

**The Wolves and The Sheep of Constitutional Law:  
A Review Essay on Kermit Roosevelt's  
*The Myth of Judicial Activism*  
Timothy Sandefur<sup>♦</sup>**

The world has never had a good definition of the word liberty, and the American people, just now, are much in want of one. We all declare for liberty; but in using the same *word* we do not all mean the same *thing*. With some the word liberty may mean for each man to do as he pleases with himself, and the product of his labor; while with others the same word may mean for some men to do as they please with other men, and the product of other men's labor. Here are two, not only different, but incompatible things, called by the same name—liberty. . . .

The shepherd drives the wolf from the sheep's throat, for which the sheep thanks the shepherd as a *liberator*, while the wolf denounces him for the same act as the destroyer of liberty. . . . Plainly the sheep and the wolf are not agreed upon a definition of the word liberty . . . .

~Abraham Lincoln<sup>1</sup>

An *elective despotism* was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced . . . that no one could transcend their legal limits, without being effectually checked and restrained by the others.

~Thomas Jefferson<sup>2</sup>

## I. INTRODUCTION

Few legal issues in recent memory have agitated the American public as much as the controversy over so-called “judicial activism.” It was one of

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<sup>1</sup> Address at Sanitary Fair (April 18, 1864), *in* 7 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 301, 301-02 (Roy Basler ed., 1953).

<sup>2</sup> THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* (1783), *in* THOMAS JEFFERSON: *WRITINGS* 245 (Merrill D. Peterson ed., 1984).

the major topics of the presidential elections of 2000 and 2004, as candidates on both sides—but particularly Republicans—spoke repeatedly about the threat emanating from an out-of-control judiciary that was “writing law from the bench” and “making laws, instead of interpreting them.” The popular press has been deluged with books about supposedly extremist judges, including Mark Levin’s *Men in Black: How the Supreme Court Is Destroying America*, Stephen P. Powers and Stanley Rothman’s *The Least Dangerous Branch?: Consequences of Judicial Activism* and Herman Schwartz’s *The Rehnquist Court: Judicial Activism on the Right*. Unfortunately, after all the dust clears away, the term “judicial activism” ends up being very difficult to define—or to separate from legitimate judicial functions.

Kermit Roosevelt III’s *The Myth of Judicial Activism*<sup>3</sup> is an elegantly written, brief examination of the controversy over the judicial role. Accessible to the layman, and up-to-date with many prescient observations on important recent cases, Roosevelt’s book is an important counterbalance to some of the more hysterical literature issuing from the judiciary’s critics, and it does an effective job of quickly demolishing some of these critics’ more outlandish claims. But Roosevelt’s book is important for another reason: because it so effectively defends mainstream legal theory, it provides a point of departure for a general discussion of the present controversy. Roosevelt does not agree with everything the Supreme Court has done recently; quite the contrary. But his disagreements are typical of the prevailing attitudes in the legal academy, including his critique of such Commerce Clause cases as *United States v. Lopez*<sup>4</sup> and *United States v. Morrison*,<sup>5</sup> and his defense of campaign finance legislation, abortion rights, and eminent domain. Roosevelt’s book therefore gives us an opportunity to consider how the legal elite thinks about itself and its role in the constitutional order.

Since 1938, attorneys, judges, and law professors have generally seen the judicial role through the lens of the famous “Footnote Four”<sup>6</sup>: that judges ought to intervene to protect “discrete and insular minorities” from legislative abuse and ought to be skeptical toward laws that interfere with the “political process,” but otherwise should leave the legislature to act more or less as it chooses. Roosevelt shares this outlook, which has at its

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<sup>3</sup> KERMIT ROOSEVELT III, *THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS* (2006) [hereinafter ROOSEVELT].

<sup>4</sup> 514 U.S. 549 (1995).

<sup>5</sup> 529 U.S. 598 (2000).

<sup>6</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

heart a surprising naïveté with regard to the actual working of democratic systems. Once we take notice of the effects of rent-seeking by politically powerful groups in legislatures, the problems with this over-confidence in legislatures become clear.

But Roosevelt's book reveals something still more fundamental: at bottom, the controversy over judicial activism is really a debate over the nature of the American Constitution. For America's founders, the Constitution was centered around protecting individual liberty—what Abraham Lincoln referred to as the liberty “for each man to do as he pleases with himself, and the product of his labor”; for Roosevelt, by contrast, as for much of the legal academy, the Constitution is primarily concerned with fostering democracy—the liberty “for some men to do as they please with other men, and the product of other men's labor.” While the framers' definition of liberty focused on the “sheep,” Roosevelt's concern is for the “wolves.”

In what follows, I will provide an overview of the contemporary “judicial activism” debate and the deeper conflict between the liberty-oriented Constitution and the democracy-oriented Progressive theory that now dominates the legal academy. I do so in hopes that we might learn something about the nature of the Constitution itself as well as some solutions to one of the most pressing problems of constitutional government.

## II. THE NATURE OF JUDICIAL “ACTIVISM”

### *A. The Constitutional Role of The Judiciary*

Before discussing “judicial activism,” we must first understand the role that judicial review plays in the American Constitution. It is exceedingly unfortunate that Roosevelt never addresses this subject. Today's debate over “judicial activism,” after all, originated in large part in the work of Robert Bork,<sup>7</sup> which is, at bottom, an attack on judicial review itself. A

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<sup>7</sup> I do not mean to suggest that this controversy is entirely new. Complaints about “judicial activism” date back at least to Justice Iredell's opinion in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 398-400 (1798) (Iredell, J., dissenting). And the subject became a particular source of controversy in the wake of the Warren and Burger Courts' rulings. See David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469, 1526 (2005) (“*Lochner* was certainly a significant case, but it never achieved anti-canonical prominence until the 1970s, when it became a foil for debate over *Griswold* and especially *Roe*.”). But Bork, through his defeated nomination to the Supreme Court and his ensuing attacks on alleged judicial overreaching, has spurred the populist backlash against the judiciary more than any other writer in this generation. See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

coherent critique of judicial activism must take care not to impugn the entire judiciary, and it is impossible to understand whether “activism” is an abuse without first understanding what judges are supposed to do.

Judicial review existed long before Chief Justice John Marshall wrote the famous opinion in *Marbury v. Madison*.<sup>8</sup> Alexander Hamilton had explained the idea more than fifteen years earlier in *The Federalist*<sup>9</sup>: the Constitution embodies the genuine will of the people. A statute, by contrast, embodies only the will of a particular legislative majority at a particular time. Thus when a statute conflicts with the Constitution, the judiciary, far from subverting the will of the people, is actually *enforcing* it when it declares that statute unconstitutional and void. This is why the great Justice Stephen Field called the United States Supreme Court “the most Democratic of all” of the federal government’s branches<sup>10</sup>: it enforces the true popular will against incursions by temporary legislative will. The Constitution is a high wall, or “bulwark,”<sup>11</sup> broadly encircling

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<sup>8</sup> 5 U.S. (1 Cranch) 137 (1803). See Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502 (2006); William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455 (2005). See also Robert J. Reinstein & Mark C. Rahdert, *Reconstructing Marbury*, 57 ARK. L. REV. 729 (2005); Scott D. Gerber, *The Political Theory of an Independent Judiciary*, THE POCKET PART, Jan. 9, 2007, at <http://thepocketpart.org/2007/01/09/gerber.html>.

<sup>9</sup> In his words,

[E]very act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves . . . .

It is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority. . . . A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

THE FEDERALIST No. 78, at 435 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

<sup>10</sup> Appendix: Correspondence between Mr. Justice Field and the Other Members of the Court with Regard to His Retiring from the Bench, 168 U.S. 713, 717 (1897).

<sup>11</sup> As James Madison explained when proposing a Bill of Rights, “[i]f [rights] are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in

the government's authorized discretion. One job of the judiciary is to ensure that the parties in democracy's often hectic debates do not breach that wall. If, after serious deliberation, the people truly changes its will, it must do so by altering, not by subverting, the Constitution.

From the outset, then, the judicial role was seen as a limitation on democratic decision-making, motivated by “distrust”<sup>12</sup> of the process of majority rule and aimed at preserving the *Constitution*,<sup>13</sup> rather than fostering contemporaneous democratic decision-making. What motivated this distrust? James Madison answers this question in *Federalist* 10 and 51: the problem with any popularly elected government is that it is liable to be captured by private interest groups seeking to use government power for their own private benefit. These “factions”—a term that Madison defines as “a number of citizens, whether amounting to a majority or minority of the whole [populace], who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community”<sup>14</sup>—can breach the limits that the Constitution places on their power and can enact laws that deprive people of their private property, abridge their religious freedom, or pursue other “improper or wicked project[s].”<sup>15</sup> When this happens—when either a small faction uses government to harm the majority, or where the majority uses government to harm the minority—“anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger.”<sup>16</sup>

More recently, the problem of faction has been termed “rent seeking,” and it has been thoroughly described by economists specializing in “public choice” theory.<sup>17</sup> As these writers explain, “[m]ajorities use their power to take away resources and opportunities from minorities and redistribute it to themselves.”<sup>18</sup> Because government's power to redistribute wealth and opportunity is a valuable commodity, and because that power will increase

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the legislative or executive . . . .” James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), in JAMES MADISON: WRITINGS 437, 449 (Jack Rakove ed., 1999).

<sup>12</sup> See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

<sup>13</sup> All judicial officers, after all, are required to take an oath to support “not a person, a party, an office, or even a nation, but the Constitution itself.” ROOSEVELT, *supra* note 3, at 23.

<sup>14</sup> THE FEDERALIST No. 10 (James Madison), *supra* note 9, at 46 (emphasis added).

<sup>15</sup> *Id.* at 52.

<sup>16</sup> THE FEDERALIST No. 51 (James Madison), *supra* note 9, at 292.

<sup>17</sup> See generally JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (Ann Arbor Paperbacks 1992) (1962).

<sup>18</sup> John O. McGinnis, *The Original Constitution And Its Decline: A Public Choice Perspective*, 21 HARV. J.L. & PUB. POL'Y 195, 197 (1997).

in value as the scope and frequency of such redistributions increase, the result is a spiral effect: the more valuable the redistributive power becomes, the more money and energy interest groups will invest in trying to exploit that power for their own benefit.<sup>19</sup>

*The Federalist* proposes at least three cures for these “mischiefs of faction.”<sup>20</sup> The most famous is the system of “checks and balances,” which pits groups against one another, ensuring that none can gain a permanent and dangerous ascendancy.<sup>21</sup> Another is to limit the power of the state in an absolute sense: where the government has no power to violate, for example, the freedom of speech, there will be little danger of factions using such a power to threaten the safety of the people.<sup>22</sup> Finally, an independent judiciary (or a judiciary as independent as possible) can “introduc[e] into the government a will not dependent on” the will of the majority, and thus able to resist its more inappropriate ambitions without being swayed by popular passions.<sup>23</sup>

These two judicial roles—preserving the Constitutional will of the people, and preventing the “mischiefs of faction”—share an important attribute: both are oriented toward protecting individual liberty. Enforcing the constitutional will of the people, including its safeguards for liberty, is important, not because doing so is what the majority wants—indeed, it is often quite unpopular<sup>24</sup>—but because it protects “the rights of individuals from the effects of . . . ill humors which . . . designing men . . . sometimes disseminate among the people.”<sup>25</sup> The constitutional will of the people is worthy of preservation only because it respects individual liberty, and factions are a threat only because they endanger liberty.

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<sup>19</sup> BUCHANAN & TULLOCK, *supra* note 17, at 287 (“[T]he profitability of investment in [political organization] is a direct function of the size of the total public sector and an inverse function of the ‘generality’ of the government budget . . . . The organized pressure group thus arises because differential advantages are expected to be secured through the political process . . .”).

<sup>20</sup> THE FEDERALIST No. 10 (James Madison), *supra* note 9, at 46.

<sup>21</sup> See THE FEDERALIST No. 51 (James Madison), *supra* note 9, at 288-93.

<sup>22</sup> See THE FEDERALIST No. 84 (Alexander Hamilton), *supra* note 9, at 481-82 (“Why . . . should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?”).

