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# THE IMPACT OF JUDICIAL ACTIVISM ON THE MORAL CHARACTER OF CITIZENS

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**ILYA SHAPIRO\***: Thanks very much for having me. I think I've spoken here a couple of times. I understand now that you like to have your speakers come with orange-jumpsuited protesters and so forth. I apologize, but I wasn't able to bring any of those.

One thing often mentioned about the Federalist Society is that it's for judicial restraint. I'm not sure that's the official policy of the Federalist Society, but in any event, these terms like "restraint," "activism," "minimalism," "neutrality"—you certainly don't want judges to have political bias—what do they mean? Quite often, "activist" is synonymous with any decision the speaker doesn't like, and "restraint" means the judge is being wise and "I agreed with that decision" (coincidentally).

So I want to make the case for an active rather than an activist judiciary. Indeed, to the extent my theory of constitutional interpretation or judicial action . . . if you want to call it activist, that's fine. That's just semantics, and I'll posit that judicial activism in the defense of liberty is no vice.

Depending on where you stand on the political spectrum, you might be angry about unelected liberal judges rewriting the Constitution to reflect their own ill-conceived policy notions, or you might be outraged that reactionary conservative judges are striking down laws and threatening all the progress we've made on civil rights and civil liberties. Either way, you're likely to view the actions of these dangerous black-robed arbiters as judicial activism that must be stopped at all costs.

But again, what is this judicial activism? If it's merely an invalidation of government action, as my former professor Cass Sunstein, now the regulatory czar, has proposed—he wrote this big empirical study and tried to have a neutral definition of activism and figure out which judges are activists. He said, anytime any legislation is struck down or federal agency action is overturned, we will call that "activist," which is a neutral definition.

There are certain problems with that because, for example, if an agency is promoting liberal regulations, then striking it down might be conservative activism—or vice versa. It depends on the nub of the matter of what exactly is being acted upon. If it's a legislature acting that has a Republican majority and it's being struck down, is that liberal activism? You get the idea. There are some methodological problems with that kind of method. But if we accept that kind of neutral definition—striking down government action—then what are the beloved liberal troika of *Miranda*, *Brown*, and *Roe* but unabashed activism? After all, each of those struck down government action.

Conversely, if President [George W.] Bush was correct that activism is disrespecting federalism and acting "without regard for the will of the people and their elected representatives," then what would be more activist than the Bush Justice Department's opposition to California's medicinal marijuana or Oregon's

right-to-die statute? Those are firm positions by the DOJ. Examples like this abound.

Judicial activism is everybody's favorite bogeyman, but neither the left nor the right can provide a coherent definition beyond Justice Potter Stewart's famous dictum, which was issued in the context of obscenity, but really, as Sandra Day O'Connor proved, could be extended to an entire non-philosophy of jurisprudence: "I know it when I see it."

Most people who use the term don't have a coherent definition. It typically, again, means "a judicial opinion with which I disagree." So you have, for example, Cass Sunstein, who thinks that there are conservative judges who are striking down agency actions that are activist. On the other hand, you have Robert Bork, the failed Supreme Court nominee and former Solicitor General and legal scholar, who thinks that any judicial opinion that defends or upholds an unenumerated right is activist. So anything that isn't listed in the Bill of Rights, if a judge says that there is a right to that, that's activist. The Ninth Amendment is an ink blot essentially because we don't know what it means—and therefore it means nothing. Those are the extremes.

But I think there's a third way. The purveyors of conventional punditry all miss the larger point. The role of the judiciary in terms of constitutional interpretation is to fully interpret and apply the Constitution, period. So, if that means upholding a law, fine. If that means striking it down, fine. Activism is doing something that is not supposed to be the judicial role or not being faithful to the Constitution, which is no small task in part because of the doctrinal mess the Supreme Court has made. Again, whether a particular statute stands or falls is of no moment. Fidelity to the founding document should be the touchstone, not a circular debate over the virtues of judicial restraint or—as John Roberts put it at his confirmation hearing—modesty: just calling balls and strikes, just being in a kind of modest judicial role. Again, where you stand on those sorts of debates depends on where you sit.

As long as we accept that judicial review is constitutional and appropriate in the first place (*Marbury v. Madison*)—and how a judiciary is supposed to execute its role and ensure that government stays within its limited powers without the power of judicial review is beyond me—then we should only be concerned that a court get it right, regardless of whether the correct interpretation leads to a challenged law being upheld or overturned, or the lower court being affirmed or reversed. For that matter, an honest court-watcher shouldn't care whether one party wins or loses. Again, to paraphrase then-Judge Roberts at his confirmation hearing, the little guy should win when he is in the right and the big guy should win when he is in the right.

