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JUDICIAL ACTIVISM: BULWARK OF FREEDOM OR PRECARIOUS SECURITY? By Christopher Wolfe.¹ Pacific Grove, California: Brooks/Cole Publishing Company. 1991. Pp. ix, 166. Paper, \$12.25.

*Thomas Morawetz*²

Academic discussion of judicial decision-making, and particularly of textual interpretation, has undergone an unprecedented revolution in the last two decades. Twenty years ago politics framed the debate. In the backwash of the Warren Court, judicial activism was understood as a symptom and tool of liberalism and left-wing political belief, judicial restraint a manifestation of conservatism and the right. Now the debate is framed by philosophy of language and epistemology. Theorists worry about whether the speaker or the hearer controls meaning, whether assumptions about shared values and shared knowledge must be deconstructed into disparate voices and agendas. How does the contrast between activism and restraint survive in this brave new world?

Popular discussion about judges has been colored little, if at all, by the academic revolution. The media and the political parties persist in seeing a political continuum (from left to right) as mirroring the distinction between activism and restraint. The Bork controversy reinforced the prevailing stereotypes.³ Ex cathedra reflections by judges themselves often echo the stereotypes as well.

Whatever ultimate merit and resilience the new philosophical and linguistic approach may prove to have, at least it affords a perspective for criticism. It teaches a catechism of questions and distinctions that, as used by contemporary writers, are tools of intellectual clarification. From this perspective, the older political mode of analysis can be faulted as naive on two grounds. It takes the attitudes and positions that happened to crystallize between 1954 and 1970 as definitive of alternative styles of judging and alternative judicial philosophies. That is, it takes a shallow and transitory distinction as deep. More important, it relies on untenable assumptions about meaning, interpretation, and value.

Christopher Wolfe's new and awkwardly titled essay, *Judicial*

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2. Professor of Law, University of Connecticut School of Law. I wish to thank my research assistant, Melinda Westbrook, for editorial help.

3. Judge Bork himself has been one of the leading promulgators of the distinction and one of the leading critics of judicial activism. See Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (Free Press, 1990).

Activism: Bulwark of Freedom or Precarious Security?, is an exercise in the old style of analysis. The academic revolution is barely mentioned and has had no impact. Professor Wolfe sets himself two goals. The first is to offer a primer of the arguments on each side of the activism debate and to be as even-handed as possible in point, counterpoint. The second goal is to show that the activists lose the debate, "that judicial activism is an unfortunate phenomenon and that the United States would be better off without it." The risk of schizophrenia in serving both goals is extreme. Primer or polemic? Professor Wolfe chooses not to choose.

One danger in being fair and hostile at the same time is, of course, that fairness (or hostility) will be compromised. Another is that the fair and hostile parts of the analysis will be out of sync. Professor Wolfe tries mightily to circumvent these dangers, even to the extent of awarding some rounds to the activists. He concedes at one point that "judicial activism has more often been a stimulus to political activity than an obstacle." At another, he admits that the threat of judicial tyranny is not serious and has been exaggerated by his confederates. At other points, however, Wolfe assumes a communitarian stance and suggests that matters usurped by the Court should indeed be left to legislative processes on the state or even the community level in the interest of stimulating political activity. And he plays the judicial tyranny card aggressively when he describes how judicial activism affects the balance of good and bad. Consistency is not his strong suit.

Three aspects of Professor Wolfe's essay deserve special consideration: his account of activism, his method of evaluating activism, and his disregard of the revolution in judicial scholarship.

Curiously but imaginatively, Professor Wolfe begins with two alternative definitions of judicial activism, one relativistic, the other absolutist. According to the first and more familiar definition, drawn from legal realist assumptions, all judges "make" law to some extent, but activist judges make law less inhibitedly and more ambitiously. According to the second definition, which Wolfe defends as preferable, legal realism is wrong and judges may perfectly well (and should) adhere to a "traditional" mode of interpretation in which they are not making law at all, not balancing interests and not establishing rules in a quasi-legislative way. Wolfe claims, moreover, that the traditional mode was generally understood, practiced, and seen as relatively unproblematic until the twentieth century.

The tantalizing promissory notes in this overture are not deemed in the rest of the book. Although Wolfe seems committed

to rejecting the new scholarly attitudes and agenda of questions, he does not give us his grounds or justify his preferences. This sparks questions. Did nineteenth-century judges see themselves as Wolfe claims?⁴ If so, does the hypothesis that *they* saw the traditional mode as unproblematic give *us* any reason to see it as unproblematic?

Professor Wolfe initially associates six features with judicial activism and adheres to that characterization throughout the book.⁵ He offers these features as corollaries of the claim that “activist judges are committed to provide judicial remedies for a wide range of social wrongs and to use their power . . . to do so.” From this it follows, according to Wolfe, (1) that judges need not adhere to the intentions of the framers or to the determinate meaning of the constitutional text, (2) that judges are not bound inviolably by precedent, (3) that judges may minimize procedural constraints on arriving at “important” judicial decisions, (4) that judges need not defer systematically to more democratic branches of government, (5) that judges may deliver broad, quasi-legislative opinions, and (6) that judges’ remedial powers have broad scope.