<sup>23</sup> THE FEDERALIST No. 51 (James Madison), *supra* note 9, at 293.

<sup>24</sup> See THE FEDERALIST No. 71 (Alexander Hamilton), *supra* note 9, at 400 (“When occasions present themselves in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests to withstand the temporary delusion in order to give them time and opportunity for more cool and sedate reflection. Instances might be cited in which a conduct of this kind has saved the people from very fatal consequences of their own mistakes, and has procured lasting monuments of their gratitude to the men who had courage and magnanimity enough to serve them at the peril of their displeasure.”).

<sup>25</sup> THE FEDERALIST No. 78 (Alexander Hamilton), *supra* note 9, at 437.

In other words, without a prior allegiance to liberty, there is no reason to regard a “faction” as a mischief. Democracy is not an end in itself, but an instrumental value serving the goals of liberty and happiness. This parallels the scheme of the Declaration of Independence, which begins with the proposition that all men are created equal, endowed with certain rights, and then explains that “Governments are instituted among Men” for the purpose of securing these rights.<sup>26</sup> When government becomes destructive of these rights, the people may alter or abolish it, and implement some new safeguard. The ontological order could not be clearer: individual rights come first, government institutions come second; the latter are justified and limited by their service to the former. Under the Constitution, judicial review helps keep government within boundaries that are designed to protect and preserve the substantive pre-political value of individual liberty—not democracy as an end in itself.

Not only the Declaration’s language, but also the very logic of a written constitution supports this view. Majorities, after all, have little need for constitutions. A pure democracy, such as ancient Athens, needed no written constitution because the majority’s will was the supreme power, trumping individual rights or traditional institutions.<sup>27</sup> The purpose of a written constitution, by contrast, is to channel the majority’s power in a direction that will best preserve individual liberty while enabling the government to accomplish its goals. Among these goals, of course, is to secure the safety and happiness of the people, so that the Constitution’s individualistic role (protecting rights) and its collective role (organizing majority rule) are reconciled, in the state where the majority is compelled to respect individual rights.<sup>28</sup> Over forty years after *The Federalist*, Madison reiterated this point in an essay entitled “Sovereignty.” The concept of majority rule, he wrote,

operates as a plenary substitute of the will of the majority  
of the society for the will of the whole society; and that the

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<sup>26</sup> See DECLARATION OF INDEPENDENCE, 1 Stat. 1 (1776).

<sup>27</sup> Note that even Socrates, whose right to freedom of speech was spectacularly destroyed by the majority of Athens, still regards himself as a creature of the *nomoi*, subservient even to the point of death. See PLATO, *Crito*, 50b-52d, reprinted in THE COLLECTED DIALOGUES OF PLATO 35-37 (Edith Hamilton & Huntington Cairns eds., Princeton Univ. Press 1973) (1961).

<sup>28</sup> See THE FEDERALIST No. 51 (James Madison), *supra* note 9, at 290 (“[I]n framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.”).

sovereignty of the society as vested in & exercisable by the majority, may do anything that could be *rightfully* done by the unanimous concurrence of the members; the reserved rights of individuals (of conscience for example) in becoming parties to the original compact being beyond the legitimate reach of sovereignty, whenever vested or however viewed.<sup>29</sup>

Thus the majority is justified in ruling only insofar as it is a *rightful* majority<sup>30</sup>—that is to say, a majority that respects the bounds of “the original compact.” Those matters which are not properly subject to rule by others—with which others are forbidden from interfering by the pre-political rules of justice and morality—cannot be legitimately governed either by a king or a majority, no matter how large.

One of the earliest ways in which the judiciary protected individual rights from wrongful interference by majorities or legislatures was through its application of the Due Process Clause of the Fifth, and later the Fourteenth, Amendments. This analysis, which has come to be called “substantive due process,”<sup>31</sup> has been misunderstood and misrepresented for decades, so it is difficult to give a brief explanation of it. The attempt, moreover, is complicated by the fact that the term “substantive due process” leaves out the most important part of the Clause: “due process of law.” A person is deprived of life, liberty, or property without due process of law whenever the government infringes on these rights in the pursuit of something that is not warranted by *law*—that is, whenever an act does not contain those substantive elements which qualify it as a law. As Roosevelt puts it, the Due Process Clause “means that the government cannot restrict your liberty in even the most trivial way unless it does so by means of a valid law,”<sup>32</sup> but “not every act, legislative in form . . . is law.”<sup>33</sup> True “law” contains certain ingredients: for example, a valid law is a law enacted pursuant to the enumerated powers, or one which fits within the

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<sup>29</sup> James Madison, *Sovereignty* (1835), in 9 WRITINGS OF JAMES MADISON 568, 570-571 (G. Hunt ed., 1910).

<sup>30</sup> Cf. Thomas Jefferson, First Inaugural Address (1801), in JEFFERSON: WRITINGS, *supra* note 2, at 492, 492-93 (“[T]hough the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect, and to violate would be oppression.”).

<sup>31</sup> This is a pejorative term adopted by critics of the concept. Its practitioners did not refer to it as such. See G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 243-45 (2000) [hereinafter WHITE, NEW DEAL].

<sup>32</sup> ROOSEVELT, *supra* note 3, at 120.

<sup>33</sup> *Hurtado v. California*, 110 U.S. 516, 535 (1884).

moral/political purposes for which government is created.<sup>34</sup> Also, a valid law includes a principle of *generality*: it sets the terms by which all persons under specified circumstances must act; it is not a mere command to particular individuals without a general public reason. As the Supreme Court once recognized, law

is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, “the general law . . . .” Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude.<sup>35</sup>

For the government to act on the basis of mere will, or simply to benefit a private party rather than serving the general public interest, would be to act in a way that does not qualify as “law.”<sup>36</sup> In short, where an enactment is not general, or not authorized by the Constitution, or in some other way falls short of the definition of a valid “law,” its imposition on a citizen will deprive him or her of liberty without due process *of law*.<sup>37</sup>

It is important to keep this theory in mind when considering allegations of “judicial activism,” because according to critics, such activism generally takes place in substantive due process cases. These critics usually accompany their attacks on “judicial activism” with the claim that substantive due process theory is absolutely bankrupt—that, as Robert Bork puts it, “[t]here could be no intellectual structure to support this concept.”<sup>38</sup> But whether one ultimately agrees with substantive due process theory or not, honesty requires one at least to acknowledge that it

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<sup>34</sup> Procedural requirements imposed on legislative power are therefore not qualitatively distinct from substantive limits on legislative authority—rather, they are a *subset* of the substantive features that make a legislative enactment what we would call “law.” Procedural fairness is simply one among many *substantive* ingredients of true law.

<sup>35</sup> *Hurtado*, 110 U.S. at 535-36; *see also* *Citizens’ Savings & Loan Ass’n v. City of Topeka*, 87 U.S. (20 Wall.) 655, 664 (1874). The quotation from Webster is from his oral argument in *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 581 (1819).

<sup>36</sup> *See also* Peter M. Cicchino, *Reason And The Rule of Law: Should Bare Assertions of “Public Morality” Qualify As Legitimate Government Interests for The Purposes of Equal Protection Review?*, 87 GEO. L.J. 139, 178 (1998) (explaining that “the test of public reasonability” requires laws to be related to “human experience and . . . [not] independent of any observable effects on public welfare”).

<sup>37</sup> *See also* Timothy Sandefur, *Is Economic Exclusion A Legitimate State Interest? Four Recent Cases Test The Boundaries*, 14 WM. & MARY BILL RTS. J. 1023, 1036-44 (2006).

<sup>38</sup> ROBERT BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* 55 (2003).

is a long-standing legal tradition—dating back at least to the eighteenth century<sup>39</sup>—and that it has solid intellectual support.<sup>40</sup>

*B. The Progressive Critique of Judicial Review*

The original understanding of the judicial role contrasts sharply with the understanding of such modern writers as Justice Stephen Breyer and Judge Robert Bork, whose work is important to understanding the terms of the activism debate. In his recent book, *Active Liberty*, Justice Breyer lays out an “approach” to the Constitution that is centered, not on individual liberty, but on democracy.<sup>41</sup> Skipping quickly past individual freedom, Justice Breyer “focus[es] primarily upon the active liberty of the ancients, what Constant called the people’s right to ‘an active and constant participation in collective power.’”<sup>42</sup> It is worth emphasizing that this “power” is power over individuals—the power to force people to do or refrain from doing

<sup>39</sup> See, e.g., *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387-89.

<sup>40</sup> See generally WHITE, *NEW DEAL*, *supra* note 31, at ch. 8.

<sup>41</sup> STEVEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).

<sup>42</sup> *Id.* at 5 (quoting Benjamin Constant, *The Liberty of The Ancients Compared with That of The Moderns* (1819), reprinted in *THE POLITICAL WRITINGS OF BENJAMIN CONSTANT* 316 (1988)). It bears noting that Constant himself did not elevate the liberty of the ancients over that of the moderns. In his famous article, Constant contended that “our happy revolution” had created “freedom and peace” in a way that was “totally unknown to the free nations of antiquity”:

You find among [the ancients] almost none of the enjoyments which we have just seen form part of the liberty of the moderns. All private actions were submitted to a severe surveillance. No importance was given to individual independence, neither in relation to opinions, nor to labor, nor, above all, to religion. The right to choose one’s own religious affiliation, a right which we regard as one of the most precious, would have seemed to the ancients a crime and a sacrilege. In the domains which seem to us the most useful, the authority of the social body interposed itself and obstructed the will of individuals. . . . Thus among the ancients the individual, almost always sovereign in public affairs, was a slave in all his private relations. As a citizen, he decided on peace and war; as a private individual, he was constrained, watched and repressed in all his movements; as a member of the collective body, he interrogated, dismissed, condemned, beggared, exiled, or sentenced to death his magistrates and superiors; as a subject of the collective body he could himself be deprived of his status, stripped of his privileges, banished, put to death, by the discretionary will of the whole to which he belonged. Among the moderns, on the contrary, the individual, independent in his private life, is, even in the freest of states, sovereign only in appearance. His sovereignty is restricted and almost always suspended. If, at fixed and rare intervals, in which he is again surrounded by precautions and obstacles, he exercises this sovereignty, it is always only to renounce it.

Constant originally drew his distinction between ancient and modern liberty to emphasize the importance of individual freedom over and above social participation—precisely the *opposite* lesson that Justice Breyer draws.

things against their will. Justice Breyer's "active liberty," in short, is the liberty of the wolf: the freedom of the collective to do what it wants "with other men and the product of other men's labor."

According to Justice Breyer, the "need to make room for democratic decision-making" requires judges to exercise "modesty,"<sup>43</sup> meaning that they must defer to legislative decisions in all but extreme cases, and even then only in the service of "participatory self-government."<sup>44</sup> In fact, Justice Breyer's modesty goes farther than merely recognizing that legislatures are given broad discretion over certain subjects; it also apparently allows judges to ignore the explicit language of the Constitution in some cases. The First Amendment, for example, declares that Congress "shall make no law . . . abridging the freedom of speech."<sup>45</sup> While some might interpret this as meaning that Congress is without power to enact a law which will abridge the freedom of speech, Justice Breyer offers a more nuanced view, which dispenses with "rigid or fixed" or "too mechanical an application" of the Amendment.<sup>46</sup> Justice Breyer does not—as some writers might—seek sophisticated definitions of "abridge," or quibble about what sort of speech is protected by the First Amendment. Such a strategy might have resulted in technical legerdemain reconciling campaign finance laws with the First Amendment. But Breyer attempts none of this. Instead, he steps back for a broader, more allegedly "democratic" view: the purpose of the First Amendment is to foster the sort of debate necessary for collective decision-making. Thus campaign finance laws—which abridge the freedom of speech by forbidding individuals to promote their political views in the public square, either by contributing to a political campaign or even by making political statements themselves<sup>47</sup>—can be justified by these broader "democratic" goals. Moreover, because the First Amendment "facilitate[s] a conversation among ordinary citizens that will encourage their informed participation in the electoral process,"<sup>48</sup> it is even conceivably justifiable for government to limit some speech and promote other speech that politicians believe is underrepresented in the public square.<sup>49</sup>

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<sup>43</sup> BREYER, *supra* note 41, at 37.