The Framers' constitutional understanding, *Federalist* papers 78 to 83 for example—the primary ones which discuss the judicial role—provide the boundaries between proper and improper judicial activism. And so, to paraphrase those understandings, there are a few rules I would apply about what courts should do.

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First, review all state action, government action, that implicates liberty. Then apply not a presumption “of constitutionality”—which is essentially what rational basis review is (Congress, everything it does, we presume, is constitutional)—but “of liberty” because, after all, the Constitution is there to promote freedom and liberty. And as *Federalist 51*, which is my favorite Federalist Paper—indeed, the vanity plate on my car says “Fed 51”—states, “If men were angels, we wouldn’t need government.” If angels govern men, well, no problem; angels do everything fine. But in a world where men govern men, we first have to empower the government to do certain things, preserve the rule of law and rules of the game, and then check that government.

Well, how do we do that? We don’t do it by presuming that everything the government does is okay. We do it by asking the question, does this promote liberty? Then we void any exertion of power that is not expressly enumerated because, by definition, any exertion of power somehow infringes liberty. Sometimes, that’s a good thing; when we criminalize something, for example, that infringes on the criminal’s liberty—but that’s good because he’s detracting from the liberty of others. We have this calculus, the basis of the criminal law.

Next, give meaning to every word of the Constitution. You know, there are no ink blots, or technicalities, or outmoded, antiquated portions.

And, finally, only exercise judicial rather than legislative or executive power. What do I mean by that? Micromanaging war, for example, however you draw that line, would be getting into the executive power. Less so now, but in the 1960s and 1970s, courts would require legislatures to pass budgets for their school systems, micromanaging the legislative process.

But why go through all this tedious process anyway, trying to be faithful to the Constitution, to the founding text, rather than having a living Constitution or some other method of interpretation? The principal benefit of a written Constitution is that it subjects judges, legislatures, and executive officials to rules and principles that cannot be liberally changed by those same government officials. To be sure, judges of good will can and will read the same words and history and come up with different outcomes. Look at *District of Columbia v. Heller*, the big Second Amendment case, with Justice Scalia’s majority opinion and Justice Stevens’s dissent: everybody purported to be doing an originalist analysis of what the right to keep and bear arms meant at the time of the ratification of the Second Amendment, and they came up with different interpretations. That’s okay. They were both engaged in good-faith judging, I would say.

But it’s impossible to conceive of a process that would produce more consistent results or that would vest the judiciary with the credibility it needs to function if we’re simply saying, “Judges, we are putting you up there because you are wise. Use your wisdom; use your judgment. That’s what you’re supposed to do.” If we value the rule of law, there is simply no substitute for a good-faith effort to apply the meaning of the Constitution, especially in light of changing circumstances and exigencies. Just because we now have the internet does not mean that we do not understand what the Commerce Clause means. Just because we had stagecoaches rather than horseback riders, or

horseless carriages after that, does not mean that each time, with each technological change, some bit of the Constitution gets outmoded.

The best founding documents are the ones that are simplest. Look at the Brazilian Constitution, which is something like 300 pages. It guarantees all sorts of different things, but I don’t think that the rule of law is stronger in Brazil than in countries that have shorter constitutions.

The dividing line, then, is not between judicial activism or abdication, which is equally a type of activism—like, for example, *Kelo v. New London*, where the Court allowed the legislature to go through with its taking, which I would argue violated all sorts of rights, but the judiciary was being “restrained.” So not between activism and restraint, but the line is rather between legitimate and vigorous judicial action and illegitimate judicial imperialism: thinking that “I am a judge; I know better.”

For proof of this observation’s legitimacy, look no further than the contrast between the public sentiment toward the very different activisms, or at least what some people call activisms, of the Warren and Rehnquist Courts, respectively. The Warren Court expanded the rights of criminals and found rights to privacy. It sometimes ended up being good policy, but some of the law is wishy-washy. The Rehnquist Court had a short-lived federalism revolution or, as I like to put it, armed insurrection. It did not go very far. But, nevertheless, a lot of its opinions were, at least by liberal commentators, labeled as activist. The public, by even now saying that the Court is too liberal, seems to have reconciled itself with the Rehnquist Court and seen that it was less activist than the Warren Court.

