

University of Pennsylvania Carey Law School

Penn Law: Legal Scholarship Repository

Faculty Scholarship at Penn Law

2007

Judicial Activism and Its Critics

Kermit Roosevelt III

University of Pennsylvania Carey Law School

Richard Garnett

University of Notre Dame

Follow this and additional works at: https://scholarship.law.upenn.edu/faculty_scholarship



Part of the [Courts Commons](#), [Judges Commons](#), [Jurisprudence Commons](#), [Legal History Commons](#), and the [Rule of Law Commons](#)

Repository Citation

Roosevelt, Kermit III and Garnett, Richard, "Judicial Activism and Its Critics" (2007). *Faculty Scholarship at Penn Law*. 932.

https://scholarship.law.upenn.edu/faculty_scholarship/932

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Law by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.

DEBATE

JUDICIAL ACTIVISM AND ITS CRITICS

“Judicial activism,” writes Professor Kermit Roosevelt, of Penn, has been employed as an “excessive and unhelpful” charge—one “essentially empty of content.” As a substitute, Roosevelt reviews here the framework for analysis of Supreme Court opinions that receives fuller treatment in his recent book, *The Myth of Judicial Activism*. Professor Richard W. Garnett, of Notre Dame, is willing to go along with “much, though not all, of” Roosevelt’s position. Ultimately, Garnett suggests “that ‘judicial activism’ might be salvaged, and used as a way of identifying and criticizing decisions . . . that fail to demonstrate th[e] virtue” of constitutional “humility.”

OPENING STATEMENT

Against “Activism”

Kermit Roosevelt III[†]

In this debate I will review the argument from my just-published book, *The Myth of Judicial Activism*. The book attempts to achieve two things: first, to counteract what I felt was excessive and unhelpful political use of rhetoric about “judicial activism,” and second, to offer a more useful perspective from which to judge Supreme Court decisions, for lawyers and non-lawyers alike.

The negative argument of the book is that “judicial activism,” as the phrase is typically used, is essentially empty of content; it is simply an inflammatory way of registering disapproval of a decision. It is supposed to indicate that a judge has decided a case based on personal policy preferences rather than law. But this is not a fair description of controversial constitutional cases for two reasons. First, I’m pretty confident that almost no judge has ever believed that he or she

[†] Associate Professor of Law, University of Pennsylvania Law School.

was deciding a case this way, and I'm certain that they don't do so with anything like the frequency critics charge.

Second, and more important, most of the difficult and controversial constitutional cases don't have clear right answers. The charge of activism relies on the idea that there is a clear answer that judges are ignoring (and therefore that they must be motivated by something other than a good faith desire to apply the Constitution). But this so-called "plain meaning" turns out to be indeterminate in many cases: the First Amendment doesn't tell us what counts as speech (art? dance? nude dance?) or what's an abridgment (firing from a government job?). Likewise, the Equal Protection Clause doesn't tell us which kinds of discrimination are forbidden and which are permitted. Because there is no plain meaning that decides the difficult cases, I argue, courts must create doctrine that takes the judges from the generalities of the Constitution to decisions in specific cases. Doctrine is what we should be evaluating, and the key issue in evaluating doctrine tends to be whether the Court is showing an appropriate level of deference to the government actor whose conduct it is reviewing.

Before turning to a discussion about appropriate deference, a quick digression on doctrine and meaning is appropriate. Originalism, in one variant—which I call "application originalism"—suggests that doctrine is unnecessary. Instead, we can use the expectations of the drafters or ratifiers as to how general constitutional language would apply in specific cases. So, for instance, rather than crafting a doctrinal rule to reflect how deferential or suspicious courts should be with respect to racial discrimination by states, we can ask whether the ratifiers would have believed that a particular act of discrimination violated the Equal Protection Clause. This approach to constitutional interpretation is frequently mistaken because we would better serve both the purpose of many general constitutional provisions and the understanding of their ratifiers if we read them to announce general standards that are to be applied in light of contemporary circumstances. So if, for example, we take the basic meaning of the Equal Protection Clause to be a ban on unjustified discrimination, the relevant constitutional question is not whether racially segregated state public schooling appeared unjustified in 1868, but rather whether it appears unjustified now. Because history can't answer that question, I argue, we do in fact need doctrine.