<sup>44</sup> *Id.* at 49.

<sup>45</sup> U.S. CONST. amend. I.

<sup>46</sup> BREYER, *supra* note 41, at 43.

<sup>47</sup> See, e.g., Bradley A. Smith, *Campaign Finance Reform: Searching for Corruption in All The Wrong Places*, 2003 CATO SUP. CT. REV. 187.

<sup>48</sup> BREYER, *supra* note 41, at 46.

<sup>49</sup> See Erik S. Jaffe, *McConnell v. FEC: Rationing Speech to Prevent "Undue" Influence*, 2004 CATO SUP. CT. REV. 245.

Justice Breyer thus inverts the entire tradition of legal interpretation. Previous generations sought the framers' intent first in the language of a written document, and then, if this was unavailing, turned to the history surrounding the drafting of the document, and then, if this was unavailing, looked to the purpose for which the legislation was drafted—at each step, proceeding from more specific to more general only reluctantly, and only where necessary. Justice Breyer, by contrast, extrapolates “general purposes”<sup>50</sup> from precise language, and then analyzes the constitutionality of a challenged law by reference to whether, in his view, it serves that general goal—perhaps even in cases where that outcome is foreclosed by the explicit language of the provision in question.<sup>51</sup>

All of these errors originate in Justice Breyer's belief that the Constitution's primary purpose is to empower “citizens to govern themselves and to govern themselves effectively”<sup>52</sup> as an end in itself. In fact, in a speech at Princeton University in April, 2006, Justice Breyer claimed that “the most important part” of the Constitution and “what it's about” is “democracy”<sup>53</sup>—which would have come as a surprise to the authors of that instrument. They did not mention democracy at all in their reasons for ordaining and establishing the Constitution,<sup>54</sup> but they unambiguously declared that liberty is a “Blessing.”<sup>55</sup> But for Justice Breyer, the Constitution's primary task is to empower majorities, and enable them to enact their preferences into laws binding on minorities.

Justice Breyer's view has a long pedigree. It dates back to the Progressive era, and particularly to the work of Justices Oliver Wendell Holmes and Louis Brandeis,<sup>56</sup> who recast the role of the judiciary in a powerful and enduring way. Where previous generations had seen the judge as essential for policing the boundaries of legitimate political

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<sup>50</sup> BREYER, *supra* note 41, at 55.

<sup>51</sup> *But see* ELY, *supra* note 12, at 3 (“In interpreting a statute . . . a court obviously will limit itself to a determination of the purposes and prohibitions expressed by or implicit in its language. Were a judge to announce in such a situation that he was not content with these references and intended additionally to enforce, in the name of the statute in question, those fundamental values he believed America had always stood for, we would conclude that he was not doing his job, and might even consider a call to the lunacy commission.”).

<sup>52</sup> BREYER, *supra* note 41, at 131-32.

<sup>53</sup> Active Liberty: A Conversation with United States Supreme Court Justice Stephen Breyer and Professor Robert P. George, *available at* <http://web.princeton.edu/sites/JMadison/events/lectures/video/Breyer.html> (last visited Nov. 27, 2006).

<sup>54</sup> *See* U.S. CONST. pmbl.

<sup>55</sup> *See also* GEORGE ANASTAPLO, *THE CONSTITUTION OF 1787*, at 18-20 (1989) (“The Framers of the Constitution evidently believed that there are such things as ‘Blessings’ . . . [and] that human beings can reliably identify the blessings, the good things of this world.”).

<sup>56</sup> *See* BREYER, *supra* note 41, at 19.

decision-making—what G. Edward White calls “guardian review”<sup>57</sup>—the Progressives argued that judges ought, in all but the rarest cases, to defer to the decisions of legislatures. As one historian has put it, during the early Twentieth Century, the Progressives believed that “overwhelming evidence” had shown that “certain basic transformations in the character of American society” required expanding the government’s power over private life in ways that exceeded the Constitution’s limitations.<sup>58</sup> The Supreme Court’s “stubborn adherence to old dogmas led them to espouse legal doctrines which were convincing more and more people that the Constitution was a barrier to social progress.”<sup>59</sup> This led to a critique of the judiciary that demanded judicial self-restraint or an “attitude of forbearance” on the part of judges.<sup>60</sup> This forbearance is perhaps best summed up in an oft-quoted line from Justice Holmes: “If my fellow citizens want to go to Hell, I will help them; that’s my job.”<sup>61</sup> Nothing could have been further from the founders’ conception of the judicial role,<sup>62</sup> in large part because abandoning “guardian review” eliminated an important check on the power of majorities and created a serious danger to the blessings of liberty. But it is fair to say that such concerns did not trouble Justice Holmes, who had little interest in individual rights.<sup>63</sup>

While this critique was being advanced, Progressives were also proposing a fundamental change in the definition of the word “liberty.”<sup>64</sup> Rather than referring to the right of the individual “to dispose, and order as he lists his person, actions, possessions, and his whole property within the allowance of those laws under which he is, and therein not to be subject to the arbitrary will of another, but freely follow his own,”<sup>65</sup> the Progressives defined freedom by an individual’s ability to participate in collective decision-making. As one contemporary observer noted, “the idea that

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<sup>57</sup> WHITE, *NEW DEAL*, *supra* note 31, at 4.

<sup>58</sup> SAMUEL J. KONEFSKY, *THE LEGACY OF HOLMES AND BRANDEIS* 105 (Collier Books 1961) (1956).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 112.

<sup>61</sup> Quoted in Walter Berns, *The Supreme Court As Republican Schoolmaster: Constitutional Interpretation and the “Genius of The People,”* in *THE SUPREME COURT AND AMERICAN CONSTITUTIONALISM* 11 (Bradford Wilson & Ken Masugi eds., 1998).

<sup>62</sup> *See id.* (“It is not clear where [Holmes] picked up that idea, but it could not have been from anything written by the Framers.”).

<sup>63</sup> *See, e.g.,* Letter from Oliver Wendell Holmes to Harold Laski (Sept. 15, 1916), in 1 *HOLMES-LASKI LETTERS* 21 (Mark DeWolfe Howe ed., Harvard Univ. Press 1953) (“All my life I have sneered at the natural rights of man.”).

<sup>64</sup> *See* ERIC FONER, *THE STORY OF AMERICAN FREEDOM* 140 (1998) (“[N]early all Progressives agreed that freedom must be infused with new meaning.”).

<sup>65</sup> JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* § 57, at 324 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690).

liberty is a natural right is abandoned, and the inseparable connection between political liberty and *political capacity* is strongly emphasized.<sup>66</sup> The Progressives thus “repudiated liberal individualism in favor of an organic vision of the good society,”<sup>67</sup> meaning that a person was “free” if he or she had some role—even a distant one—in forming the collective will.<sup>68</sup> This accounts for an otherwise puzzling sentence in Justice Holmes’s famous dissent in *Lochner v. New York*: “I think that the word ‘liberty,’ in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion . . . .”<sup>69</sup> Of course, the word “liberty” had referred at the time of the founding to the individual’s freedom from coercion by the dominant opinion, but for Holmes, it meant “the right of a majority to embody their opinions in law.”<sup>70</sup>

This shift in the understanding of freedom coincided with the Progressives’ abandonment of older ideas about the nature of morality and justice. Of these thinkers, Holmes was again the leader. Morality, in Holmes’s eyes, was entirely a matter of social consensus. Judges, therefore, must be basically agnostic on the question of right versus wrong, moral versus immoral, just versus unjust, and allow those matters to be decided by collective consensus. Whatever a governing majority chose to adopt would be *ipso facto* justice, and one’s moral perspective on that choice would be entirely subjective—essentially a matter of taste. “Men to a great extent believe what they want to,” he wrote, “although I see in that no basis for a philosophy that tells us what we should want to want.”<sup>71</sup> Our moral views are merely preferences, or tastes, and thus insusceptible of argument or reasoning, just as “you cannot argue a man into liking a glass of beer.”<sup>72</sup> If such preferences differ greatly, the only recourse is for people to kill one another, but if the preferences happen to coincide, or if (somehow) one does manage to persuade others to adopt one’s moral “tastes,” then the result is to create a “morality,” which entitles the

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<sup>66</sup> CHARLES EDWARD MERRIAM, A HISTORY OF AMERICAN POLITICAL THEORIES 313 (1903) (emphasis added).

<sup>67</sup> FONER, *supra* note 64, at 144.

<sup>68</sup> See also Tiffany R. Jones, *Campaign Finance Reform: The Progressive Reconstruction of Free Speech*, in THE PROGRESSIVE REVOLUTION IN POLITICS AND POLITICAL SCIENCE 321, 327-330 (John Marini & Ken Masugi eds., 2005).

<sup>69</sup> 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

<sup>70</sup> *Id.* at 75.

<sup>71</sup> OLIVER WENDELL HOLMES, *Natural Law* (1918), reprinted in THE ESSENTIAL HOLMES 182 (Richard A. Posner ed., 1992).

<sup>72</sup> *Id.* at 181.

majority to force individuals into compliance.<sup>73</sup> For Holmes, the majority's might literally made right.<sup>74</sup>

So for the Progressives, the *procedures* whereby the "might of the majority" was formed and expressed came to trump the substantive outcomes of politics.<sup>75</sup> The same was true in law: "if the legal process was adhered to, the outcome is just,"<sup>76</sup> regardless of what that outcome might be. Progressive legal theory was so morally agnostic, in fact, that Progressive era legal thinkers set off in pursuit of a theory of law that would be separated entirely from ethics—a *wertfrei*, or "value free," law that would operate without appeal to normative claims at all and would therefore be "scientific."<sup>77</sup>

In a Progressive world of process and moral agnosticism, judicial review exists not primarily to protect substantive rights, or to promote pre-political principles of justice, but to promote and preserve the mechanisms of democratic decision-making. This is at bottom a collectivist theory, which reverses the founders' presumption of individual rights as prior to, and the only justification for, political society. In fact, where the Progressive theory does preserve individual rights, it does so only as a means to the end of better democratic decision-making. Freedom of speech, for example, receives constitutional protection, not because it is an essential right of all human beings, but because it promotes an effective method of resolving political questions. Individual liberty is the means by which the end of collective decision-making is advanced.<sup>78</sup> So while the

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<sup>73</sup> See *id.* at 182.

<sup>74</sup> See generally ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF OLIVER WENDELL HOLMES* (2000).

<sup>75</sup> As Louis Menand has put it, the Progressives "shift[ed] the totem of legitimacy from premises to procedures. We know an outcome is right not because it was derived from immutable principles, but because it was reached by following the correct procedures." LOUIS MENAND, *THE METAPHYSICAL CLUB* 432 (2001). Cf. RALPH KETCHAM, *JAMES MADISON: A BIOGRAPHY* 43 (1990) ("[James] Madison had at the foundation of his political education a supreme emphasis on the *ends*, not the *means*, of government . . . . A great gulf, therefore, separates the thought of Madison (and other founding fathers) from that of believers in such later concepts of . . . simple majoritarian democracy, who denied that principles of justice and virtue can be identified and made the foundations of government, and therefore have a higher sanction than the will of the majority.").

<sup>76</sup> MENAND, *supra* note 75, at 432.

<sup>77</sup> See generally GRANT GILMORE, *THE DEATH OF CONTRACT* 16-21 (1974) (describing Holmes' attempt to fashion a value-free theory of contract); G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 74 (1980) ("[I]n proclaiming the incomprehensibility or the current irrelevance of traditional moral values, the Realists, like their counterparts in history or political science or philosophy, were identifying themselves with moral relativism"); Albert W. Alschuler, *The Descending Trail: Holmes' Path of the Law One Hundred Years Later*, 49 FLA. L. REV. 353, 380-86 (1997) (detailing Holmes' attempt to separate law from morals).

<sup>78</sup> See MENAND, *supra* note 75, at 409 ("[R]ights are created not for the good of individuals, but for the good of society. Individual freedoms are manufactured to achieve group ends.").

founders saw liberty from the viewpoint of the sheep—the right of people to be let alone “to regulate their own pursuits of industry and improvement”<sup>79</sup>—the Progressive conception sees liberty from the wolf’s point of view: the right of the majority to enact its preferences into laws binding on individuals.