Ultimately, judicial power is not a means to an end—be that end liberal, conservative, or libertarian—but instead is an enforcement mechanism for the strictures of the founding document. To that end, as it were, certain judicial decisions will produce unpopular outcomes. But the solution to that in a republic with a founding document intended just as much to curtail democratic excesses as to empower democracy, is to change the law.

If we are governed by law and not men, and you don’t like the decision that the judges have made interpreting the law, then pass a new law, or, in the case of a constitutional decision, amend the Constitution. People say that it’s too hard to amend the Constitution. But that’s because of the various constitutional perversions we’ve had going back to the New Deal and Progressive Era. If a decision was made to enact all sorts of facially unconstitutional legislation in the first place and just have courts go along with it, then, obviously, it becomes harder to pass actual constitutional amendments because we are effectively amending the Constitution without literally amending it.

Any other method than changing the law when you do not like the legal result, or changing the Constitution when you do not like the constitutional result, leads to a sort of judicial abdication and the loss of those very rights and liberties that can only be vindicated through the judicial process.

Think, for example, of the Lilly Ledbetter case. A few years ago, a woman sued Goodyear for sex discrimination in employment. She was paid less over many, many years than

men in her position. She got up to the Supreme Court, and the Supreme Court ruled that in their interpretation of the statute at issue, the statute of limitations had run. So it did not rule that she did not have a case or that she was not discriminated against, but that the statute of limitations had run. This became a huge political issue in the 2008 election, and, lo and behold, the first law that President Obama signed was the Lilly Ledbetter Fair Pay Act and Paycheck Fairness Act.

You can argue over the policy of it, but it changed the statute of limitations. I mean, what it actually did was say that every time that you received a new paycheck, a new statute of limitations would start running. There were alternatives that were proposed, but that is the one that won out.

That's a great result in terms of how our system is supposed to work: If you don't like the Supreme Court's interpretation, change the law. Otherwise, you simply have judges who are exercising judicial power divorced from any authority given to them by the Constitution, and they are no better than an executive tyrant or an out-of-control legislature.

Any other method leads to government or judging by pure force of will rather than by the consent of the governed, implied consent, protection for minority rights, or whatever your theory is of where the government receives its legitimacy to act. Or it leads to government by black-robed philosopher kings. As Justice Scalia is fond of saying, even if we wanted that kind of rule, why in the world would we pick *nine lawyers* for that job? There is a better way, whether we call it activism or, say, the proper role of an Article III judge.

**FRED SMITH\***: Thank you for that, and thank you to the Federalist Society for this invitation. I think, in light of those remarks, this really is not a debate necessarily about judicial activism. I am not about to get up here and defend or take the position that judges should never be active.<sup>1</sup> It is really a debate about the role of a judiciary in a democratic society and the role of a judiciary in a society that has a Constitution that purports to guarantee to the states a republican form of government.

In a system that guarantees popular sovereignty and representative government, under what circumstances is it legitimate for appointed individuals or, in some cases, one appointed individual to overturn the legislation that has been duly enacted by people who have also taken an oath to faithfully uphold the Constitution?

We both agree that there is a role for judicial review, and I think we both agree that substituting one's own policy judgments for the law is always inappropriate. That said, I think we also probably agree that the phrase "freestanding activism" by itself is not very useful for many of the reasons that he just pointed out. In addition to Cass Sunstein's attempt to quantify it, more recently, Cory Yung has a piece in *Northwestern Law Review* that attempts to quantify judicial activism in terms of how frequently legislation is struck down.

Another approach, though, is to say that judges should only strike down legislation when it is unconstitutional beyond

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a reasonable doubt. This is a position that was taken by James Bradley Thayer, and the reason that he took that position was that if judges are too active in overturning democratically-enacted legislation, then, at some point, legislators and presidents and governors will not do their jobs. They will not faithfully uphold the Constitution because they know that if they overstep boundaries, the courts will step in. Therefore, you are reducing the role for democratically-enacted legislators to do their job in interpreting, or at least applying faithfully, the Constitution.

I actually have a lot more sympathy for that view than Ilya. That said, I believe that sometimes courts do have a duty to strike down legislation even if reasonable people can disagree. And to me the question is when should courts invalidate statutes about whose constitutionality reasonable people can disagree, and when should courts not do that? When should courts have a more or less active role?