Wolfe assumes that these features coalesce into a coherent stance toward judicial interpretation. Whether they do or not, however, is a matter of historical accident. Some of the Warren Court’s more noteworthy decisions seemed to many observers to illustrate this conception of activism.⁶ Under other historical circumstances, however, the norms of adherence to precedent and deference to the legislature may be diametrically opposed. Moreover, when a court is convinced that either the legislature or past courts have betrayed the framers or the constitutional text, it may have to choose between deference to legislators and precedent, on one hand, and faithful adherence to constitutional resources on the other. Thus, some of the features Wolfe finds to be characteristic of activism are as likely as not to be incompatible.

A second problem with this multi-part account is that its terms are vague and hyperbolic. Has *any* judge ever thought herself “inviolably” bound by precedent, thought that no precedent, even ones

4. Many contemporary scholars challenge the suggestion that the modern conception of adherence to original intent was accepted uncontroversially by the founders and by jurists in the nineteenth century. H. Jefferson Powell argues, for example, that the claim that “modern intentionalism was the original presupposition of American constitutionalism” is “historically mistaken.” H. Jefferson Powell, *The Original Meaning of Original Intent*, 98 Harv. L. Rev. 885, 948 (1985).

5. This characterization seems to be the core of his argument whether one adopts a relativistic or an absolutist definition of activism.

6. Nonetheless, aspects of Wolfe’s characterization are inherently invidious and fit neither the Warren Court nor any other. See my argument in text below.

inconsistent with each other, could be overturned? Has any judge so rigidly adhered to "procedural constraints" that she has not felt compelled to consider the substantive importance of each particular case and context? Does any judge defer "systematically" (whatever that means) to "more democratic" branches of government? Does systematic deference require a commitment to never finding legislation unconstitutional? If not, what does it entail? In much of his characterization of activism, Professor Wolfe seems to follow a hidden agenda. If all judges overrule precedent at times, then activists must be those who do so wrongly. If all judges sometimes overturn legislative acts, then activists must be those who do so by the wrong criteria. Thus, his characterization of activism is invidious *ab initio*.

Scholars use various methods to evaluate theories of judicial decisionmaking. As academic discussion has moved from political to philosophical underpinnings, the prevailing method of evaluation has shifted from attention to the political and social effects of various judicial practices to the coherence and consistency of such practices.⁷

Current attention focuses, in other words, on such questions as these: Do activism and restraint really characterize coherent and generalizable judicial strategies? Are they based on defensible theories of meaning and value? Do these terms define the main alternative ways of proceeding?

I have already questioned Professor Wolfe's assumptions that his version of activism is coherent and generalizable and that it represents an objective and not invidious description. On the basis of these assumptions, he evaluates the (allegedly) competing approaches on the basis of their putative political and social effects. He asks which method produces better results.

This question is itself fraught with risk of abuse and ambiguity. How does one limit and identify the relevant evidence? One may examine, as Wolfe does, a circumscribed slice of history—the performance of the Warren Court, with cursory asides to the periods of economic *laissez faire* and the New Deal—and assess these results. Or one can look at the entire course of our constitutional experience and ask whether we were better off with activist or restrained courts. Or one can look at the effects *sub specie aeternitatis* and ask whether we are generally better off with activist courts, because of

7. As a result, problems of interpretation (or hermeneutics) have been the subject of many recent symposia. Among the most important have been those at 11 *Cardozo L. Rev.* 921 (1990), and 58 *S. Cal. L. Rev.* 1 (1985). Almost all writers in the domains of feminist theory, critical legal studies, and law and literature concern themselves with hermeneutic issues.

anticipated effects on morale, participation, and citizen interest. Or, finally, one can question whether we are ever wise enough to answer any of these questions.

The game is one at which the ancient Sophists would have done themselves proud. At any point of the game, causal links may be questioned, value judgments may be proclaimed, and—in the alternative—the very possibility of finding links or making any value judgments at all may be raised as a trump. Answering any of the questions with finality, or even plausibility, requires more expertise in social psychology and in political analysis than even the most arrogant practitioners of these fields should claim to have. Consider, for example, the following dilemmas. Have *Miranda* and its progeny benefited society by insuring respect and protection for criminal defendants or have they damaged society by crippling crime control? Has *Roe v. Wade* been good or bad for American society? What about *Brown*?