One of the primary targets of the Progressive critique of the judiciary was substantive due process theory. This made sense, because due process was an area of the law where the normative claims of America’s constitutional order had been most obviously asserted. The famous dissents of Holmes and Brandeis are the artifacts of this conflict: they and their allies contended that the *Lochner*-era Court was implementing normative theories “which a large part of the country does not entertain,”<sup>80</sup> and that the Constitution was not intended to implement any consensus about right and wrong—instead, it is “made for people of fundamentally differing views”<sup>81</sup> who negotiate for political power in the state. The Due Process Clause should therefore not be used to enforce outdated notions of justice, but instead should be seen as a flexible guarantee of some type of procedural regularity. In fact, Holmes regarded the Due Process Clause as “the usual last resort” for those who had no real argument.<sup>82</sup> In his view, the Clause required merely that a legislature enact the statute permitting it to do the complained-of act, or that a court follow a regular procedure when enforcing it. That this allowed the legislature to determine (or eliminate) the limits on its own authority was considered irrelevant.<sup>83</sup>

The Progressive idea of judicial deference became increasingly popular throughout the early decades of the twentieth century. This was largely due to the growth of the administrative state, which routinely came into conflict with the Constitution’s limits. As the judges ruled these innovations unconstitutional, Progressive politicians began focusing sharp attacks on the judiciary, demanding that it adopt a more lenient attitude. Professor Roosevelt’s great-great-grandfather Theodore attacked “[t]he stick-in-the-bark legalism, the legalism that subordinates equity to

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<sup>79</sup> Jefferson, First Inaugural Address, in JEFFERSON: WRITINGS, *supra* note 2, at 494.

<sup>80</sup> *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

<sup>81</sup> *Id.* at 76.

<sup>82</sup> *Buck v. Bell*, 274 U.S. 200, 208 (1927).

<sup>83</sup> Note again the error caused by regarding *procedural* restrictions on legislative authority as being qualitatively different from *substantive* restraints, when they are actually a subset of substantive restraints. See *supra* note 34. Procedural limits are imposed in a constitution because they are thought to foster certain substantive outcomes. If there is no substantive objective (e.g., “fairness”) to be obtained, there is no reason to put procedural hurdles (e.g., “an unbiased hearing”) in the decision-maker’s path.

technicalities,” which “should be recognized as a potent enemy of justice.”<sup>84</sup> He sought “to emancipate [the courts] from a position where they stand in the way of social justice; and to emancipate the people, in an orderly way, from the iniquity of enforced submission to a doctrine which would turn Constitutional provisions which were intended to favor social justice and advancement into prohibitions against such justice and advancement.”<sup>85</sup>

Throughout the 1920s and early 1930s, complaints about the judiciary’s rigid enforcement of constitutional standards increased, famously climaxing in 1934 with the Court’s abandonment of meaningful substantive due process in *Nebbia v. New York*.<sup>86</sup> Under *Nebbia*’s “rational basis” test, courts defer to the decisions of political bodies to an extreme degree, on the theory that legislatures are better suited to address the subject matter in question. Whenever it may be conceived that a legislature might have thought a challenged law would be a good idea for the general public, the court will declare the legislation valid—even where such legislation fails to accomplish the asserted goal, or where there is no reason to believe that it will.<sup>87</sup>

Although Progressive theories are usually seen as politically liberal, the most influential modern critic of judicial activism, the conservative Robert Bork, adopts the Progressive critique of the judiciary almost verbatim in his book *The Tempting of America: The Political Seduction of The Law*.<sup>88</sup>

The “temptation” of which Bork writes is the temptation of judges to implement their political preferences as constitutional law. This is deplorable because in the “Madisonian system,” which is the American Constitution, “in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities.”<sup>89</sup> The majority need not enunciate any practical, general purpose for its commands over the individual: “[m]oral outrage is a sufficient ground for prohibitory legislation.”<sup>90</sup> Bork even criticizes Holmes for not being deferential

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<sup>84</sup> Theodore Roosevelt, *A Confession of Faith* (1912), in 17 THE WORKS OF THEODORE ROOSEVELT: SOCIAL JUSTICE AND POPULAR RULE 254, 264 (1926).

<sup>85</sup> *Id.* at 262. One wonders what Teddy would have thought of Prof. Roosevelt’s principled stand against the abuse of executive detention powers in the War on Terror! See generally Kermit Roosevelt III, *Guantanamo And The Conflict of Laws: Rasul And Beyond*, 153 U. PA. L. REV. 2017 (2005).

<sup>86</sup> 291 U.S. 502 (1934).

<sup>87</sup> See, e.g., *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313-15 (1993) (detailing the “paradigm of judicial restraint” that is rational basis).

<sup>88</sup> BORK, *supra* note 7.

<sup>89</sup> *Id.* at 139.

<sup>90</sup> *Id.* at 124.

enough.<sup>91</sup> Although Bork acknowledges a duty on the part of judges to protect the individual against the majority, he provides no recipe for doing so and limits individual liberties strictly to those that have been expressed explicitly in the Bill of Rights<sup>92</sup>—something which the Ninth Amendment teaches us is an improper interpretation.<sup>93</sup>

Like the Progressives, Bork rejects the idea that individual rights precede the state and thus limit the legitimate reach of government. Furthermore, again like the Progressives, Bork is ultimately a moral agnostic.<sup>94</sup> He writes:

There is no principled way to decide that one man's gratifications are more deserving of respect than another's or that one form of gratification is more worthy of another. . . . There is no way of deciding these matters other than by reference to some system of moral or ethical values that has no objective or intrinsic validity of its own and about which men can and do differ . . . . The issue of the community's moral and ethical values, the issue of the degree of pain an activity causes, are matters concluded by the passage and enforcement of the laws in question. The judiciary has no role to play other than that of applying the statutes in a fair and impartial manner.<sup>95</sup>

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<sup>91</sup> *Id.* at 45.

<sup>92</sup> *Id.* at 139.

<sup>93</sup> That Amendment provides that “[t]he enumeration of certain rights in this Constitution *shall not be construed to deny or disparage others* retained by the people.” U.S. CONST. amend. IX (emphasis added). See generally Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006). Bork rejects reliance on the Ninth Amendment entirely, falsely contending that “[t]here is almost no history that would indicate what the ninth amendment was intended to accomplish.” BORK, *supra* note 87, at 183; cf. THE FEDERALIST No. 84 (Alexander Hamilton), *supra* note 9, at 481 (“They [*i.e.*, bills of rights] would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted.”); Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in MADISON: WRITINGS, *supra* note 11, at 420 (explaining that a Bill of Rights must be “so framed as not to imply powers not meant to be included in the enumeration” of powers in Article I, Section 8).

<sup>94</sup> See also Timothy Sandefur, *Liberal Originalism: A Past for The Future*, 27 HARV. J.L. & PUB. POL’Y 489, 509 (2004) (“[T]he conservative originalist is unable to build a political morality on any more fundamental ground than majority will.”).

<sup>95</sup> Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 10 (1971) (footnote call number omitted). Bork has stuck to his argument on this point, as well. See Robert H. Bork, *The Judge’s Role in Law And Culture*, 1 AVE MARIA L. REV. 19, 28 (2003) (“The sole task of the [judge] . . . is to translate the . . . legislator’s morality into a rule to govern unforeseen circumstances.”) Note that Bork begs the question, because he assumes that impartiality is a value that a judge is bound to follow. Presumably, the judge should do so when the majority has decided that she should, but then how does that account for Bork’s assertion of the “obvious moral rightness” of *Brown*

Thus, despite his reputation for moralistic conservatism, Bork is entirely consistent in his majoritarianism: the majority has unlimited freedom to adopt its (entirely subjective) moral preferences as law, and to impose those preferences on others. There is no way of judging the rightness or wrongness of the majority's choice in this matter, because the fact that a majority has adopted it makes it right.

Bork's argument is centered almost entirely around the wolf's view of liberty: the right of legislative majorities to enact their preferences into law. What protections are accorded to individual rights in Bork's view are matters of legislative grace only—placed explicitly in the Constitution by the majority, and presumably also revocable by the majority. In fact, Bork angrily rejects the contention—raised in Justice Blackmun's dissent in *Bowers v. Hardwick*<sup>96</sup>—that individual rights are protected for the individual's sake.<sup>97</sup> The “extreme individualism” represented by this idea would lead to a world in which “morality is completely privatized and society may make no moral judgments that are translated into law.”<sup>98</sup>

It is worth reiterating just how far removed Bork's view is from the actual views of the Constitution's framers.<sup>99</sup> Although he ascribes to James Madison the belief that “majorities are entitled to rule, if they wish, simply because they are majorities,”<sup>100</sup> we have seen that nothing could be further from the actual beliefs of James Madison. For Madison, as for the other founders, majorities were *never* “entitled” to rule—they were *authorized* to rule, and there were moral, political, and legal limits to that authority. Bork's “Madisonian” principle is anything but Madisonian:

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*v. Board of Education*, BORK, *supra* note 7, at 76, given that there was no majority preference for equal treatment in that case?

<sup>96</sup> 478 U.S. 186, 199-214 (1986) (Blackmun, J., dissenting).

<sup>97</sup> BORK, *supra* note 7, at 121.

<sup>98</sup> *Id.* at 122.

<sup>99</sup> To take just one tangential example, compare BORK, *supra* note 7, at 121-22 (“That view [i.e., that the individual belongs to himself and not to society as a whole] can hardly be taken seriously. . . . [N]o husband or wife, no father or mother, should act on the principle that a ‘person belongs to himself and not to others.’ No citizen should take the view that no part of him belongs to ‘society as a whole.’”), with Letter from Thomas Jefferson to James Monroe (May 20, 1782), in JEFFERSON: WRITINGS 779 (Merrill D. Peterson, ed., 1984) (“If we are made in some degree for others, yet in a greater are we made for ourselves. It were contrary to feeling & indeed ridiculous to suppose that a man had less right in himself than one of his neighbors or indeed all of them put together. This would be slavery & not . . . liberty . . . . Nothing could so completely divest us of that liberty as the establishment of the opinion that the state has a *perpetual* right to . . . [its] members. This to men of certain ways of thinking would be to annihilate the blessing of existence . . .”). See generally HARRY V. JAFFA, ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION: A DISPUTED QUESTION (1994); HARRY V. JAFFA, STORM OVER THE CONSTITUTION (1999).

<sup>100</sup> BORK, *supra* note 7, at 139.

James Madison consistently held that majority power is only a procedural value serving the substantive goal of individual liberty.<sup>101</sup>

It is also important to note that Bork's criticism does not stop at a critique of alleged "activism." It is, in fact, a criticism of judicial review itself. Bork has attacked the concept of judicial review, calling *Marbury v. Madison* "intellectually dishonest"<sup>102</sup> and an example of judicial "misbehavior[.]"<sup>103</sup> and he has proposed amending the Constitution to permit the overruling of Supreme Court decisions by the full Congress or by the Senate.<sup>104</sup> In this, he is consistent. If the majority has the right to rule simply because it is a majority, and judges may not impose their own values by interfering with majority choices, there seems to be no sensible justification for constitutional limits on the majority—except that the majority has chosen to place constitutional limits on itself. Yet even these limits are not strictly defensible, given the Constitution's age and the limited nature of the consent it received even when it was new. The legislature of California represents more than 30 million people—ten times the entire population of the United States at the time of the Constitution's ratification. If majority rule is an irreducible axiom, then it seems pointless to prevent 30 million people today from acting on a political preference simply because it conflicts with a document approved two centuries ago by only a fraction of that number. Bork's majoritarianism is too extreme to support judicial review or even a written Constitution.

Whatever its shortcomings, Bork's criticism of the judiciary has had enormous influence, culminating in the 2004 presidential debates, when President George Bush contended that the theory of "substantive due process" gave rise to the *Dred Scott* decision<sup>105</sup>—a falsehood that

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<sup>101</sup> See also Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in MADISON: WRITINGS, *supra* note 11, at 421 ("Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly [sic] to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents. This is a truth of great importance, but not yet sufficiently attended to . . . . Wherever there is an interest and power to do wrong, wrong will generally be done, and not less readily by a powerful & interested party than by a powerful and interested prince."). It may be safely said that Madison's greatest contribution to political science was his *restriction* of majority rule.