So this brings up the question of how to decide whether the doctrine that the Court has crafted is sensible. The best way to do this, I suggest, is to think in terms of deference. Deference strikes me as the central concept for two reasons. First, a surprising amount of doctrine boils down to the choice of a particular level of deference—for

instance, that is how I read the tiers of scrutiny, which of course crop up all over the place. Second, if we are concerned about courts abusing their power and usurping the policymaking function of other governmental actors, a lack of appropriate deference is the basic form that this abuse and usurpation would take. Also, the deference inquiry is manageable, whereas trying to decide whether a particular decision is correct or not is very hard and very technical and hence not likely to be a useful endeavor for non-lawyers.

How do we decide whether the level of deference is appropriate? I think there is a fairly small set of factors that suggest when courts should defer or should not. In the book, I identify what I think are the four most important. *Institutional competence* goes to the respective abilities of courts versus legislatures or executive officers to decide a particular question. Because I read many important constitutional provisions to have a cost-benefit balancing component (e.g., the Equal Protection Clause in part tells states not to discriminate against some group unless the discrimination produces net benefits to society, though also in part not to do so out of hostility), which institution is better at assessing costs and benefits in a particular context will frequently be relevant. And, to the extent that the assessment relies on weighing competing policies, the decision should generally be left to the representative branches for reasons of democratic accountability. This is a Legal Process sort of consideration. *Defects in democracy* attempts to identify cases in which the legislative assessment will be suspect for structural reasons—as when benefits of a law go to in-staters and costs fall on out-of-staters. This is a John Hart Ely/process theory consideration. *Lessons of history* considers whether particular actors have proven themselves trustworthy or untrustworthy in particular circumstances. This is where a history of discrimination against a particular group would come into the equal protection analysis, for instance. *Costs of error* attempts to decide whether it is worse in a certain set of cases for the courts to err by upholding an unconstitutional act or striking down a constitutional one. This consideration will lead courts to adopt stances that produce different error distributions. If, for instance, the only constitutional question is whether a law is in the public interest, the costs of error factor will ordinarily suggest deference. The harm of a mistake in a close case is small, and a legislature that makes a mistake can realize that and correct it fairly easily, whereas a mistaken judicial decision is harder to fix. But if the error is one that would impose very high costs on a small group of individuals and is unlikely to be remedied through the democratic process, the costs of error factor might suggest less deference (the “beyond a rea-

sonable doubt” standard, evidently reflecting a belief that it is worse to convict the innocent than to acquit the guilty, is an example).

All of this sounds reasonable, I hope. Disagreement will arise in applying the factors to particular cases. But here I try to stay reasonable by judging the Court’s decisions using a very weak criterion. In most difficult cases, there will be factors pointing in different directions, and any reasonable reconciliation of the competing factors is legitimate. That is, different judges will, appropriately, have different views as to the relative significance of these factors, and they will reach different conclusions about how much deference is appropriate in particular cases. There really aren’t right answers here, so all we can ask is that the judges be sincere and, to some extent, consistent. Most decisions will turn out to be legitimate. But, I like to say: this is not a bug, it’s a feature. Most of what the Court has been doing *is* legitimate.

A couple of examples will illustrate how these factors may be applied to Court decisions. Heightened scrutiny (a lack of deference) for discrimination against women is supported by the lessons of history factor (see, e.g., coverture). How gender discrimination doctrine fares under a defects in democracy factor is unclear: women are underrepresented in legislatures but are a majority of the electorate. The institutional competence factor almost always suggests deference. The costs of error factor will probably depend on the particular issue. Taking all of these factors into account, a court could legitimately come out either way on the question of whether heightened scrutiny is appropriate. So what’s the use? There is some value in focusing disagreement on the relevant factors and their respective significance. But there might also be a value in structuring analysis in a way that highlights consistency, or the lack thereof. If the Court says that heightened scrutiny is not appropriate, or not appropriate only because of women’s voting power, then it will be hard for that Court to explain why heightened scrutiny *is* appropriate for affirmative action.