Ambiguities in the Constitution abound. If we look at the phrase "equal protection" and try to answer that question just using text, it is pretty difficult. Does it include some sort of anti-subordination principle? Does it include gender? On the face of it, it does not say that it does and does not say that it does not. Does it only apply to race? Does it apply to the disabled? Does it only apply to laws that have a discriminatory purpose? The language's purpose does not appear in the Equal Protection Clause, but it has been interpreted to mean that. Does it apply to gender classifications? And if it does, does it apply to gender restrictions in marriage laws? That is just one example.

Another example would be, what does liberty mean? Does it only encompass physical constraints? Does it encompass state-created liberty interests? What about the freedom, more broadly, to be left alone? What does "cruel" mean? Who decides? Does it include the concept that punishment should be proportional to a crime? That is, would the death penalty be okay for stealing a bar of chocolate? Does it include the concept of whom a state may punish? That is, would it be okay to give the death penalty to a seven-year-old? What does "unusual" mean? What is the denominator when we are trying to decide what is "unusual"? Reasonable people can disagree about the meaning of these words, and, to add another layer of complication, we have, of course, the Ninth Amendment, which says that just because a right is not enumerated in the Constitution does not mean that it does not exist.

To add another layer of complication, the Constitution tells us about the scope of congressional action. Reasonable people, though, can disagree about those provisions, too. It is not obvious on the face of the Interstate Commerce Clause what that means. Does "interstate commerce" mean only when one state is engaging in commerce with another state? Using text alone, that strikes me as a plausible interpretation. Does it only apply to commercial activity that affects national markets? Does it apply to activity that affects national markets that is not commercial in nature, but in its consequences is commercial, even though the activity itself is not commercial? What about the tax power? Is it okay to attach tax consequences to certain conduct, like buying a home, being married, having kids, donating to charity, or having health insurance?

Section 5 of the Fourteenth Amendment allows Congress to pass legislation—“appropriate legislation” is the language—to enforce that provision. Who decides what is appropriate? Does the Constitution thereby vest in Congress the ability to decide what is appropriate? Is it a political question to get into the muck of whether or not what Congress does with respect to Section 5 is valid or not, or appropriate or inappropriate? And are judges actually getting involved in the legislative role when they try to decide whether Congress acted appropriately?

Judges, by definition, therefore must apply judgment in all of these types of cases and many others. In my view, in deciding how to apply that judgment, the work of John Hart Ely is very useful because his view is that the problem with always relying on the legislature to take care of constitutional problems is that sometimes the legislature doesn't reflect the will of society, the channels of political change can be clogged in a number of ways, or there may be people who do not have an equal voice in government.

There are two consequences that flow from that fact. The first is that it is my view that constitutional provisions that are designed to protect the equality of rights and constitutional provisions that are designed to clear the channels of political change should be applied to government action even when reasonable people can disagree about the constitutionality of the action. In those situations, judges should be faithful to the text, the history, and precedent without respect to whether or not reasonable people can disagree.

By contrast, our constitutional design gives considerable voice to the rights of states. It is inherent in the design of the Constitution. By this, I mean, if you look to the Senate, every state has an equal voice in the Senate, and our Founders thought it was very consequential. Madison put it this way: “No legislation can be passed, first, without the consent of the majority of the people,” referring to the House, “and then with respect to the majority of the states,” referring to the Senate. Chief Justice Marshall said something very similar in *McCulloch v. Maryland*. He said that the states and their sovereignty are represented in the Senate. As a result, I think that in situations that involve states' rights, if reasonable people can disagree about text, history, and precedent, then courts should be more deferential to legislatures.

Second, I believe that the ultimate minority in any society is the individual, and as a result—actually, Ilya and I agree on this point—constitutional provisions that are designed to protect individual liberty, including the First, Second, Fourth, and Fifth, should be applied rigorously with attention to the text, history, and precedent regardless of whether reasonable people can disagree. One concern I have, however, is that sometimes there are different barriers that courts have placed in the way of litigants who are attempting to enforce their constitutional rights. And, by restricting the remedies that are available to people who are seeking their constitutional rights, courts, therefore, in effect were also restricting the right itself.

Chief Justice Marshall also told us that for any right, there must be a remedy. Karl Llewellyn said the same thing: if you do not have a remedy, then you do not have a right. You can call it a right all you want, but if there is no remedy, there

is no right.