<sup>102</sup> BORK, *supra* note 38, at 54; see also MARK R. LEVIN, MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA 26-33 (2005) ("[T]he framers did not intend to grant general authority to the judiciary to rule on the constitutionality of legislative acts. . . . Marshall's ruling in *Marbury* was nothing short of a counter-revolution.").

<sup>103</sup> BORK, *supra* note 38, at 54.

<sup>104</sup> *Id.* at 81.

<sup>105</sup> *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

originated in *The Tempting of America*.<sup>106</sup> It is, at bottom, a Progressive critique of the judiciary, resting on a broad, amoral majoritarianism that allows the legislature to act at will with virtually no meaningful limits.

### III. KERMIT ROOSEVELT'S APPROACH TO JUDICIAL ACTIVISM

#### A. *Is There "Activism" or Just Doctrinal Discretion?*

In *The Myth of Judicial Activism*, Kermit Roosevelt resoundingly claims that there is simply no such thing as judicial activism. The term is only "a rhetorically charged shorthand for decisions the speaker disagrees with"<sup>107</sup> and stems from a misconception about the nature of judicial work. Those who accuse judges of activism believe that the Constitution contains a direct, unambiguous meaning—a "plain meaning"—which can be applied directly to cases without any interpretive gloss. But, Roosevelt contends, this is virtually never the case. Although some constitutional provisions are so clear—such as the age limit provided for the Presidency<sup>108</sup>—other constitutional provisions are far more general. This is particularly true of the most important and far-reaching clauses, such as the Equal Protection or Due Process Clauses, which are far from unambiguous in their relation to particular cases. They require some intermediary between the facts of the case and the general constitutional language to determine whether or not a government action has violated the prohibitions on unequal treatment or undue deprivation. This gap, Roosevelt continues, is filled by "doctrine"—the body of law that interprets the general language of the Constitution and applies it to particular circumstances. But doctrine must never be confused with the actual meaning of a constitutional provision. Instead, the Court should seek only to implement doctrinal rules that are "good way[s] to achieve

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<sup>106</sup> See BORK, *supra* note 7, at 28-33. In a truncated form, this claim first appears in ELY, *supra* note 12, at 16, but Ely was more circumspect than Bork. In fact, *Dred Scott* mentions Due Process in only a single sentence, and that sentence is logically correct. See *Dred Scott*, 60 U.S. at 450. The opinion's error lies in its finding that Congress lacked power to prohibit slavery in the western territories. See *id.* at 451-52. But assuming that premise as given, the conclusion *would* logically follow that attempts to do so would be without force of law and thus would deprive Dred Scott's master of property without Due Process of Law. See HARRY V. JAFFA, *CRISIS OF THE HOUSE DIVIDED* 290-91 (1959) ("Taney's assertion that the Constitution expressly affirms the right to slave property, and by this reason enjoins a duty to protect slave property, rests mainly on a construction of Section 2, Article IV, and does not depend upon the Fifth Amendment at all. And this assertion, combined with the supremacy clause, certainly does yield, as a logical necessity, the conclusion that no state may destroy the right of property in a slave.").

<sup>107</sup> ROOSEVELT, *supra* note 3, at 3.

<sup>108</sup> *Id.* at 15.

compliance with the underlying meaning.”<sup>109</sup> For several reasons, the doctrine that grows up around a constitutional provision may end up being over- or under-inclusive, accomplishing either more or less than the actual aim of the provision.<sup>110</sup>

There may be several reasons that courts adopt doctrine that does not quite fit the meaning of a constitutional provision, but the most important reason for Roosevelt is institutional competence: are other branches of the government better suited to address a given issue than is the judiciary? If so, then it is proper for courts to leave the subject generally to the other branches, even where doing so may allow unconstitutional decisions to stand. If not, courts take a firmer position, prohibiting the other branches from acting, even though in some cases these branches might have acted properly. Thus by adopting a higher standard of review, the court “overenforces” the Constitution, barring the legislature from more than it should; by adopting a lower-level standard, it “underenforces” the Constitution, leaving the legislature more discretion than the Constitution warrants. Either path has its risks, but Roosevelt contends that, since “a decision erroneously striking down a law is harder to correct than one erroneously upholding a law,” courts should normally defer, and choose the underenforcing path.<sup>111</sup> Only where history or institutional handicaps show that the legislative process cannot be relied upon for “balancing the costs and benefits” should the court apply a higher level of scrutiny.<sup>112</sup>

This is really a restatement of plain-vanilla Footnote Four jurisprudence,<sup>113</sup> and it suffers from the same four flaws. First, legislatures do not simply weigh the costs and benefits of legislation: they are subject to pressures which put minorities—and sometimes even majorities—at an inherent disadvantage, which careful enforcement of the Constitution might help correct. Second, it is not true that the danger of wrongly annulling a law exceeds the danger of wrongly upholding it: on the contrary, underenforcement of the Constitution presents unique risks that overenforcement does not present. Third, courts are not much better equipped to determine when a legislature is capable of making decisions than they are at determining whether those decisions are or are not within constitutional boundaries—in fact, the latter seems a much easier course.

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<sup>109</sup> *Id.* at 195.

<sup>110</sup> *Id.* at 24-36.

<sup>111</sup> *Id.* at 29.

<sup>112</sup> *Id.* at 33.

<sup>113</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). *Cf.* ELY, *supra* note 12, at 100-04 (presenting a similar analysis).

Yet inviting courts to pick and choose when to apply higher scrutiny also invites them to smuggle policy preferences into their decisions in just the ways that concern the critics of “activism.” Finally, one cannot determine whether a legislature is capable of making proper decisions without reference to substantive values—yet Progressive constitutionalism is built on avoiding such normative references.

Before fleshing out these thoughts, it is worth acknowledging that, while the term “judicial activism” seems impossible to define precisely, there are some cases which fit the general description. For instance, it is hard to describe *Guinn v. Legislature of Nevada*<sup>114</sup> as anything other than judicial overreaching motivated by a desire to reach a specific policy outcome in the face of directly contrary constitutional language.<sup>115</sup> In that case, the governor of Nevada, unable to marshal the constitutionally required two-thirds legislative vote to approve his proposed tax increase, sought a writ of mandate in the state supreme court to compel the legislature to approve his budget. Concerned that the failure to approve the budget would stall funding for government schools, the court granted the writ, ordering the legislature to disregard the Nevada Constitution’s two-thirds vote requirement and to “proceed expeditiously . . . under simple majority rule.”<sup>116</sup> The court claimed that this ruling was justified because “[w]hen a procedural requirement that is general in nature prevents funding for a basic, substantive right [*i.e.*, government-funded schools], the procedure must yield”<sup>117</sup>—a conclusion that flies in the face of centuries of constitutional law. As a note in the *Harvard Law Review* recognized, “prioritizing substantive provisions over procedural ones” allowed the Nevada Supreme Court “to sidestep specific rules in favor of provisions that require more discretion.”<sup>118</sup> One of the most important reasons for the longstanding “canons of constitutional interpretation”—canons the *Guinn* court ignored—is “to limit judicial policymaking.”<sup>119</sup> Yet the *Guinn* court’s analysis seems entirely consistent with the approach offered by Justice Breyer in *Active Liberty*; by extrapolating a general purpose from

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<sup>114</sup> *Guinn v. Legislature of Nevada*, 71 P.3d 1269 (Nev. 2003), *reh’g denied*, 76 P.3d 22 (Nev. 2003) (per curiam), *cert. denied sub nom. Angle v. Guinn*, 541 U.S. 957 (2004), *overruled by Nevadans for Nevada v. Beers*, 142 P.3d 339, 348 (Nev. 2006) (per curiam).

<sup>115</sup> I tell the story of this astonishing case in *A Private Little Bush v. Gore, or, How Nevada Violated the Republican Guarantee and Got Away with It*, 9 TEX. REV. L. & POL. 105 (2004).

<sup>116</sup> *Guinn*, 71 P.3d at 1272.

<sup>117</sup> *Id.* at 1275.

<sup>118</sup> Recent Case, *Constitutional Interpretation: Nevada Supreme Court Sets Aside a Constitutional Amendment Requiring a Two-Thirds Majority for Passing a Tax Increase Because It Conflicts with a Substantive Constitutional Right*, 117 HARV. L. REV. 972, 977 (2004).

<sup>119</sup> *Id.* at 977-78.

the overall constitutional structure, the court saw fit to disregard “technicalities.” In fact, the *Guinn* court criticized the two-thirds requirement for standing in the way of democratic decision-making, because it imposed a super-majority requirement.<sup>120</sup> Thus by setting aside the specific procedural requirement—a requirement which set out the procedures for legislative decision-making—the court gave itself discretion to “balance the interests” in various constitutional provisions and ultimately to control the outcome of the political process, all while arguably serving “democracy.” Roosevelt states that “[i]f so many complaints about the Court’s performance are that it has been too lax in supervising other governmental actors, the problem is clearly not that judges are abusing their power,”<sup>121</sup> but as *Guinn* demonstrates, there are abuses of omission as well as abuses of commission: courts can corrupt the constitutional order and violate the rights of the minority precisely by deferring too much to legislative majorities, or by advancing “basic democratic objectives”<sup>122</sup> in the face of constitutional limits.

#### B. Four Problems with Roosevelt’s Approach

##### 1. Public Choice and Factions

Roosevelt believes that the legislature, though not perfect, is better suited to weigh the costs and benefits of proposed legislation, satisfy more members of the public, and solve problems with the least amount of trouble. In general, this is obviously true. But the virtues of representative government must not blind us to its significant flaws. In particular, we must heed the insights of public choice theory.<sup>123</sup> As we have already noted, public choice theory demonstrates that when a legislature has the

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<sup>120</sup> See *Guinn*, 73 P.3d at 22 (“In [*Guinn*, 71 P.3d 1269] we were necessarily concerned with the interest of *preserving the democratic process*. A majority of legislators, representing a majority of the citizens of this state, make decisions on the services to be provided and the future of the state. . . . Where these matters have been discussed and duly voted upon, the Constitution requires that the decision of the majority be respected. *Against . . . the democratic process . . . we balanced the interests fostered by the supermajority requirement.*” (emphasis added)).

<sup>121</sup> ROOSEVELT, *supra* note 3, at 233.

<sup>122</sup> BREYER, *supra* note 41, at 48.

<sup>123</sup> It is beyond the scope of this article to discuss the gerrymandering, campaign finance regulation, and other ways by which incumbents have rendered themselves virtually election-proof. Suffice it to say that these realities darken this myth even further. In addition, many of the rules and regulations that affect the rights of ordinary Americans are not laws implemented by lawmakers, but are regulations adopted by administrative agencies entrusted with very broad authority to determine and enforce the law’s mandates. Yet these agencies are in no realistic sense responsible to the voting public. Thus the idea that the people can “vote the bums out” if they dislike government policy is often laughably naïve.

power to redistribute resources between groups in society, that power will become a valuable commodity over which private interest groups will struggle for control.<sup>124</sup> The greater the potential rewards, the more time and money these factions will invest in the effort to persuade the legislature to act for their benefit. Meanwhile, because the costs of redistribution are widely dispersed among the populace, and its benefits highly concentrated on a few winners, there will be far less lobbying in opposition to any particular redistributory program than there will be in favor of it.<sup>125</sup>

Roosevelt is silent about rent-seeking. Although he often refers to the institutional competence of legislatures, and acknowledges that there are “cases in which there are reasons to doubt that the legislature is acting in good faith,”<sup>126</sup> he provides no reliable mechanism for determining when this is so. He identifies racial discrimination<sup>127</sup> and discrimination against those born out of wedlock<sup>128</sup> as examples of improper biases which pervert the democratic process, but such prejudices are only the most obvious examples of the problems of public choice. If judicial skepticism is warranted whenever the legislature is subject to biases which put particular groups at a disadvantage, that should apply also to other forms of discrimination, including discrimination against private property owners, discrimination against entrepreneurs, or discrimination against bakers who want to work overtime. As Robert McCloskey put it,

[T]he scattered individuals who are denied access to an occupation by State-enforced barriers are about as impotent a minority as can be imagined. The would-be barmaids of Michigan or the would-be plumbers of Illinois have no more chance against the entrenched influence of the established

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<sup>124</sup> See generally BUCHANAN & TULLOCK, *supra* note 17.