In other cases, it’s very hard to justify the level of deference the Court uses. Too much deference to the purported innocent justification for racial segregation was the problem in *Plessy*, and it’s hard to see why the Louisiana legislature of 1890 should have been trusted. Too little deference to the legislature was the problem in *Lochner*, and it’s not obvious why the legislature wasn’t simply the better decision-maker (though I think that *Lochner* is more defensible than commonly supposed). And, to be provocative, I find the lack of deference hard to justify in the Section 5 cases like *Garrett* and *Kimmel*, in Commerce Clause cases like *Morrison* (*Lopez* is a little easier), in the adoption of strict scrutiny for affirmative action, and in *Bush v. Gore* (though I also

think there's more to say about that case). I look forward to your thoughts.

REBUTTAL

The Virtue of Humility

Richard W. Garnett[†]

Kermit Roosevelt's opening statement—which sets out the argument of his new book, *The Myth of Judicial Activism*—is a characteristically thoughtful and engaging contribution to the conversation about the role of judges, and the nature of good judging, under our Constitution. As he predicted, I agree with much, though not all, of what he says. I will try here to flag a few of my disagreements, and also to identify some points where a bit of clarification might help me embrace Professor Roosevelt's arguments. I will also pose a few questions for him—questions that are prompted by his initial contribution—that I hope he will address in his closing argument.

For starters, I agree that, for the most part, the “political use of rhetoric about ‘judicial activism’” is “excessive and unhelpful.” Even if one wants to hold on to the view, as I do, that the term is not *entirely* “empty of content,” and even if one is not ready to conclude that “judicial activism”—properly understood—is a “myth,” one can and should agree that the term today often serves as little more than a slogan or epithet. I am reminded of then-Justice William Rehnquist's quip in a 1976 *Texas Law Review* article on the “living constitution” claim: implicitly acknowledging the challenge of contending with a constitutional cliché, Rehnquist joked about being in the unenviable, “necrophilia[c]” position of playing partisan for the “dead” Constitution. In any event, Professor Roosevelt is quite right to insist that the important task of “judg[ing] Supreme Court decisions”—the task he takes up in his new book—requires and deserves better.

The same could be said, I think, about the latest Court-related mantra, “judicial independence.” Indeed, when it comes to constitutional sloganeering, “judicial independence” might be the new “judicial activism.” Justices O'Connor and Breyer—and many others—have, in recent months, taken to the stump, op-ed pages, and Constitution Day gatherings to warn of dire threats to “judicial independence.” But if, as Professor Roosevelt writes, “judicial activism” usually

[†] Lilly Endowment Associate Professor of Law, University of Notre Dame Law School.

fessor Roosevelt's views on these points. First, it seems to me both possible and important to distinguish between votes to invalidate the policy choices of state legislatures as inconsistent with the Constitution's substantive individual-rights provisions, and votes to invalidate regulatory measures enacted by Congress as outside Congress's enumerated powers. That is, it is one thing to invalidate federal laws for reasons having to do with the distribution of power; it is another, it seems to me, to strike down state laws as misuses of power. Second, it is not at all clear to me why a Justice's votes to invalidate the Court's own precedents should count as evidence of judicial activism. (I owe this point to Professor Larry Solum.) Why would a Justice's vote to correct her own, or her judicial colleagues', or her judicial predecessors' error indicate the kind of over-eager second-guessing of politically accountable actors that we normally associate with "activism?" Turning to Professor Roosevelt's project, what role should *stare decisis* considerations play in our evaluation of judges' work and decisions?

It is (long past) time to turn to Professor Roosevelt's proposed method of deciding whether the Court's doctrines and decisions are sensible. At the heart of his argument is the idea of "deference": "Deference strikes me as the central concept . . . [because] a surprising amount of doctrine boils down to the choice of a particular level of deference." And so, before turning to the four factors he suggests are most important to deciding whether or not a court should "defer" to another actor or institution, it is worth asking: what do we mean by "deference?"