And there are a number of moments that, in my view, courts have unduly stepped in the way of litigants. One would be the context of sovereign immunity. The Eleventh Amendment says that the judicial power of the United States shall not be construed to extend to any class of cases in law or equity between a citizen of one state and another state, or between the citizen or subject of a foreign state and a state.

Despite that language, the Supreme Court has interpreted it somehow to mean very strange things. Number one, a citizen cannot sue his own state despite the very clear language of the Eleventh Amendment. And, number two, Congress cannot pass legislation that allows people to sue states, even when that means that someone is suing a state in state court despite the language, “the Judicial power of the United States.” And I do not think that there is any reasonable construction of the Eleventh Amendment that would lead to that view. The only way that you get there is to do what the Court has been very candid about doing. Justice Scalia has said that the Eleventh Amendment stands not for what it says but for the broad presuppositions for which it stands. In my view, that is problematic.

Another example would be the role of qualified immunity. There are a number of moments where the Court has interpreted qualified immunity in ways that are not particularly tied to any constitutional provision. I mean, the words “qualified immunity” themselves appear nowhere in the Constitution.

Another example would be what are called *Bivens* suits. People are allowed to sue federal actors for different constitutional violations. But in recent years courts have been increasingly stingy about when they will allow different *Bivens* remedies. There is a case called *Arar* from the Second Circuit that came out last year that strongly implies that you do not have a remedy against a federal actor who violates different substantive due process rights, and the Court went out of its way in *Iqbal* to say that they have never said that you have a *Bivens* right for First Amendment violation, suggesting that the right to sue for this type of violation is now potentially on the chopping block as well. That is concerning because, again, there is no right if there is no remedy.

Another example would be standing. Sure, the Constitution says that you have to have a case or controversy, but the Court has gone much further than that language in deciding what constitutes a case or controversy before someone is able to come into court.

My basic point is that in a democratic society there should be deference given to legislators because we should trust that they take their responsibility seriously to uphold the Constitution, and therefore the background principle should be, when reasonable people disagree about constitutional text or history, deference should go to the legislature.

However, when you are dealing with a constitutional provision that is intended to clear the channels of political change or protect individual liberties, such as the Bill of Rights, that is a very different circumstance, and in this situation courts should faithfully apply the text, history, and precedent without respect to whether reasonable people disagree. I do not think

that the courts have done that in the context of sovereign immunity or in *Bivens* cases and, in some instances, in the case of qualified immunity.

**MR. SHAPIRO RESPONSE:** Thanks very much for those remarks. This is a broad, high-level conversation we are having here, and I find myself agreeing with most of what Professor Smith has said, particularly with the examples he used: sovereign immunity, qualified immunity, and *Bivens*. On standing, I think the Court is pretty good except for the Establishment Clause issues, but that's because its Establishment Clause jurisprudence is a complete muddle.

But if you read between the lines of what he's saying and what I said, you do tease out one huge difference, and that is *the presumption*. Professor Smith mentioned such things as "when reasonable people disagree." When that happens, whoever bears the burden of persuasion, evidence, or proof loses because they have not borne that burden. Whoever is challenging loses.

I think that there should be a thumb on the scales of liberty at all times, and I guess I'm for less deference by the courts to the legislature than Professor Smith is. Legislators have taken an oath to uphold the Constitution. (And that is perhaps the only thing on which I agree with [former Delaware Senate candidate] Christine O'Donnell; I do think that congressmen and senators do need to consider the constitutionality of any legislation that's presented to them. I probably agree with her, too, that she's not a witch, although I really don't have the information to make a full determination on that.) But this does go to the role of a judiciary in a free and democratic society and what does a republican system of government mean?

There is one other key thing that I don't know if you picked up on. Professor Smith seems to apply a different presumption on the "liberty" provisions of the Constitution versus the rest, meaning, I guess, the "powers" or structural provisions of the Constitution. That is a false dichotomy. Our Constitution is a holistic document. The entire thing, even before the Bill of Rights was added, was created to promote individual liberty. Powers and rights are two sides of the same coin.

Remember the debate about whether even to have a bill of rights: Why do we need this? We don't give government any powers to violate our rights. Furthermore, if you enumerate the rights, that will disparage all these other ones. We can't enumerate every single right. I have a right to wear a hat that's red; I have a right not to wear a hat. I have the right to get out of bed on the right side, on the left side. We can't just enumerate all of these things. So we have the Ninth Amendment to do that. And to underline that we aren't giving the federal government any more powers, we have the Tenth Amendment.

