorical distinctions based on the corporate identity of the speaker and the content of the political speech").

48. See *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (holding that "political gerrymandering claims are nonjusticiable" because there are no "judicially discernable and manageable standards for adjudicating political gerrymandering claims").

49. See *Boy Scouts of America v. Dale*, 530 U.S. 640, 644 (2000) (holding that applying New Jersey's public accommodations law to require the Boy Scouts to readmit an avowed homosexual and gay rights activist violated the Boy Scouts' First Amendment right of expressive association).

50. Richard Cotton, one of Justice Brennan's law clerks in the Court's 1972 term, observed that Brennan "had the ability to see a case through the eyes of the people involved." STERN & WERMIEL, *supra* note 1, at 206.

As Justice Brennan himself observed, the Supreme “Court is not a council of Platonic guardians given the function of deciding our most difficult and emotional questions according to the Justices’ own notions of what is just or wise or politic.”⁵¹ Rather, “our government structure assigns to the people’s elected representatives the function of making policy for handling the social and economic problems of state and nation” and “the impropriety of a judiciary with life tenure writing its own social and economic creed into the Constitution is therefore clear.”⁵² At the same time, though, Brennan insisted that “[j]ust as an individual may be untrue to himself, so may society be untrue to itself.”⁵³ The Court’s responsibility in interpreting and applying the Constitution, he rightly insisted, is to “keep the community true to its own fundamental principles.”⁵⁴

51. *Id.* at 233 (quoting Justice William James Brennan, The U.S. Constitution, Speech at Maxwell Air Force Base (Sept. 9, 1963), reprinted in 2 AIR WAR C. SUPPLEMENT 3, 43).

52. *Id.* (quoting *A Visit with Justice Brennan*, LOOK, Dec. 18, 1962).

53. *Id.* at 234 (quoting Justice William James Brennan, Bouton Lecture at Princeton University (Feb. 4, 1969)).

54. *Id.*