Clearly, appellate courts do and should "defer" to lower courts and non-judicial officials all the time. By "defer," though, does Professor Roosevelt mean "go along with a reading of the Constitution that the reviewing judge believes, in light of her preferred method of constitutional interpretation, is mistaken?" Or, "go along with an application of a rule that the reviewing judge agrees is, in fact, the rule that the Constitution provides, even though she thinks the rule was applied incorrectly, or to facts found erroneously?" Or something else? Does "deference" go to the question of whether the actor whose decision, conduct, or policy is being reviewed got things wrong, or to the question of whether that actor's error should be corrected? Professor Roosevelt has suggested that our evaluation of the Court's doctrine should focus on whether the Court is showing appropriate "deference." I hope it is not too fastidious to ask for clarification on what "deference" is.

Another question: Professor Roosevelt notes—and I agree—that "most of the difficult and controversial constitutional cases don't have

clear right answers.” And, he contends—correctly, I believe—that the “plain meaning” of the Constitution’s text is not always so plain. When developing and applying doctrine, though, what is the role, if any, of the “original meaning” of the relevant text? Let’s take it as given that the “original meaning” and original expected applications of constitutional text are not always easy, or even possible, to pin down. But are they *relevant* to our assessment of doctrine and decisions? How? Is original meaning a factor, at all, in the “deference” inquiry that Professor Roosevelt proposes? He states that one variant of “originalism” “suggests that doctrine is unnecessary,” and I do not mean to endorse such a variant. I assume we *do* need doctrine. I wonder, though, whether or not Professor Roosevelt believes that the construction of doctrine and its deployment need to be shaped and meaningfully confined, not only by considerations of “institutional competence” and “lessons of history,” but also by the text’s original meaning and historically rooted paradigm cases.

Finally, in his recent Walter F. Murphy Lecture, “Constitutional Virtues” (published in the *Green Bag*), Professor H. Jefferson Powell took up the question, why does the Constitution bind? Does it have, and how does it have, “legitimate authority?” Along the way to answering that question, he identifies “humility” as a constitutional virtue, and defines it as:

the habit of doubting that the Constitution resolves divisive political or social issues as opposed to requiring them to be thrashed out through the processes of ordinary, revisable politics. . . . [t]his virtue manifests itself in the continuing recognition that the Constitution is primarily a framework for political argument and decision and not a tool for the elimination of debate.

It seems to me that “judicial activism” might be salvaged, and used as a way of identifying and criticizing decisions—such as, in my view, *Casey*—that fail to demonstrate this virtue.

Professor Roosevelt’s aim, in *The Myth of Judicial Activism*—that is, to help us move past the ineffective, loaded lobbing of “activism”-as-epithet to a conceptually clear, attractive, and usable understanding of how judges ought to do their jobs—is a worthy and important one. I look forward to hearing more.

CLOSING ARGUMENT

Kermit Roosevelt III

As always, Professor Garnett's thoughts prompt me to clarify and reconsider my own. I think he is quite right to point out that "judicial independence" shows the potential to become as mindless a slogan as "judicial activism." (Interestingly, George Lakoff's recent book, reviewed unflatteringly [here](#) by Stephen Pinker, urges just this move: activist judges should be "rebranded" as "freedom judges.") But I do not, at the moment, see shouts of "judicial independence!" stifling honest criticism of judges in the way that shouts of "judicial activism!" threaten to undermine judicial independence via jurisdiction-stripping or impeachment. (Admittedly, I think both of these threats are remote, but they are an important strain in the rhetoric of activism.)

Perhaps more importantly, I think we can make judicial independence a meaningful phrase. The appeal to judicial independence asks us to distinguish between constructive criticism of the judiciary—arguments that a particular decision makes a mistake in its reasoning, or history, or the like—and attempts to intimidate or overawe judges, and to disavow the latter. I put assertions that judges are abusing their power or acting in bad faith in the latter category, and I think they are undesirable (unless, of course, they are accurate, which I do not think they are). Put another way, judicial independence asks us to give judges the freedom to make decisions we think are wrong, as long as they are honestly wrong. It recognizes that the remedy for such decisions is the appointments process.