The Ninth and Tenth Amendments, taken together, are the Constitution in a microcosm. We have a sea of liberty with islands of governmental authority to keep the rules of the game in check. For example, Professor Smith said that the Commerce Clause was nebulous or might change. The regulation of interstate commerce at the time of the ratification of the Constitution, was meant to apply to regular commerce that goes between states.

Commerce doesn't mean manufacturing or trade or anything with a dollar sign attached to it, as we now think of

it in context. It means the interstate trade in goods. This was an anti-protectionism measure to prevent states from levying tariffs against each other, and other trade barriers, as continued to happen under the Articles of Confederation and prevented us from having a "more perfect union," as it were.

What we now conceive of as the dormant Commerce Clause was really, if you read the ratification debates, what that provision was all about. It was not a sword so much for the federal government to go and intrude in all areas of our life—we now have to debate, does this local economic activity have a substantial enough effect in the aggregate on interstate commerce if it is part of a comprehensive scheme? And how many angels dance on the head of that pin?—it was a shield to protect and promote liberty, to promote trade and commerce, and these sorts of things.

Go back to Political Theory 101. We all have our own 100-percent individual sovereignty of which we delegate certain bits to the government to protect our rights against murderers, for national defense, sometimes for public goods, these sorts of things. We delegate temporarily, enumerate these limited powers that we give to that other sovereign, the government. We retain all other powers, and we have all of our full natural rights.

To limit government power is to enhance our liberty. It's not a matter of presuming that everything that government does is constitutional. Congress could've been wrong in its assessment of its own powers. We don't want Congress to assess its own powers . . . And when reasonable, good people disagree, does a judge have to throw up his hands? No. The judge is paid to figure out, to make those hard calls about whether the Constitution permits the government to do that or not.

The main liberty-protecting provisions of the Constitution, as understood in 1789, 1791, and 1868—with the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments—were not in the Bill of Rights. They were the structural provisions of the Constitution. So having this thumb on the scales presuming that anything that Congress does as long as it might be reasonable is going too far. It gives too much power to legislators—and it [also] gives too much power to judges.

You know, they play this game of bifurcated rights that started with *Carolene Products*, footnote 4: Is this right "fundamental"? If it is, then government can't do what it's doing. If it isn't "fundamental," then the government can do what it's doing. It's not a principled way of judicial interpretation, and that's at the root of a lot of our disputes.

**PROFESSOR SMITH RESPONSE:** Two things. First, with respect to standing, in particular, what bothers me about current standing doctrine is that if a litigant's constitutional rights have been violated and it is not compensable with damages for whatever reason—maybe because the litigant cannot show that it violated clearly established law, which is something you have to show under qualified immunity—and that person wants to seek an injunction from a court to say, I do not want this to happen to me again—I want to stop this practice that violates my constitutional rights and other people's constitutional rights—that litigant not only has to show that his constitutional rights have been violated before, he also has to show that his constitutional rights are likely to be violated again. And that has

been read into standing and mootness. It is at that intersection. That is what I was referring to when I referred to standing doctrine that I think is, at some point, divorced from the Constitution and ends up restricting constitutional rights.

But we do have a disagreement. We have a disagreement about what the institutional role of judges is, and what judges' comparative advantage is. I happen to think that legislators have a role in applying the Constitution faithfully. And I believe that if courts go too far, then legislators will not take that responsibility nearly as seriously as they should. I think that the reason why legislators do not take that responsibility as seriously as they should is that they think that if they go too far, then a court will step in.

Regarding the language regulating interstate commerce, I do not think that there is something inherent in the role of being a judge that makes them necessarily better at deciding what interstate commerce is than someone who has been elected to faithfully uphold the Constitution. That is why I believe in the background principle that when reasonable people can disagree, we should defer to legislatures on a number of questions and, again most notably, states' rights.

I have a reason for my dividing line. My dividing line between when we should have that deference and when we should not is clear. We want legislators to reflect the public will, but there are circumstances when legislation may not reflect the public will, most notably when the channels of political change are involved. If you have a poll tax or separate schools that relegate one segment of society to a place where they are not ultimately able to express their voice, when the channels of political change are blocked, when groups of people are subjugated in our system such that it can hardly be called a republican form of government (which has happened throughout much of our history), those are the circumstances where I think that even if reasonable people can disagree, we should apply the text, the history, and precedent without respect to them.

## Endnotes

1 "Active" here is defined as engaging in the process of judicial review.

