

### Judicial Activism in Perspective (Judicial Review and the Consent of the Governed: Activist Ways and Popular Ends)

Ellen S. Podgor

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# BOOK REVIEW

## JUDICIAL ACTIVISM IN PERSPECTIVE

ELLEN S. PODGOR\*

JUDICIAL REVIEW AND THE CONSENT OF THE GOVERNED: ACTIVIST  
WAYS AND POPULAR ENDS.

By Donald E. Lively.

Jefferson, North Carolina: McFarland & Company, Inc., 1990.

Pp. vii, 154. \$25.95.

Congressional approval for those nominated by the President to the United States Supreme Court has become a philosophical expedition with senators attempting to discern the biases of those who seek to assume the bench. For Robert Bork, such scrutiny proved fatal to his candidacy; while for Anthony Kennedy, Antonin Scalia, Sandra Day O'Connor, and David Souter, the passage, albeit controversial, proved successful. Although talk of judicial activism continues to elicit criticism and fear, it merely reflects a perspective permeating the work of the United States Supreme Court since shortly after its inception.<sup>1</sup>

Professor Donald Lively, in his newest book, *Judicial Review and the Consent of the Governed*, dissects the activism of the Court from an historical as well as a philosophical perspective. He

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\* Associate Professor of Law, St. Thomas University School of Law. B.S. 1973, Syracuse University; J.D. 1976, Indiana University (Indianapolis); M.B.A. 1987, University of Chicago; LL.M. 1989, Temple University. I wish to thank Professor Donald E. Lively of the University of Toledo College of Law for providing this impressive work to review.

<sup>1</sup> See D. LIVELY, *JUDICIAL REVIEW AND THE CONSENT OF THE GOVERNED: ACTIVIST WAYS AND POPULAR ENDS* 8-9 (1990) [hereinafter LIVELY, *JUDICIAL REVIEW*]. The negative perception and fear of judicial activism stem from "the role of an unelected judiciary in reviewing, and sometimes invalidating popular law." *Id.* Or, more vividly, an activist judiciary is one that "[cuts] law from its own cloth with only token advertence to the [C]onstitution." *Id.* at 10.

criticizes those who presume to speak authoritatively from the Constitution's text as if having knowledge of the framers' true intent and the essential nature of this purported scripture.

The Court's interpretive function, articulated by Chief Justice John Marshall in the seminal case of *Marbury v. Madison*,<sup>2</sup> lends credence to the premise that activism is inherent to the judicial process.<sup>3</sup> Professor Lively describes the role of activism as ranging from the Court's passive declination of review of cases to its actual acceptance and interpretation using the Constitution.<sup>4</sup> Lively discounts conservative rhetoric that accuses judicial activism of exceeding simple interpretation of the Constitution. He notes that the "open-ended terminology" of the constitutional guarantees renders this impossible,<sup>5</sup> and further argues that the framers "inscribed an invitation for activist vitalization."<sup>6</sup>

Lively begins his discourse by proposing that activism, a misunderstood term, is at the heart of any expounding or application of the law.<sup>7</sup> In a subsidiary proposition, Lively explains that popu-

<sup>2</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>3</sup> See LIVELY, JUDICIAL REVIEW, *supra* note 1, at 37-39. Chief Justice John Marshall established the Constitution as paramount law and the Supreme Court as its sole interpreter. *Id.* Although facially a political dispute concerning the validity of a Federalist court-packing scheme, Chief Justice Marshall shrewdly allowed the interests of his party, the Federalists, to be sacrificed for the long-term, vastly superior, gain of judicial supremacy. *Id.* at 38. Professor Lively points out that judicial power, as delineated by Marshall, "constituted not merely a definition but veritable seizure of authority," since Marshall did not refer to original intent in his opinion. *Id.*

<sup>4</sup> See *id.* at 17. According to Lively, so-called judicial restraint and activism are, practically speaking, not as analytically divergent as might first appear, since both "can have profound political and constitutional consequences." *Id.* For example, a "constrained" interpretation of the equal protection clause led to the separate but equal doctrine, whereas a "more overtly activist" reading led to desegregation orders. *Id.* Thus, the Court actively decides a constitutional principle each time it hears an argument, regardless of whether the principle is upheld or overturned: "Even complete passiveness . . . can represent activism that is subjectively motivated." *Id.*

<sup>5</sup> *Id.* at 14.