Can we give similarly useful content to the notion of activism? Activism is related to independence as I have defined it in that activist decisions are those that are dishonestly wrong, the product of bad faith. Activist decisions are the ones that are not protected by the appeal to independence. The problem is that there is no agreed-upon way to determine which decisions fit that bill.

This might seem to be as much of a problem for "independence" as for "activism," since appropriate appeals to independence likewise depend on the distinction between good-faith error and bad-faith activism. In my book, I offer the concept of legitimacy as a different way of thinking about bad faith. I define legitimacy as choosing a level of deference for which there is some justification in terms of institutional competence, or history, or structural analysis of the democratic process. It turns out that most decisions are legitimate, as I define the

term; that is, there is some justification other than political will for what the Court has done. So, my analysis suggests that while we can, to some degree, distinguish between legitimate and illegitimate decisions, the best way I can think of to draw that line makes most of them appear legitimate (i.e., not rendered in bad faith). And thus, most of them can appropriately be defended by the appeal to independence.

That is my attempt to make sense of “activism,” and its upshot is that activism in the sense of bad-faith decision making is very rare, or at least that we can very rarely be confident about identifying it. Other people, as Professor Garnett notes, have taken a different approach. They define activism in such a way that it is both objectively identifiable and fairly common: activism is voting to strike down a state or federal law or to overturn a prior precedent.

I agree with Professor Garnett that this redefinition of judicial activism is too often deployed as a political stratagem. That is, there seems to be an attempt to (1) redefine activism so that the term is no longer pejorative (because some laws should be struck down and some precedents overturned); (2) point out that “conservatives” may do this more frequently than “liberals”; and (3) restore the pejorative connotation while asserting that conservatives are the real activists. This is an intellectually dishonest move, and to the extent that some people make it (I’m not saying any particular person is), they should be ashamed of themselves.

Assuming that the redefinition is not used to score rhetorical points, it still suffers from the basic problem that it gives up the idea that activism is something to be condemned. Thus, while Professor Lori Ringhand’s study does tell us something quite interesting, it doesn’t tell us much about activism as the term is ordinarily used. Professor Ringhand’s findings provide insight on the assertiveness or self-confidence of Justices regarding their constitutional views compared to those of other governmental actors or earlier Courts. The concept of deference is central to my analysis—the extent to which a Justice is deferential in different circumstances will tell us a lot about that Justice’s approach to constitutional decisions, and it might even help us in deciding whether the Justice is displaying an inconsistency suggestive of bad faith.

But the “different circumstances” point is key. Lumping all the votes together gives a very imprecise measure. So I completely agree with Professor Garnett that to get the real benefit of the data we need to separate out different kinds of cases—federal laws versus state laws; limits on federal power versus individual rights; and additionally, analysis with different constitutional provisions. (To Professor Ringhand’s credit, I think she has done much of this, and it is in part the

media's fault that the study is being reported in terms of a monolithic activism score.) This additional analysis would allow us to reverse-engineer a Justice's decision-making process in terms of the factors that suggest greater or lesser deference. Thus, it would allow us to say something about the relative significance that Justices give to the factors I identified (institutional competence, lessons of history, defects in democracy, etc.) and maybe identify other factors.

If we are interested not in explanations for deference (or its lack thereof) but rather in the conventional understanding of activism, there are perhaps other reasons. Striking down a law as beyond federal power does not prevent states from regulating, and therefore it perhaps looks less like the imposition of a judge's political preferences. (Assuming, that is, that "state regulation rather than federal" is not an impermissible political preference for the judiciary. I would call it a "high politics" preference, and permissible in a way that hostility to a particular law is not.) On the other hand, hostility to a particular law might lead a judge to strike it down to the extent that she can, even if she can't prevent all regulation. So, it may very well be that a ruling that a law goes beyond federal power is just as likely to be made in bad faith as a ruling that an activity is constitutionally shielded from all regulation. Again, though, I do not think that bad faith is present in any but a vanishingly small set of cases.