Volumes could and have been written about *subtopics* of each question. The questions themselves are fatally unfocussed. A critic of *Roe* may oppose abortion *tout court*, or she may feel that the Court did not go far enough and thus sowed confusion and dissent, or she may think that such matters are best left to legislatures, which can marshal public opinion and ameliorate controversy. In the latter case, she may feel that controversies are generally better handled by legislators, or she may feel that this is so only for specially intractable issues. All of these positions are defensible—and so are the diametrically opposite positions. Any attempt, however, to say simply that *Roe* (or *Miranda*, or *Brown*) was good or bad, sound or unsound, and to generalize from that observation to an attitude toward judicial activism is to display disconcerting naivete.

Major parts of Professor Wolfe's argument are precisely of this shape. He chooses the best known and most dramatic "activist" opinions and asks whether they were good or bad for American society. He corrals the putatively "liberal" arguments for a presumptive case that they were good, and concludes provisionally that activism is good. Then he steps back and lists some counterarguments against the same cluster of opinions. Finally, he questions whether anyone can see far enough into the future or take an atemporal viewpoint to address goodness or badness with confidence. None of this works, because it is arbitrary; countermoves, counterinferences, and counter-conclusions are always fully imaginable and available.

What Professor Wolfe's consideration of activism leaves out is

formidable. The yield of the last two decades of constitutional theory has at least three elements that are relevant to his aims.

Thomas Grey⁸ and Richard Kay⁹ are among the many theorists who recognize that the choice between adherence to original intent and so-called activism may at most be an academic exercise. Both point out the scope and importance of established constitutional doctrines that are in no way traceable to the intentions of the founders. These constitutional inventions involve federalism, incorporation, virtually all elements of the Bill of Rights, and so on. Thus, *even* if activism is largely a twentieth-century strategy of decisionmaking, what would it take to reverse the effects of that strategy? Note how many of the products of activism are now at the established center of constitutional doctrine and no longer controversial.

Second, our Constitution is, by any reckoning, an old constitution. This implies not only that it is virtually inconceivable to undo two hundred years of constitutional evolution, much of it fueled by putatively activist attitudes, but also that the founders' ideas and principles will generally be made relevant to our world at a high level of abstractness. Adherence to what the founders meant by "due process," "equal protection," "unreasonable searches and seizures," and the "free exercise" of religion is possible only with regard to ways in which their world is congruent with our own. Congruence, in turn, is most likely to be found in general and abstract ways. Moreover, claims of congruence are likely to be highly controversial; controversy will characterize both claims that an aspect of the founders' world corresponds to an aspect of our own *and* claims that the founders had a particular level of generality in mind. Our ability to distinguish activism from restraint depends on how confidently we can resolve such controversies.

Finally, contemporary theory is informed by the insights of hermeneutics, which questions the distinction between "understanding the text on its own terms and reading the interpreter's concerns into it."¹⁰ Hermeneutic approaches to the process of retrieving meaning from texts stress that the imposition of the interpreter's interests is neither willful nor deliberate, but rather unconscious and inevitable. This way of addressing interpretation has

8. See, for example, Thomas C. Grey, *Do We Have an Unwritten Constitution?* 27 *Stan. L. Rev.* 703 (1975).

9. See Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 *Nw. L. Rev.* 226 (1988).

10. David Couzens Hoy, *Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*, 58 *S. Cal. L. Rev.* 135, 137 (1985).

transformed legal theory, most notably as the understructure of critical studies, including critical feminism.

Hermeneutic approaches undercut the distinction between activism and restraint by implying that the idea of restraint as respect for the true meaning of a text is naive and that what the critic calls "activism" is the practicing judge's attempt at faithful understanding. If it is possible to save the distinction from this widely accepted critique, Professor Wolfe gives no basis for such a salvage effort. Given the wide and growing gap between academic discourse about interpretation and the common rhetoric of restraint that gives "conservatives" their protective camouflage, it would be interesting to see a thorough and rigorous attempt to define and unseat judicial activism. Based as it is on naive methods and outdated assumptions, this book is not that book.

WHOM DOES THE CONSTITUTION COMMAND? By Larry Alexander¹ and Paul Horton.² Westport, CT.: Greenwood Press. 1988. Pp. xii, 169. \$37.95.

*Thomas P. Lewis*³

I

This is a challenging, carefully written book, offered by its authors as a guide to clear thinking about the nature of constitutional violations.⁴ The authors contend that a "root" question, posed in their title, is presented in almost any case in which doctrines such as state action or "under color of law" are in play, but that a comprehensible answer is almost never offered by the Supreme Court. They are emphatic about their purpose. It is "conceptual, analytical, and exegetical in character, not argumentative or normative." They have no intention to answer their titular question with respect to any constitutional provision, and they refuse to take issue with any particular case. Under attack is the "conceptual morass" created by the Court's failure to focus explicitly on the question they pose.

They are agreed on several abstract analytical points. Three

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4. I have exercised great care to describe the authors' positions accurately. Because their book is an elaborate but tightly written effort to touch all the bases created by their analytic framework, the risk of some distortion in a summary may be unavoidable.