<sup>125</sup> Redistribution does not necessarily take the form of actual transfer payments. Any legislative action which has the potential of benefiting a particular group and burdening others will be subject to such pressures. Occupational licensing, for example, is routinely subject to rent-seeking pressures, as economic groups seek to protect themselves against competition from newcomers. See generally David E. Bernstein, *Licensing Laws: A Historical Example of The Use of Government Regulatory Power Against African-Americans*, 31 SAN DIEGO L. REV. 89 (1994). Because occupational licensing serves as a barrier to entry, established businesses often lobby the government to establish licensing regimes that will close the market to at least some degree, enabling the insiders to raise their prices securely. See generally Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6 (1976).

<sup>126</sup> ROOSEVELT, *supra* note 3, at 25.

<sup>127</sup> *Id.* at 26.

<sup>128</sup> *Id.* at 33-34.

bartenders and master plumbers than the Jehovah's Witnesses had against the prejudices of the Minersville School District.<sup>129</sup>

Thus "[t]o speak of their power to defend themselves through political action is to sacrifice their civil rights in the name of an amiable fiction."<sup>130</sup>

Roosevelt's failure to address these issues is particularly glaring in his discussions of *Lochner* and of *Kelo v. City of New London*.<sup>131</sup> Although he sees *Lochner* as "a good faith mistake rather than a deliberate one,"<sup>132</sup> he goes on to argue that the Court should have sustained the maximum-hours legislation challenged in that case on the grounds that the "anti-favoritism principle"<sup>133</sup> of substantive due process—the idea that government must promote the general welfare rather than the particular benefit of specific groups—is not always "a plausible understanding of the requirement that legislation serve the public good."<sup>134</sup> Instead, in a modern, industrialized society, "government regulation might be necessary to avert clashes between labor and capital and to allow the economy to function at all."<sup>135</sup> In short, "once the question becomes whether redistribution of bargaining power serves the public good, the superior competence of legislatures becomes evident, suggesting the modern deferential approach."<sup>136</sup>

But this analysis is hopelessly vague. The term "public good," after all, is anything but clear, and legislatures can be counted on to claim that anything they do is for the public good.<sup>137</sup> Without any discussion of the public choice dynamics that warp the legislative process, courts can do

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<sup>129</sup> Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 50 (citations omitted).

<sup>130</sup> *Id.* at 50.

<sup>131</sup> 545 U.S. 469 (2005).

<sup>132</sup> ROOSEVELT, *supra* note 3, at 213-14.

<sup>133</sup> *Id.* at 215-16.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 216.

<sup>136</sup> *Id.*

<sup>137</sup> *Cf.* Brutus VI, in 1 DEBATE ON THE CONSTITUTION 618-19 (Bernard Bailyn ed., 1993) ("It is as absurd to say, that the power of Congress is limited by these general expressions, 'to provide for the common safety, and general welfare,' as it would be to say, that it would be limited, had the constitution said they should have power to lay taxes, &c. at will and pleasure. Were this authority given, it might be said, that under it the legislature could not do injustice, or pursue any measures, but such as were calculated to promote the public good, and happiness. For every man, rulers as well as others, are bound by the immutable laws of God and reason, always to will what is right. It is certainly right and fit, that the governors of every people should provide for the common defence and general welfare; every government, therefore, in the world, even the greatest despot, is limited in the exercise of his power. But however just this reasoning may be, it would be found, in practice, a most pitiful restriction. The government would always say, their measures were designed and calculated to promote the public good; and there being no judge between them and the people, the rulers themselves must, and would always, judge for themselves.").

nothing, because legislatures will merely declare that imposing some unwarranted cost on a minority (or giving some concentrated benefit to a minority at the expense of the majority) benefits the general public. This is just what happened in *Kelo*, in which the Supreme Court held that the “public use” clause of the Constitution does not forbid legislatures from seizing private property and transferring it to developers for their own private use.<sup>138</sup> Roosevelt contends that *Kelo* was correctly decided, because “the question of whether the benefits of a particular government act exceed its burdens is one that legislatures are generally better at answering.”<sup>139</sup> But the Constitution does not allow legislators to approve whatever law has benefits that exceed costs, let alone to “do good.” Rather, it declares that while the government may do many things, there are some things it may not do—such as taking property for private use.<sup>140</sup>

Yet Roosevelt contends that courts should defer to legislatures in cases involving economic freedom and property rights because legislative choices “are subject to review and correction through democratic politics in a way that judicial decisions are not.”<sup>141</sup> This is McCloskey’s “amiable fiction”—the myth that victimized minorities can persuade the majority to “throw the bums out.” In fact, most victims of eminent domain (like Wilhemina Dery), and most of those whose right to earn a living is violated by economic regulations (like Joseph Lochner or his employee, Aman Schmitter), are relatively powerless individuals, who can only rarely hope for legislative protection—or even attention.<sup>142</sup>

Roosevelt’s attitude toward *Lochner* and *Kelo* raises the inescapable question: why should courts apply a higher scrutiny in some cases and defer in others? If deference is good enough for economic liberty and private property rights, then why is it not acceptable in cases involving religious liberty or racial discrimination? What factors indicate that a court should distrust the legislative process? Roosevelt’s answer here is

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<sup>138</sup> See generally Timothy Sandefur, *Mine and Thine Distinct: What Kelo Says About Our Path*, 10 CHAP. L. REV. 1 (2006).

<sup>139</sup> ROOSEVELT, *supra* note 3, at 136-37.

<sup>140</sup> U.S. CONST. amend. V.

<sup>141</sup> ROOSEVELT, *supra* note 3, at 136-37.

<sup>142</sup> See *Kelo v. City of New London*, 545 U.S. 469, 521-22 (2005) (Thomas, J., dissenting) (“If ever there were justification for intrusive judicial review of constitutional provisions that protect ‘discrete and insular minorities,’ surely that principle would apply with great force to the powerless groups and individuals the Public Use Clause protects.”) (citation omitted); see also *San Remo Hotel L.P. v. City And County of San Francisco*, 27 Cal.4th 643, 697 (2002) (Brown, J., dissenting) (“[T]he majority’s exception for legislatively created permit fees is mere sophism, particularly where the legislation affects a relatively powerless group and therefore the restraints inherent in the political process can hardly be said to have worked.”).

unsatisfying. Laws infringing on the rights of women or of blacks are enacted by legislatures that “contain very few blacks and women,” and given the long history of discrimination against these groups, it is likely that those laws are motivated by “reprehensible” attitudes. Further, the lawmakers who enact such laws will not themselves be subject to such laws, and “the political power of blacks and women may be insufficient to prompt correction” of such decisions.<sup>143</sup> Yet the same things could be said of the homeowners in *Kelo* or the bakery-shop owner and his employee in *Lochner*. Legislatures tend to be dominated by lawyers, intellectuals, and activists, rather than practicing businessmen; their homes are rarely threatened with the use of eminent domain. The history of politics is replete with legislative action aimed against businessmen or private property owners, and their relative political power is unlikely to prompt correction of wrongful legislation—particularly given the public choice dynamics at work.<sup>144</sup> *Lochner* and *Kelo* cannot be shrugged off by claiming that the laws challenged in those cases advanced the public welfare—since legislatures that persecuted blacks and women claimed the same justification for those laws.

Roosevelt’s legislative bias theory weakens still further when he begins fiddling with the relevant minorities. In discussing abortion, for example, Roosevelt notes that such laws have an obviously disproportionate effect on women—but this is not the real minority at risk. Instead,

[t]he question is how well the legislature can be expected to represent the interests of pregnant people. . . . If we focus the inquiry more narrowly on those who actually seek abortions, the case for deference becomes even weaker. These people . . . are . . . generally speaking, younger women. And, again speaking generally, they tend to be poor and unmarried. So the question comes down to

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<sup>143</sup> ROOSEVELT, *supra* note 3, at 98.

<sup>144</sup> The public choice dynamics of eminent domain abuse have been discussed at length. See, e.g., Sandefur, *Mine And Thine Distinct*, *supra* note 138, at 34-37; Stephen J. Jones, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 306 (2000); Donald J. Kochan, “Public Use” and the Independent Judiciary: *Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49 (1998). For more on the rent-seeking problem in *Lochner*, see Alan J. Meese, *Will, Judgment, and Economic Liberty: Mr. Justice Souter and the Mistranslation of the Due Process Clause*, 41 WM. & MARY L. REV. 3 (1999); Michael J. Phillips, *Entry Restrictions in the Lochner Court*, 4 GEO. MASON L. REV. 405 (1996).

whether we trust legislatures to weigh appropriately the interests of young, poor, unmarried women.<sup>145</sup>

But if a court can manipulate the categories in this way when deciding whether a legislature can be trusted with a question, then the scope of judicial discretion would expand greatly. Opponents of abortion, after all, would be quick to argue that the relevant minority is not pregnant women, but *unborn children*, who are not members of any legislature on earth, and have no realistic opportunity to defend themselves in the legislative process. The question could very plausibly be put: whether legislatures can be trusted appropriately to weigh *their* rights, assuming they have any.<sup>146</sup> The same problem applies to the other cases Roosevelt discusses. A prohibition on working more than ten hours a week in a bakery is likely to fall hardest on poor, under-represented, immigrant bakery employees who need to work extra hours to make more money to support their families.<sup>147</sup> How well can a legislature be trusted to weigh appropriately the interests of poor, immigrant bakery employees? The use of eminent domain for private development tends to fall hardest on the poor and members of racial minorities—a point well articulated by Justice Thomas in his *Kelo* dissent.<sup>148</sup> Virtually every case challenging the constitutionality of a law will be brought on behalf of a litigant who is absolutely unique in some ways, and a member of a powerless minority in many other ways. By defining the relevant characteristics in one way or the other, it is possible to describe almost any litigant as a powerless minority—or, with almost equal plausibility, to deny that claim.

Roosevelt, therefore, offers no coherent explanation for why deference is appropriate in some cases but not others. This lends credence to the skepticism that Justices Scalia and Thomas have voiced elsewhere: “The picking and choosing among various rights to be accorded ‘substantive due process’ protection is alone enough to arouse suspicion; but the categorical and inexplicable exclusion of so-called ‘economic rights’ (even though the

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<sup>145</sup> ROOSEVELT, *supra* note 3, at 124-25.

<sup>146</sup> I have contended that, at least early in development, they have none. See Timothy Sandefur, *Liberal Originalism: A Past for the Future*, 27 HARV. J.L. & PUB. POL’Y 489, 522-25 (2004).

<sup>147</sup> See generally Bernstein, *Centennial Retrospective*, *supra* note 7, at 1526 (“*Lochner* involved a local dispute between small-time bakery owners, mostly former bakery employees themselves, who felt put-upon by the bakers’ union, and a bakers’ union dominated by individuals of German descent struggling mightily to combat competition from workers from other ethnic groups.”).

<sup>148</sup> See *Kelo*, 545 U.S. at 521-22 (Thomas, J., dissenting).

Due Process Clause explicitly applies to ‘property’) unquestionably involves policymaking rather than neutral legal analysis.”<sup>149</sup>

Of course, none of this is meant to suggest that judicial intervention is the solution for rent-seeking.<sup>150</sup> The judiciary is simply not able to deal with every instance of special-interest legislation. But the classical justification for an independent judiciary has *always* been that it adds an extra layer of security against this lamentable tendency of republican government.<sup>151</sup> As the Supreme Court has put it, the judiciary has a “special role in safeguarding the interests of those groups that are ‘relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.’”<sup>152</sup> But such categories include not just racial minorities or women—they can include businessmen, property owners, and any other group that lacks the political influence and organization to lobby the legislature to respect the rights of its members.