Whether votes to overturn precedent should count is also an interesting question. Such votes tell us something interesting about how assertive the Justice is with respect to past Courts, or the degree of intra-branch deference. Since I have already said that I would like to see the activism score broken down, I do not see any harm in also having this data available. Conceivably this data could be used to create a baseline measurement for the assertiveness of individual Justices, apart from the complicating variables of different constitutional provisions and different actors under review.

This brings me to the question of what I mean by deference, something I should have made clearer in my opening statement. I mean basically the use of what Larry Sager has called an "under-enforcing rule." Take the Equal Protection Clause as an example, and suppose for the moment that we agree that the meaning of this provision is something like "states may not engage in discrimination without adequate justification." (You may not agree, in which case we would have to have a longer conversation, but to explain my perspective, suppose that for now.) Obviously, the doctrine or tests that the Court applies in actual cases—the tiers of scrutiny—differ from this meaning. Rational basis review under-enforces—it lets discrimination

stand, not if the Court thinks it is justified, but if the legislature might rationally have thought it promoted some legitimate interest. I would call strict scrutiny an anti-deferential doctrinal rule—it does not defer but actually stacks the deck against the legislature; it will strike down some discrimination that’s consistent with the meaning of the Constitution. So the question for the Court is when to adopt a deferential stance and under-enforce—i.e., leave responsibility for compliance largely with the body whose action it is reviewing—and when to adopt an anti-deferential stance.

Meaning is relevant from my perspective because in assessing the Court’s performance, I think we need to start with meaning, and then ask which institution is best at determining whether some governmental act complies with that meaning. That tells us whether a deferential, non-deferential, or anti-deferential doctrine is appropriate. Humility, as Jefferson Powell defines it, fits neatly with this model: a humble Court will tend to be deferential; it will give the representative branches of government wide latitude to hash out policy matters. Defining activism as a lack of humility is tempting, but I think that it suffers the same problem as Professor Ringhand’s definition (to which it is essentially equivalent): sometimes the Constitution does resolve divisive social issues. It does so clearly on occasion (as with the eradication of slavery by the Thirteenth Amendment) and less clearly on others (as with the prohibition on racially segregated schooling that *Brown* found in the Fourteenth Amendment). Whether it resolves disputes about abortion or gay rights is a hard question.

I agree with Professor Garnett’s assessment of *Casey* in so far as I am not a fan of fundamental rights substantive due process—I do not believe it makes sense for judges to be charged with identifying and protecting these mysterious fundamental rights, and I do not think the text or history of the Due Process Clause provide a basis for the practice. (Whether the Ninth Amendment or the Privileges or Immunities Clause might is a different question.) But, I think that what the Court has done in those areas is defensible from the perspective of asking what the appropriate level of deference is; that is, I think that abortion restrictions present situations in which legislatures cannot necessarily be trusted to balance costs and benefits accurately. And since I think that the Due Process Clause can fairly be read to command legislatures to weigh the interests of all affected people equally (though this is a meaning that usually will be under-enforced) I think that the decisions are at least legitimate, even if different approaches might be preferable. If we want different approaches (and we may), then we should appoint Justices who will follow them (and we may have). As I like to tell my students, in the end we get the Constitution

we deserve.

CLOSING ARGUMENT

Richard W. Garnett

I appreciate Professor Roosevelt's response to my thoughts and questions. These two back-and-forth exchanges have been enjoyable and helpful for me, though I am all too aware that we have only scratched the surface of the important issues raised and explored in *The Myth of Judicial Activism*.

After reflecting on Professor Roosevelt's latest contribution, I think it is clear that we agree that "judicial independence" is important, and that the term can and should be used meaningfully. We also agree that efforts to "intimidate or overawe" judges would threaten "judicial independence," properly understood. That is, Justice O'Connor was right, in her recent *Wall Street Journal* essay, to remind us that "we must be . . . vigilant in making sure that criticism does not cross over into intimidation." On the other hand, I think Professor Roosevelt and I agree that forceful, "honest criticism" of judges and their rulings should not be regarded as disrespecting or undermining judicial independence and also that it would be unfortunate if arguments about the importance of "judicial independence" were deployed merely to silence critics or to insulate judges' rulings from critique.

