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Abraham Lincoln understood judicial activism. For Lincoln, the paradigm of the unrestrained Supreme Court was the decision in *Dred Scott v. Sandford.*[1] Lincoln saw the "illegitimacy" of *Dred Scott* not in that the Supreme Court had overturned an act of Congress. It was, rather, that the Supreme Court, in the guise of making a legal decision, instead made a political decision. Even worse, it was a political decision that sought to redefine the polity in fundamental, constitutional terms.

Lincoln's attack on *Dred Scott* was unrelenting, but he continued to defend the Supreme Court as a legal institution. He did not question the Court's legal authority to decide cases between parties brought before it. However, he refused to grant legitimacy to a Court bent on substituting its will for the results reached by the branches of government that are charged with making political decisions. As he explained in his First Inaugural, he did not "deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of the suit."[2] "At the same time," he continued, "the candid citizen must confess that if the policy of the Government, upon vital questions affecting the whole people, is to be irrevocably fixed by the decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal."[3]

Lincoln's position echoed the most eloquent articulation of judicial review ever made by the Court: in *Marbury vs. Madison,*[4] Chief Justice Marshall articulated the fundamental principles that would guide the Court's authority and define what defenses were available to one branch of the federal government against the incursion of another. First, the Chief Justice said that the Court's duty is solely to determine what the given law is.[5] The Court is not to decide matters of discretion, whether entrusted to the President or to Congress.[6] Second, the Court refused to abide by an action of Congress that invaded the Court's essential function in the separation of powers scheme, namely to uphold valid laws. The Court did not tell Congress which laws it could pass, merely that when Congress unconstitutionally invaded the Court's sphere of determining which law was to apply to the parties before it, the Court would ignore the

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1. 60 U.S. (19 How.) 393 (1857).

2. *Quoted in* 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 331 (Boston, Little, Brown & Co. 1926).

3. *Id.*

4. 5 U.S. (1 Cranch) 137 (1803).

5. *Id.* at 177.

6. *Id.* at 165-66.

"command" of Congress and continue to decide cases by the applicable law.[7] When Marshall wrote the famous statement that "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[8] he was attempting to confine the Court to the law and remove it from politics. Marshall insisted that it was a moral requirement deriving from the oath he took to obey the command of the Constitution. Congress, through an unconstitutional statute, could not conscript the Court into a violation of the Constitution. The Constitution, Marshall declared, was to govern courts as well as Congress. For Marshall, then, judicial restraint was a form of public virtue. Marshall's view established the classical and constitutionally-grounded definitions of judicial activism and of judicial restraint.

When the Supreme Court overturns a legislative act on constitutional grounds, it may be right or wrong in its judgment. Any errors in judgment are to be cured by criticism and reconsideration by the Court, new appointments, or by adjusting the appellate jurisdiction of the Court. When, in certain rare instances, the Court refuses to confine itself to legal reasoning, or rather, when the so-called legal reasoning is but a transparent cover for a clearly political decision, then the political branches have the same moral right to ignore the decision of the court *as a political decision*, whether or not the political decision is perceived as the wise political outcome. The co-ordinate branches, however, must leave the legal effectiveness of the Court's decision intact as to the two parties before it.[9]

In the late nineteenth century, however, the Progressive movement expounded the notion that impermissible judicial activism included not only invalid political decisions made by the Court but also any decision wherein the Court struck down a considered act of Congress or of the States.[10] The Progressive position on the Court had two bases. First, the Progressives, as heirs in their own way to the Anti-Federalists, the Jeffersonian Republicans, and the Jacksonian Democrats, were decidedly democratic in their notion of political legitimacy.[11] Legitimate political decisions necessarily flowed from the will of the people. Some Progressives believed that the Constitution of 1789 was flawed by inhibitions of the democratic will. Others thought it was designed for an eighteenth-century economic structure unattuned to the industrialism of modern times. They therefore supported such reforms as the popular election of the Senate, women's suffrage, initiative and referendum, and the overriding of

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7. *Id.* at 177.

8. *Id.* at 177.

9. After he became president, Lincoln used his own constitutional method to correct the Court through the appointment of Stephen Field as a tenth justice approved by Congress. More problematic was his defiance of an order by Chief Justice Taney and his consideration of arresting Taney. *See Ex Parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861); Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81 (1993).

10. EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 13 (2000).

11. *See* Saul A. Cornell, *The Changing Historical Fortunes of the Anti-Federalists*, 84 Nw. U. L. Rev. 39, 58 (1989).

judicial decisions by popular will.[12] To the Progressives, the fact that an unelected Court sat at the highest level of the judiciary was not easily reconcilable with their notion of democracy. Whenever the Court struck down an action of the elected legislature, therefore, it was viewed as an incursion into the democratic prerogative.

There was another, more substantive principle driving the Progressive attack against the Court. Many Progressives saw society in a class struggle. The majority of the populace, who, by democratic theory, had the right to determine the future of the polity, was unable to exercise this right because of oppression by wealthier and privileged classes. Legislation that improved the labor, educational, and health position of the workers was therefore, in its substance, something to be desired. Yet, the Constitution itself, some Progressives held, was structured so as to bar such democratic, progressive legislation; this structure was deliberately written into the Constitution by those same privileged and wealthy classes, who had controlled the Constitutional Convention.[13] The Court, when enforcing a constitutional provision against the Congress, was utilizing a Constitution that was in some ways tainted. The Progressives, therefore, envisioned a Court that would accede to the legislative will and ignore the class-based, oppressive constraints of the Constitution. Thus, when Justice Holmes dissented, as he rarely did, in a case that applied federal antitrust law to a railroad takeover,[14] the progressivist President Theodore Roosevelt famously declared that he "could carve out of a banana a judge with more backbone than that."[15] Decisions were condemned as judicially activist, therefore, when they overturned a (reformist) legislative provision, making them doubly illegitimate.