## 2. *Wrongly Annuling a Law is Less Dangerous than Wrongly Affirming It*

One of Professor Roosevelt’s premises is that more danger would result from a court overzealously striking down laws than a court which allows unconstitutional laws to stand. But this claim is highly questionable. Legislatures are well equipped to defend themselves from judicial decisions that they consider erroneous. They may challenge the courts directly by stripping them of jurisdiction or by creating new, more sympathetic administrative bodies to determine cases. In the last resort, they may simply ignore judicial decisions that they dislike. Both Congress and presidents have done this more than once in American history.<sup>153</sup>

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<sup>149</sup> *United States v. Carlton*, 512 U.S. 26, 41-42 (1994) (Scalia and Thomas, JJ., concurring in judgment).

<sup>150</sup> The judiciary itself is also subject to public choice pressures. What else are amicus briefs but so much judicial lobbying? As philosopher Anthony de Jasay notes, private interest groups not only seek to maximize their gains from legislation, but also to devise a constitutional order that will give them the best opportunities for such legislation. See ANTHONY DE JASAY, *JUSTICE AND ITS SURROUNDINGS* 83 (1998). The constitutional revolution of the New Deal is best seen as a major shift in the direction of increasing such opportunities. See McGinnis, *supra* note 18, at 204-08. In addition, the current fights over judicial nominations are a function of the benefits—economic or otherwise—that interest groups expect to obtain or fear losing, depending on the makeup of the judiciary.

<sup>151</sup> See Steven M. Simpson, *Judicial Abdication and the Rise of Special Interests*, 6 CHAP. L. REV. 173, 201-05 (2003); Sandefur, *Economic Exclusion*, *supra* note 37, at 1036-48.

<sup>152</sup> *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 486 (1982) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

<sup>153</sup> See, e.g., *Communications Workers of Am. v. Beck*, 487 U.S. 735 (1988); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

Less confrontationally, legislatures can influence the appointments of new judges, preventing judges who are less deferential to legislative power from obtaining seats on the bench. Or—most obviously—they can simply re-enact the legislation without the offending provisions. This is far easier than Roosevelt seems to think. In 2003, after federal judges held that the Federal Trade Commission (FTC)’s “do-not-call” registry<sup>154</sup> exceeded the FTC’s statutory authority,<sup>155</sup> the Congress enacted legislation *the same day* to grant the FTC this authority. Four days later, the President signed the bill into law. Such legislative celerity may be unusual, but it does show that legislatures are able to enact their policies into law in spite of judicial obstacles, particularly where those policies truly enjoy widespread support.<sup>156</sup>

This contrasts with the reaction to *Goodridge v. Department of Public Health*,<sup>157</sup> in which the Massachusetts Supreme Judicial Court held that the state Constitution required Massachusetts to permit same-sex marriages. Roosevelt rightly praises this decision—which has been widely criticized as an instance of judicial activism<sup>158</sup>—and notes that although the public furor led to the introduction of legislation to overturn it, the legislation was never enacted. This inaction, Roosevelt contends, is part of “a gradual process of acceptance by the general public,”<sup>159</sup> as it learns that same-sex marriage will not bring about social calamity. Roosevelt is right that there are good reasons for the *Goodridge* decision—one major reason that attempts to overturn it have failed—but it is also important that any such legislation would seriously infringe on the rights of a significant minority of Massachusetts citizens. These examples show that legislatures are able quickly to correct wrongful decisions—or decisions they perceive as wrongful—but that when the legislation in question really does pose a risk to the rights of a significant part of the citizenry, that process is not quite so quick. Nor should it be. Legislatures, after all, *ought* to be hindered in their attempts to violate individual rights.

The danger of wrongly striking down laws is simply *not* greater than the danger of wrongly upholding laws. The equities weigh strongly in favor of

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<sup>154</sup> 47 C.F.R. § 64.1200 (2002).

<sup>155</sup> *U.S. Security v. F.T.C.*, 282 F. Supp. 2d 1285, 1292 (W.D. Okla. 2003), *rev’d sub nom.* *Mainstream Marketing Services, Inc. v. F.T.C.*, 358 F.3d 1228 (10th Cir. 2004), *cert. denied*, 543 U.S. 812 (2004).

<sup>156</sup> I am indebted to Randy E. Barnett for this observation.

<sup>157</sup> 798 N.E.2d 941 (2003).

<sup>158</sup> *See, e.g.*, John C. Eastman, *Philosopher King Courts: Is The Exercise of Higher Law Authority Without A Higher Law Foundation Legitimate?*, 54 *DRAKE L. REV.* 831, 834 (2006).

<sup>159</sup> ROOSEVELT, *supra* note 3, at 108.

the latter. Compare any two cases from the list of infamous decisions, one from each category. *Lochner v. New York*,<sup>160</sup> for example, is widely regarded (though not by Roosevelt) as among the worst Supreme Court decisions ever—allegedly an example of judicial activism that struck down legislation that ought to have been upheld. But its outcome hardly compares with the notorious cases of judicial over-restraint, such as *Buck v. Bell*.<sup>161</sup> The consequence of *Lochner* was to strike down a particular attempt by the state of New York to forbid bakers from working more than ten hours per week, even if they chose to. During this period, many other laws protecting the health and safety of workers—and even going beyond that—were upheld.<sup>162</sup> But the *Lochner* Court held that the specific legislation in question had no genuine connection to public health and safety.<sup>163</sup> The consequence, at worst, was to leave employers and employees to bargain over the terms of their employment in the way they were doing before the maximum-hours legislation was enacted. *Buck*, by contrast, allowed agents of the state to deprive Carrie Buck and others of their rights to bodily integrity and child-bearing, forever.

The consequences of *Buck* seem far worse, in at least three ways. First, while the outcome of *Lochner* was to leave the parties in the *status quo ante*, the result of *Buck* was to uphold the state's authority to do a positive injury to a person which would not otherwise have been allowed. Second, while the legislature was free after *Lochner* to devise alternative means of advancing its goals of protecting workers, Carrie Buck was left without alternatives: she had no legal recourse to protect her interests against injury—except for the “amiable fiction” of lobbying the legislature to change its mind. Annuling legislation leaves the legislature free to enact a virtually infinite number of other laws to pursue the same goal (so long as the goal itself is legitimate); in fact, a judicial opinion will often give the legislature guidance as to how that might be accomplished. But upholding legislation ensures that an individual will be forced to submit to the state's coercive power, often without any realistic escape. If we take seriously the proposition that the law should err on the side of protecting the innocent,<sup>164</sup> we cannot justify a presumption in favor of upholding doubtful legislation.

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<sup>160</sup> 198 U.S. 45 (1905).

<sup>161</sup> 274 U.S. 200 (1927).

<sup>162</sup> ROOSEVELT, *supra* note 3, at 215.

<sup>163</sup> 198 U.S. at 64.

<sup>164</sup> Cf. *Schlup v. Delo*, 513 U.S. 298, 324-25 (1995) (“The quintessential miscarriage of justice is the execution of a person who is entirely innocent. Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system. That concern is reflected, for example, in the ‘fundamental value determination of our society that it is far

Finally, while a decision striking down a law will result in an opinion on which future legislatures can rely when drafting the next legislation, a decision affirming a law gains momentum that makes it harder to challenge that or similar laws later on. An erroneous decision upholding a law will be given *stare decisis* effect, and will become part of the cultural background, making it vastly more difficult to overturn the law later on if it turns out to have been unconstitutional. Consider *Plessy v. Ferguson*,<sup>165</sup> for example. It took decades to overrule this decision, precisely because *Plessy* itself led to greater cultural and legal entrenchment of the segregation laws. Society comes to consider issues “settled” once the Court has upheld the relevant law—often leading to copycat legislation and another round of laws designed to prevent people from evading the previous law. Courts are then understandably reluctant to overturn practices that have become more widespread in the ensuing years.<sup>166</sup> No such effect accompanies a decision wrongfully striking down a law. After such a decision, the legislature and its attorneys have plenty of opportunities to craft better legislation the second time around, or, if necessary, to challenge the judiciary directly.

### 3. *Courts Are Not Equipped to Judge the Institutional Competence of Other Branches of Government*

Roosevelt’s theory rests on the presumption that courts can discern when legislatures are competent to resolve a matter or when there are obstacles to a fair legislative decision. But it is not clear why courts are any better at discerning this than they are at judging the merits of a constitutional controversy. In fact, courts would seem far better equipped for the latter, since they have at their disposal all the traditional tools of legal analysis—judges can read the Constitution’s language, previous decisions, the *Federalist Papers*, and other sources to guide them in constitutional interpretation. But they have few tools to guide their judgment as to whether a legislature is competent. Roosevelt suggests that one such tool is history: courts can detect attempts at racial discrimination, for example, by reference to historical experience. But at the time that segregation and slavery existed, many regarded these institutions as

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worse to convict an innocent man than to let a guilty man go free.” (quoting *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring)).

<sup>165</sup> 163 U.S. 537 (1896).

<sup>166</sup> See, e.g., *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (“We do not think there is such justification for overruling *Miranda*. *Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.”).

legitimate; historical guidance would not have helped the courts that made such decisions. On the contrary, the *Dred Scott* decision was led astray largely by its reliance on historical facts rather than legal principles, and the Court found historical sources unhelpful in *Brown v. Board of Education*.<sup>167</sup>

Roosevelt acknowledges that the Court avoided historical references in *Brown*,<sup>168</sup> but then, how are judges to determine whether a legislature is competent? Aside from these objections, history alone cannot help a court to determine whether it ought to treat an emerging minority (e.g., homosexuals) like a traditionally oppressed minority (e.g., blacks) or whether to find that it is a minority that does not require special protections (e.g., alcohol drinkers).<sup>169</sup> Analogies are plentiful on either side, but the court's decision as to which analogy to embrace will not be guided by history; it will be guided by substantive values. A judge committed to gay rights in the name of equality will tend to apply the race analogy; a judge concerned with traditional family values will find that less compelling than the drinker analogy; a Holmesian "pragmatist" will rely on subjective value-judgments. But none will be guided simply by history.

More importantly, the law has not developed tools for determining legislative competence the way it has developed tools for judging legality or illegality. In fact, the tools that courts have developed were designed to reduce as much as possible any inquiry into the often subjective and illogical nature of the legislative process. Courts prefer to focus instead on more objective matters such as the text of an enacted law. This is true even in cases where the law in question may have been enacted through an improper procedure.<sup>170</sup> Courts, in sum, cannot investigate legislative competence; they can only choose to defer or not to defer. And that choice will be guided, not by history, but by substantive values.

Of course, deferring on the basis of legislative competence, at bottom, fails to answer the really important questions. Nobody challenging a law doubts that legislators are *able* to legislate on a particular matter; rather, they challenge whether the legislature's chosen course of action is within

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<sup>167</sup> 347 U.S. 483, 489 (1954) (History "is not enough to resolve the problem with which we are faced. At best, [it is] inconclusive.").

<sup>168</sup> ROOSEVELT, *supra* note 3, at 66.

<sup>169</sup> This analogy is adopted from ROOSEVELT, *supra* note 3, at 96-99.

<sup>170</sup> The "enrolled bill rule," for example, holds that "[s]o long as a bill is properly enrolled, its procedural validity may not be questioned." John C. Roberts, *Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers, and The Enactment Process*, 52 CASE W. RES. L. REV. 489, 568 (2001). See generally *United States v. Munoz-Flores*, 495 U.S. 385, 391-92 n.4 (1990); *Field v. Clark*, 143 U.S. 649, 672 (1892).

constitutional limitations, or whether the legislature has the legitimate authority to use its abilities at all with respect to a certain subject matter. Roosevelt's prescription—that courts should in most cases accept legislative decisions “if the legislature could rationally have thought that it produces net benefits to society”<sup>171</sup>—ignores the very purpose of the Constitution. That purpose is to *add to* cost-benefit analysis (which every legislature does anyway) *other* limits to the legislature's discretion—limits the founders incorporated into the Constitution out of concern that the protection of individual liberty would not be effectuated by cost-benefit analysis alone.