We might part ways when it comes to identifying the more serious threat—the misuse of "judicial activism" or the misuse of "judicial independence"—to the rule of law. (Of course, it is worth remembering, and being thankful, that—as Professor Roosevelt points out—"both of these threats are remote.") At present, I am more concerned about the latter. On balance, I am inclined to agree with Judge William Pryor, who insisted in his own *Wall Street Journal* piece that "criticism of judicial decisions is essential to the progress of our constitutional republic" and that the best way for judges to protect their independence is not to scold those who protest their rulings but instead to take particular care to exercise—as *The Federalist* put it—"neither force nor will, but merely judgment." All things considered, I am troubled more by, say, the language (usually attributed to Justice Souter) in the *Casey* joint opinion impatiently "call[ing] the contending sides of a national controversy to end their national

division by accepting a common mandate rooted in the Constitution” than I am by, say, grandstanding politicians’ half-hearted efforts to prevent the Court from considering challenges to the language of the Pledge of Allegiance.

Professor Roosevelt suggests, in his closing statement, that we can usefully identify “activist” decisions as “those that are dishonestly wrong, the product of bad faith.” I wonder, is this definition too narrow? Does it capture what it is that those who attempt to use terms like “activist” and “judicial activism” in a serious and careful way are getting at? I’m not sure. It is one thing, it seems to me, to charge that a judge who renders a decision whose outcome one dislikes on policy or moral grounds has “dishonestly” arrived at that outcome; it is another, it seems to me, to say that a judge “[h]onestly” has chosen to employ an inappropriately “activist” interpretive approach or doctrine.

We can concede, for example, that Justice O’Connor is being scrupulously honest when she announces her conclusion that a particular religious display unconstitutionally “endorses” religion. That is, there is no need to doubt that she is honestly reporting her belief that the display in question is likely to be perceived by a reasonable observer as having the purpose or effect of making non-adherents feel like “outsiders, not full members of the political community.” I do not believe, though, that this concession disables us from criticizing her religious display decision, or her approach to the Establishment Clause, on the ground that it owes more to her intuitions and ideals, or to her beliefs about the role and capacities of judges, than to the constraints that the Constitution in fact imposes on state actors.

I could offer, and—I am sure—Professor Roosevelt and I could debate, many other similar examples. For now, I will simply suggest that a ruling or approach can be both “honest” and “activist.” To be clear: Professor Roosevelt and I agree that “judicial activism” is misused in the public debate, and is in need of clarifying analysis. Like the words “controversial,” “partisan,” and “divisive,” the term “activism” is too often an epithet lacking content. (As Justice Thomas put it during his confirmation hearings, “judicial activism is when the court rules against you.”) It seems to me, though, that to focus too closely on a judge’s honesty—or, for that matter, as Professor Ringhand does, on whether a judge’s decision invalidates a legislative act or reverses a precedent—might be to lose some of the term’s serviceable, and important meaning.

In a comment published in 2004 in the *California Law Review*, Keenan Kmiec identified a magazine article written in 1947 by Arthur Schlesinger, Jr., as the Ur-text for “judicial activism.” In that piece,

Schlesinger proposed that the Court was split into at least two distinct camps, the “judicial activists” and the “champions of self restraint.” The former, he contended, were marked by the view that the Court “can play an affirmative role in promoting the social welfare.” The former were

more concerned with the employment of judicial power for their own conception of the social good; [the latter] with expanding the range of allowable judgment for legislatures, even if it means upholding conclusions they privately condemn. One group regards the Court as an instrument to achieve desired social results; the second as an instrument to permit the other branches of government to achieve the results the people want for better or worse.

I do not think Schlesinger’s claim was that the “activists” were dishonest—i.e., that they invalidated policies that they believed *were* constitutional but to which they objected on political or moral grounds. Instead, the heart of “judicial activis[m]” seemed to be, for Schlesinger, an excessive confidence in judges’ ability and authorization to push policy in the right direction. To be “activist,” perhaps, is not to willfully substitute one’s notion of the social good for the Constitution; it is to adopt and apply an interpretive approach or stance that, when honestly and scrupulously applied, nevertheless imports the Constitution’s enforceable content from one’s (or one’s like-minded “reasonable” friends’) political and moral beliefs.