<sup>6</sup> *Id.* at 28. Professor Lively lambastes the "self-proclaimed exponents of restraint [who] advocate interpretation of the [C]onstitution as written or insist upon what its creators clearly intended." *Id.* Characterizing any attempt at deciphering original intent as "a largely vain assignment," Lively discredits the attempt to create any guiding purpose from largely confidential convention proceedings, and plausible but divergent understandings of original opinion and purpose. Moreover, the elasticity of the constitutional language reflects the time's adherence to a philosophy of "natural rights," believed to have been derived from God and therefore antedating state-given rights. See *id.*

<sup>7</sup> *Id.* at 8. Because "[a]ctivism wears a variety of faces," much of the misunderstanding and fears engendered by the term "activism" arise from a confusion of terminology. *Id.* at 9. Activism is equally present when the Court preempts state action because of federal law as well as when, more controversially, "the judiciary attempts to inject meaning into text that

lar inclinations affect the sensitivities of the Court and result in an exercise of power along majoritarian lines.<sup>8</sup>

An entire chapter discusses the father of constitutional law, John Marshall, whose arrogation of power to the Court was "unashamedly activist."<sup>9</sup> Like Marshall, Justices regularly engage in activism in interpreting the Constitution. Professor Lively distinguishes Justice Marshall's position from his successors because "Marshall wrote on virtually a clean slate" while the others were often bound by precedent.<sup>10</sup> For all Justices, however, Lively sees the Bill of Rights as a textual starting point from which substantive meaning evolves.

Professor Lively openly criticizes those who focus upon intent because they discount or disregard how subsequent experience may alter original expectations or contemplation.<sup>11</sup> He likewise finds verbal sophistry in the claim that "the [C]onstitution is speaking for itself by means of penumbras, emanations or other internal design, rather than candidly acknowledging that the Court determines the document's message pursuant to the values imparted and consequent drafting of principles."<sup>12</sup>

Professor Lively does not limit his analysis to a rendition of forceful exhortations supporting his proposition. Rather, an entire chapter considers the arguments against judicial activism. He thus establishes the futility of strict literalism of the Constitution. The equal protection doctrine demonstrates "how outside values will shape constitutional law regardless of how the judicial function is characterized."<sup>13</sup> In addition, Professor Lively reduces the fear of

is not self-defining." *Id.* Much criticism of an active judiciary derives from a dissatisfaction with its results. *Id.* at 14; see also *infra* note 20 (comment of Justice Souter before the Senate Judiciary Committee).

<sup>8</sup> See LIVELY, JUDICIAL REVIEW, *supra* note 1, at 23. As examples of the Court's acquiescence to popular sentiment, Lively cites its endorsement of slavery in the separate but equal doctrine, its reconciling "McCarthyism" to a proper reading of the first amendment, and its curbing of busing as a remedy for segregation. *Id.*

<sup>9</sup> *Id.* at 38. Chief Justice Marshall's broad interpretation of "necessary and proper" in the commerce clause and his "[d]eferential reading[] of congressional power to regulate commerce" tended to consolidate power in a strong central government. See *id.* at 35. Marshall's bold usurpation of power, however, starkly contrasted with the actions of his predecessor, John Jay, who refused reappointment to the Court because it lacked authority. *Id.*

<sup>10</sup> See *id.* at 35.

<sup>11</sup> *Id.* at 39; see *infra* note 13 and accompanying text.

<sup>12</sup> LIVELY, JUDICIAL REVIEW, *supra* note 1, at 32.

<sup>13</sup> *Id.* at 68. A common theme running through Professor Lively's discourse is the inevitable impingement of external values on constitutional law. *Id. passim.* While noting that criticism of outside influence usually comes from proponents of judicial restraint, Lively

judicial legislation often associated with judicial activism, by demonstrating how it is constrained by majoritarian forces: "Even if cut from the Court's rather than the [C]onstitution's cloth, externally referenced principles of constitutional law reveal a distinctly majoritarian weave posing little practical threat to democratic values."<sup>14</sup> Despite the influence of majoritarian societal pressures on the Court, Lively strongly rejects "[r]aw public sentiment" as the "exclusive determinant of constitutional principle."<sup>15</sup> Even should the Court miscalculate public sentiment, the legislature will be on hand to "reclaim the lost ground."<sup>16</sup>

Lively's discussion of judicial subjectivism includes an extensive analysis of the *Lochner*<sup>17</sup> decision. He explains the case as decision making by "a judiciary with a distorted sense of the [C]onstitution and itself."<sup>18</sup> Rather than reflecting its time, *Loch-*

offers the counter-example of Ronald Reagan's campaign promise to appoint judges who "respect family values and the sanctity of innocent human life." *Id.* at 68 (footnote omitted). Lively asserts that review pegged to "family values as a basis for narrowing or eliminating abortion rights" impedes their effectiveness elsewhere. *Id.* This "represents primarily a framework for intellectual and political hypocrisy." *Id.* at 69. Lively similarly criticizes those who eschew the influence of value on constitutional law, yet easily interpret the freedom of speech clause as excluding some types of expression: "A determination that street vernacular is unfit for broadcast and thus constitutionally unprotected . . . reflects nothing more than a choice of values unrelated to actual terms of the [C]onstitution." *Id.* at 116.