#### *4. Progressivism's Elevation of Procedure over Substance Must Be Abandoned*

Finally, and most important, we must confront the substantive values underlying our Constitutional order. Legal thinkers have been searching for some way to avoid these normative issues for some time, either believing that they are entirely matters of subjective personal taste or hoping that the often bitter conflicts that erupt over them can be avoided by transferring our allegiance to the process itself. In the end, this attempt is doomed, because the legitimacy of a procedure is itself a substantive judgment. We cannot determine whether a procedure is “fair,” for example, without first forming a concept of fairness to guide us. We cannot determine whether the legislature's decision to discriminate against some minority is a “defect[] in democracy”<sup>172</sup> without having a pre-existing idea of what a democracy *ought* to look like. We cannot determine whether a legislature is competent to settle an issue, or whether it has fallen prey to unfair political biases, without a substantive value (such as equality) to which to compare it.

No matter how we frame it, the normative goals must precede our judgment of the means chosen to advance those goals. But if we do have substantive normative commitments, then democracy is not an end in itself, but a means for advancing those values. And that gives the judiciary a proper role—and a far better lodestar—in policing the boundaries of legislative discretion without majoritarian deference. Any theory of judicial deference based on moral agnosticism or on promoting process over substance must therefore be abandoned.

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<sup>171</sup> ROOSEVELT, *supra* note 3, at 25.

<sup>172</sup> *Id.* at 27.

The argument that courts must avoid interfering because they are not as well equipped as legislatures to address complicated issues has some superficial plausibility. But a closer look reveals it to be nothing more than abdication of the judicial duty. Litigants who argue over the constitutionality of a law, after all, are usually not asking a judge to design a solution to a complicated problem, or to weigh the benefits and costs of alternative solutions—but simply to judge whether the particular solution adopted by the legislature meets constitutional requirements. And when a judge declares a solution to have exceeded the boundaries, the judge is not requiring the legislature to do any particular thing—he or she is simply declaring that the legislature must not exceed a given standard. This preserves legislative discretion—so long as that discretion is cabined within the proper boundaries.

Deference, by contrast, gives the legislature the power essentially to set its own limitations, and often with disastrous results. An ironic honor roll of “great moments in judicial deference” would have to include such shameful decisions as *Buck*, *Plessy*, or *Korematsu*—not a pleasant record, to say the least. In fact, the problems with deference are well illustrated by the fact that only three years after rational basis was adopted,<sup>173</sup> the Supreme Court scaled back its application, declaring that some laws, including laws that infringed on the rights of “discrete and insular minorities,” might receive more protection.<sup>174</sup> Since that day, the Court has refused to employ rational basis review in cases in which it considers the substantive constitutional principle to be especially important.

A convincing explanation has yet to be found for respecting only some of the substantive commitments in the Constitution while pushing aside others, such as the security of economic liberty or of private property rights, in the name of process-oriented commitments to legislative discretion.

#### IV. TOWARD A THEORY OF PRO-CONSTITUTIONAL “ACTIVISM”

We have seen how many of the flaws in the current understanding of the judiciary’s role flow from embracing the wolf’s definition of liberty—that the legislature or the majority should be free to enforce its will on the individual in almost every case. The Progressives’ view elevates the procedural means (democracy) over the substantive good (liberty), a

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<sup>173</sup> *Nebbia v. New York*, 291 U.S. 502, 537 (1934).

<sup>174</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

fallacious approach with results often embarrassing—and sometimes downright horrifying. Judicial deference cannot be justified by the “amiable fiction” that elected officials are accountable to voters for their violations of the Constitution. Nor can it be defended on the grounds that the substantive commitments of American society are simply whatever emerges from the process of collective decision-making.

A perfect solution to the controversy over judicial activism, of course, will not be found. If there is any solution, it will come as the result of cultural attitudes toward the Constitution, rather than from debates among lawyers. The controversy about the judiciary’s role, after all, is a symptom of a deeper conflict about political philosophy, a conflict which finds expression not only in the “red-blue” map, but in differing fundamental attitudes about the role of government: whether government exists to protect freedom, or whether it exists to enforce the will of the majority.

What might a solution look like? First, a more wholesome understanding of the judiciary’s role—which would make room both for “activism” and proper deference—would have to focus on the actual words and context of the Constitution itself. A “pro-constitutional” activism would be highly textualist, enforcing the Constitution as written, with a healthy respect for its foundations in individual liberty, rather than making exceptions to its terms, or viewing it as a “living” document which can be interpreted to meet political exigencies.<sup>175</sup> In many cases this would require courts to declare laws invalid—even popular laws—if they violate the terms of the Constitution. On the other hand, it would respect the role of the legislature where that role is clearly laid out in the Constitution. For example, rather than interpreting the Commerce Clause to allow Congress to regulate virtually anything it thinks worth regulating,<sup>176</sup> such an approach would adhere to the “first principle[.]” that Congress has only limited and enumerated powers.<sup>177</sup>

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<sup>175</sup> It might be objected that my defense of a natural rights-based constitutional theory is inconsistent with a “highly textualist” interpretation. In fact, it is my contention that the text of the Constitution incorporates precisely the natural rights theory that the founders presumed when writing that text. Properly protecting so-called “unenumerated” rights is therefore to respect the text, in those cases where the text declares that such rights shall receive constitutional protection. This is accomplished through the presumption of liberty. On the contrary, Bork and others who reject the natural rights tradition are the ones who end up ignoring the plain text of the document—most obviously in Bork’s notorious dismissal of the Ninth Amendment and the Fourteenth Amendment’s “Privileges or Immunities” clause as essentially indecipherable “ink blots.” See Barnett, *supra* note 94, at 9-10.

<sup>176</sup> See, e.g., *Gonzalez v. Raich*, 545 U.S. 1 (2005).

<sup>177</sup> *United States v. Lopez*, 514 U.S. 549, 552 (1995).

There are three steps that we could take today toward a pro-constitutional activism. The first would be to eliminate the double standard by which some rights are accorded serious respect and meaningful judicial protection, while others—equally fundamental—are treated like “poor relation[s]”<sup>178</sup> and accorded practically meaningless “rational basis” scrutiny.<sup>179</sup>

Second, and more fundamentally, a pro-constitutional theory of judicial activism must be based on a reorientation toward the meaning of liberty. For too long, legal and political elites have defined freedom as the right of the collective to enforce its will on individuals: the wolf’s definition of liberty. By rejecting it and returning instead to the sheep’s definition—the American founders’ definition—of liberty as the right of the individual to act without state interference so long as she respects that right in others, we can begin properly to understand the structure of the American Constitution: individual rights are prior to government and are the source of its legitimacy. Limits on individual rights, therefore, must be justified by some acceptable public purpose, and must be no greater than necessary to accomplish this purpose. Randy Barnett has described this approach as the “presumption of liberty.”<sup>180</sup>

Finally, an approach to judicial activism rooted in this nation’s substantive commitment to liberty would have a healthy respect for the natural rights philosophy on which the Constitution was based. Modern theorists have held, with John Hart Ely, that “our society does not, rightly does not, accept the notion of a discoverable and objectively valid set of moral principles” by which to guide our constitutional course.<sup>181</sup> But precisely the opposite is true. Americans in general share (and, I contend, rightly so) a belief in the basic truth of the principles enunciated in the Declaration of Independence—principles that, in Lincoln’s words, apply to all men and all times.<sup>182</sup> Even many lawyers, judges, and law professors share that belief when it really matters.<sup>183</sup> At the very least, our Constitution was written on the premise that such an objectively valid set

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<sup>178</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

<sup>179</sup> See generally Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J. L. & LIBERTY 897 (2005).

<sup>180</sup> RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 256-69 (2003).

<sup>181</sup> ELY, *supra* note 12, at 54.

<sup>182</sup> Letter from Abraham Lincoln to Henry L. Pierce (Apr. 6, 1859), in 3 BASLER, *supra* note 1, at 376.

<sup>183</sup> See *DECLARATION OF INDEPENDENCE: ORIGINS AND IMPACT* 303-14 (Scott Douglas Gerber ed., 2002) (listing Supreme Court decisions that cite the Declaration of Independence).

of political principles does exist, and can be known, by lawyers and laymen alike, and it was written to operate only on such an expectation.<sup>184</sup>

The abandonment of these principles is a relic of the twentieth century that has proven itself untenable and often destructive. This is not to say that judges should render decisions on “principles of abstract justice”<sup>185</sup> alone—a practice Chancellor Kent rightly warned would quickly lead to the destruction of law and order. But constitutional fidelity requires fidelity also to the philosophical context in which its words were written. Most of all, judges must rid themselves of the Progressive-era prejudices against natural rights. The idea that natural rights theory is subjective, or can support any claim at all,<sup>186</sup> is simply wrong; in fact, natural rights theory is an intellectually rigorous tradition which depends on logic and evidence just like other theories, despite the fact that those writing in this tradition sometimes disagree, and sometimes err (as do writers in all fields of intellectual endeavor).<sup>187</sup> Most of all, the lasting strength of the natural rights approach to law is demonstrated by the frequency with which even those who otherwise are skeptical of the idea will often appeal to its universal principles of rightness—sometimes under the phrase “human rights”—and approach a truly thoroughgoing moral relativism with shyness.<sup>188</sup>

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<sup>184</sup> See also ANASTAPLO, *supra* note 55, at 19 (“The Framers of the Constitution evidently believed that there are such things as ‘Blessings.’ That is, they seemed to believe that there was something substantial (we would say objective) about good things . . . [and they] hoped for reliable decisions about the moral and immoral both from judges in their applications of the common law and from statesmen in the exercise of their powers.”).

<sup>185</sup> *Yates v. People*, 6 Johns. 337 (N.Y. 1810).

<sup>186</sup> See, e.g., ELY, *supra* note 12, at 50 (“[Y]ou can invoke natural law to support anything you want.”).

<sup>187</sup> One would not be justified in rejecting the field of mathematics, for example, on the grounds that “one can use mathematics to prove anything.” This would not be true—careful adherence to the logic of mathematics produces objective results testable in practice. The same is true of even more complicated and more contested fields of study, such as economics. Economists differ radically over methods, predictions, and recommendations, but this does not mean that economic science is invalid or that it cannot be relied upon as a basis for legal judgment. The same goes for natural rights theory. See JACQUES MARITAIN, *THE RIGHTS OF MAN AND NATURAL LAW* 62-63 (Doris C. Anson trans., Charles Scribner’s Sons 1949) (“Men know [the natural law] with greater or less difficulty, and in different degrees, running the risk of error here as elsewhere. . . . That every sort of error and deviation is possible in the determination of these things merely proves that our sight is weak and that innumerable accidents can corrupt our judgment. . . . All this proves nothing against natural law, any more than a mistake in addition proves anything against arithmetic.”)

<sup>188</sup> But see RICHARD A. EPSTEIN, *SKEPTICISM AND FREEDOM* 76-83 (2003) (describing Judge Richard Posner’s extreme moral relativism).

## V. CONCLUSION

Kermit Roosevelt is right that people tend to cry “judicial activism” when they disagree with the substantive outcome of a decision. But we must not therefore lose sight of the importance of substantive outcomes. The controversy over judicial activism is an indicator of the profound differences between the American people on many important issues. But we cannot hope to resolve these debates by reference to the Progressive notions of process and moral agnosticism. We must rid ourselves of the delusion that a lasting constitutional order can exist among people who truly have “fundamentally differing views.”<sup>189</sup> A constitutional order can exist only among people of fundamentally *shared* views about political authority, justice and injustice, right and wrong. Appealing to the legislature, as Roosevelt does, to resolve these fundamental clashes does not discharge the judicial responsibility, but abandons it, because the judicial duty is to uphold the Constitution. That Constitution and the Declaration on which it stands embody the shared principles of the American people. But today, the legislative, executive, and judiciary frequently disregard the language of these documents in the name of social change or some “necessary” expedient, and they rationalize their infidelity on the ground that amendment is impracticable, but that legislative democracy ought to prevail. This should not be allowed to continue. The Constitution’s framers rightly saw democracy as an instrumental value, serving the substantive value of liberty. As our nation continues to debate the role of the judiciary, a principled return to our nation’s commitment to liberty’s blessings ought to serve as a guidepost to our future. That will be a long and hard struggle, but one very much worth the effort.

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<sup>189</sup> *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).