All this brings me back to Professor Roosevelt’s opening contribution, and to the thesis of his new book. Again, he proposes that the “best way” to “decide whether the doctrine that the Court has crafted is sensible” is to “think in terms of deference.” And he identifies, in his opening statement, the “four most important” factors that “suggest that courts should defer or should not”: “institutional competence,” “defects in democracy,” “lessons of history,” and “costs of error.”

With respect to the “institutional competence” factor, I agree that “many important constitutional provisions . . . have a cost-benefit balancing component”—the Fourth Amendment’s reasonableness requirement, for example—and that the task of interpreting and enforcing the Constitution will often require judges to decide which institution or branch of government is “better at assessing costs and benefits in a particular context.” However, I am not sure that the fact that a particular institution or branch is “better at assessing costs and benefits in a particular context” means that that branch is constitutionally authorized to strike and enforce the cost-benefit balance, or to second-guess the assessment of even a less-able institution or branch. Professor Roosevelt and I agree that, generally speaking, the

job of “weighing competing policies” is best “left to the representative branches for reasons of democratic accountability.” I would also want to consider, though, the possibility that—putting aside concerns about competence and “accountability”—the Court might not always be constitutionally authorized to take up the balancing task. The question of a state actor’s power to act is, I think, prior to the question of its ability to act wisely, in accord with the correct cost-benefit balance.

Professor Roosevelt’s second factor, “defects in democracy,” “attempts to identify cases in which the legislative assessment will be suspect for structural reasons.” I am uneasy, though—Professor Ely notwithstanding—with the view that the Court is charged with evaluating and supervising the democratic process. Turning to the “lessons of history” factor, I have similar reservations about inviting judges to “consider[] whether particular actors have proven themselves trustworthy or untrustworthy in particular circumstances.” It is not that such untrustworthiness is never relevant, but it does not seem to me that the power of a politically accountable actor or institution to act waxes and wanes with the Court’s assessment of its past performance.

Finally, Professor Roosevelt writes that the “[c]osts of error” factor “attempts to decide whether it is worse in a certain set of cases for the courts to err by upholding an unconstitutional act or striking down a constitutional one.” I agree that this factor is crucial to the evaluation of doctrine and decisions. And, it suggests an important distinction between the “federalism” decisions—in which the Court has invalidated acts of Congress and which have been criticized by Professor Sunstein and others as “activist”—and those decisions, like *Roe v. Wade*, to which many conservatives have attached that label. Could it be that constitutionalized errors regarding the constraints that individual-rights provisions impose on governments’ regulatory power are “costly” in ways that even wrongheaded decisions about the vertical and horizontal allocation of powers are not?

After all, a decision like *Lopez* says nothing about the merits of gun-control proposals, or even about their permissibility as a general matter. Such a decision merely affirms that the power of Congress to regulate interstate commerce does not extend so far as to allow it to prohibit the possession of guns near local schools. It does not purport to end the gun-control discussion or resolve the gun-control debate; it leaves those who want to keep guns away from schools free to make their case to the politically accountable body that is constitutionally authorized to enact the measures they support. There are, I believe, significant, if not always recognized, costs that attend decisions that do not simply declare—as the Court did in *Lopez*—that one side in a policy debate pursued its aims in the wrong legislature, but rather an-

nounce that one side acted with “animus,” or embraced a “cruel” punishment, or attacked fellow citizens’ fundamental liberties. It is less “costly”—and, perhaps, less “activist”—to tell the losers in a case to fight in another arena than to tell them, in effect, that there is something unworthy, and un-American, about pressing the fight at all.

In his opening statement, after making the case for a focus on deference, Professor Roosevelt wrote, “[a]ll of this sounds reasonable, I hope.” Indeed, it does. His project, and the generous, thoughtful, charitable spirit that animates it, are commendable. I am grateful for the opportunity to share my own questions, comments, reservations, and respect.