<sup>14</sup> *Id.* at 98. For example, public reaction to the judicial treatment of abortion rights modified the right of privacy. *Id.* Professor Lively believes that the public is "divided not so much over the existence but the scope of the liberty," and that a more narrow delineation of the right would remain "consonant with societal norms." *Id.* at 129. In Lively's view, public opinion, on the whole, has remained supportive of abortion rights' "practicalities," despite the opposition of a small minority. *Id.* at 128. "[T]he continuing epilogue to the abortion decision actually demonstrates effectively how any judicial pronouncement is not necessarily the final word but the beginning of an interaction among representative forces that ultimately determines constitutional configuration." *Id.* at 129. Thus, although he eschews the value of "raw public sentiment," Lively acknowledges the modifying role societal values can exert on judicial enunciation of a constitutional principle. *Id.* at 128-29.

<sup>15</sup> *Id.* at 128. If majority rule were given full rein, Lively asserts that issues such as "slavery, segregation and First Amendment freedoms could be decided by a plebiscite." *Id.* at 129.

<sup>16</sup> *Id.* at 109. The imposition of notification requirements and the prohibition against public funding for abortions reflects the conformity of the legislature's narrowing of judicially declared rights with societal values. *Id.*

<sup>17</sup> *Lochner v. New York*, 198 U.S. 45 (1905). In *Lochner*, the Court elevated freedom of contract between employer and employees over state regulation of bakers' working hours. *See id.* at 61-64. As a prime example of result-oriented analysis, *Lochner* illustrates the Court's failure to consider the inequality in bargaining power between the two parties. *See* LIVELY, JUDICIAL REVIEW, *supra* note 1, at 108. Lively defines result-oriented analysis as the "[u]nexposed attachment of an exclusive label to an act or practice, when more than one fits." *Id.*

<sup>18</sup> LIVELY, JUDICIAL REVIEW, *supra* note 1, at 113.

ner exemplifies the "Court's lagging behind and even impairing the effectuation of evolving societal values."<sup>19</sup>

Professor Lively's book can serve as a framework for those commencing a study of constitutional interpretation. It provides structure to the unstructured and a semblance of process to theory that is often garbled. This work, however, is more than a primer for the law student; it is a text ready to educate those who undertake the questions of the Senate Judiciary Committee. One can only contrast Judge Bork's arrogant profession of true knowledge of the constitutional scripture with Justice Souter's open admission that constitutional interpretation necessarily refers to the text, the precedent, and the times.<sup>20</sup> This substantially more realistic approach enabled the latter to ascend to the Court and derail the candidacy of the former.

Because Professor Lively's focus is more theoretical than practical in scope, he precludes neither conservative nor progressive construction. Rather, he insists that whatever one's perspective, one must acknowledge that construction does occur. Adherents of either viewpoint can fortify their positions with a false reliance on their supposed "true" knowledge of the document and its drafters' underlying intent.

Although *Judicial Review and the Consent of the Governed* provides a wealth of information on the structure of constitutionalism, the slim volume lacks an in-depth application of structure to the vast number of existing decisions. For those who seek a review of the many aspects of constitutional law, Lively's book will not rise to meet the occasion.

Equally absent is a comprehensive consideration of the factors

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<sup>19</sup> *Id.* at 109. In contrast, the right of privacy attended to "societal values." *Id.* Lively believes it "strikes a more positive chord" in a broad cross-section of the populace than do contractual liberties. Lively distinguishes *Lochner*-type judicial activism from that of the Warren Court: where *Lochner* esteemed freedom of the marketplace, the Warren Court sought to enliven democratic principles. *Id.*

For example, *Brown v. Board of Education*, 347 U.S. 483 (1954), continues to garner praises, while *Lochner* is reviled as an "aberration if not abomination." LIVELY, JUDICIAL REVIEW, *supra* note 1, at 115.

<sup>20</sup> See Lewis, *Souter Comments in Approving Way on Activist Court*, N.Y. Times, Sept. 18, 1990, at A1, col. 3. In testimony before the Senate Judiciary Committee, Justice Souter characterized a judicial activist as "someone who rules against you," stating that courts occasionally "are forced to take on problems which sometimes might be better addressed by the political branches of government." *Id.* Justice Souter alarmed conservative Senators when he termed the *Miranda* decision a "pragmatic experiment" rather than a creation of "new rights for criminals." *Id.*

that underlie the majority view. Although Professor Lively refers to the influence of majoritarian values,<sup>21</sup> economic scholars might find that economic factors play an overriding role. Other theorists might consider the American political structure to be the preeminent force controlling the Court's views. His failure to analyze the motivation behind majoritarianism does not, however, significantly impair the insight of Lively's book.

Professor Lively's writing and vocabulary are akin to a melodious symphony with organization as well-composed as a work by Mozart. It is refreshing to hear, in the constitutional theory of one calling for intellectual honesty, a consistent authenticity. The ethical implications of acknowledging that external values affect judicial interpretation may yet rectify the perceived lack of credibility within the present legal system.

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<sup>21</sup> See LIVELY, JUDICIAL REVIEW, *supra* note 1, at 98.