This more simplistic view of judicial activism, certainly rejected by John Marshall and Abraham Lincoln, took root in the minds of the leading intellectuals: the professorate, their students, and ultimately in the judges themselves.[16] Yet an ironic turn of events would turn this simplistic and inaccurate notion of judicial activism into a weapon of conservatives in the latter half of the twentieth century.

Beginning in 1937, a new progressively influenced majority on the Supreme Court came to doubt its own authority to strike down legislative acts.[17] Where provisions of the Constitution and legislative will appeared to conflict, the Court

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12. *See* RICHARD HOFSTADTER, *The Progressive Party Platform of 1912*, in, THE PROGRESSIVE MOVEMENT, 100-115, 129-130 (1963); LEWIS L. GOULD, THE PROGRESSIVE ERA 5 (1974). The question of black suffrage under the Fifteenth Amendment was more complicated, for Southern populists were in some ways a wing of the Progressive movement, at least in the Democratic Party.

13. *See, e.g.*, CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (Transaction Publishers 1998) (1913).

14. Northern Secs. Co. v. United States, 193 U.S. 197 (1904) (Holmes, J., dissenting).

15. *Quoted in* RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW: CASES AND NOTES 146 (2d ed. 1985).

16. *See, e.g.*, James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

17. *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

retreated to a balancing test, attempting to assess the relative weights of legitimate political forces in the country. A number of constitutional provisions (e.g., the Contracts, Takings, and Commerce Clauses) were effectively disregarded. The Court's role was understood simply to act as referee, seeking to keep peace between the contending pressure groups and forces in the society.[18] As a result, the Court permitted myriad Congressional regulations of questionable constitutionality, particularly under the Commerce Clause.[19] The Court no longer saw any constitutional bar to these laws. The Court had lost the sense of its legal persona as John Marshall had identified it.

The Court was happy to defer to Congress's broad use of Commerce Clause power for two reasons. First, the justices believed that they were upholding the democratic will. Second, the Court believed it was rightfully undoing the perceived alliance of the previous Court with privileged business interests.

The Warren Court both expanded the legal interpretation of the constitutional clauses that allowed progressivist-friendly decisions and invoked the political wisdom of such decisions to justify them. Important areas such as legislative reapportionment,[20] search and seizure,[21] procedural protections to welfare,[22] and police practices[23] came under the scrutiny and the modification of the courts. In some situations, such as segregation, a legislatively mandated practice had long been patently contrary to the Constitution. Unfortunately, rather than remain content to strike down legal segregation vigorously and completely, the courts went further and undertook an administrative role of unprecedented degree.[24] In doing so, the Court demonstrated that it had drifted from its limited legal role in our system of government.

In reaction, conservatives claimed the courts were acting in an activist manner. Yet, many conservatives simply advanced the impression that the Supreme Court was being insufficiently democratic, as opposed to arguing it should remain within its appropriate sphere. These conservatives had accepted the first part of the Progressive notion of the polity—that legitimacy flows from

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18. Footnote 4 of Carolene Products Co. v. United States, 304 U.S. 144, 152 (1938) did retain judicial scrutiny for legislation that on its face purportedly violates a specific prohibition of the Constitution, but the footnote makes clear that the Court regarded its primary purpose to defer to and umpire the political process.'

19. *See, e.g.*, United States v. Walsh, 331 U.S. 432 (1947); United States v. Darby, 312 U.S. 100 (1941).

20. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964).

21. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961).

22. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970).

23. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966).

24. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 12-16 (1971) (discussing the special ability of lower courts to oversee and implement aggressive desegregation plans under their equitable powers); Green v. County School Bd. of New Kent County, 391 U.S. 430, 438-39 (1968) (discussing obligation of district courts to "assess the effectiveness of a proposed plan in achieving desegregation"); *but see* Milliken v. Bradley, 418 U.S. 717, 744-45 (1974) (judges are not qualified to implement broad interdistrict remedies requiring "complete restructuring of the laws of Michigan" and turning judges into "de facto 'legislative authority'").

the will of the people as expressed through the legislature alone. On the current Supreme Court, for example, conservative-leaning justices like O'Connor and Kennedy are part of this tradition.

On the other hand, some conservatives more accurately understood the nature of judicial activism. Decisions that overturn the considered will of the people are not necessarily judicially activist. Rather, judicially activist decisions are those that bring the Court outside of its constitutionally defined role.[25] The Court was not authorized by the Framers to make political decisions. It was not formed, despite some appropriate range of discretion in equity jurisdiction, to undertake the regulation of entire areas of the American political life.

Rather, the Court should stay true to its position in the Constitution and under the Constitution. It has a legal identity, not a political one. Legally invalid statutes must be struck down. But political decision-making, social reform, and administrative supervision of the American people are functions belonging to the other branches of government. John Marshall and Abraham Lincoln understood the distinction. And so should we.

25. *See generally* WALTER BERNS, TAKING THE CONSTITUTION SERIOUSLY (1987).