

THE JUDICIARY'S PROBLEM?

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The largest problem facing the American judiciary today happens to be one of the greatest problems facing our nation, a problem which threatens freedom at its very foundation. That problem is judicial activism. Judicial activism is results-oriented judging, where a judge bases decisions on his or her personal opinion of what is fair or just, rather than on the law as written. Having chosen the outcome, the trick is for the activist judge to then find a way to legally justify the result. Typically, judicial activism is based on improper considerations of non-constitutional theories, the creation of new rights not expressly granted or preserved by the constitution or statute, or the invalidation of laws because the judge views them as bad policy, rather than being in conflict with express written laws or constitutional provisions.

The opposite of judicial activism is judicial restraint, where the constitution and laws lead inevitably to the correct result. Activism and restraint both refer to the process or method a judge uses to reach a particular decision; they do not refer to the political ramifications of that decision. Therefore, judicial activism and judicial restraint are neither inherently conservative nor inherently liberal. Judges who are political conservatives can engage in judicial activism to further their agenda, just as judges who are political liberals can engage in judicial restraint out of respect for the law.

The judiciary should be our government's least dangerous branch, not its most dangerous. Activism makes the judiciary most dangerous. The proper judicial philosophy should be to decide cases according to a neutral interpretation of the constitution and laws. Judging ought to be impartial. Judges ought not make policy from the bench; that is a legislative or executive branch prerogative. Judges should interpret and apply, not make, law. Judges should seek to apply the actual constitution rather than their own political preferences. Judges should put aside their personal opinions or convictions and interpret and uphold or strike down laws, after squaring them with the constitution, statutes, and case law. Proper judicial *review* is essential to constitutional order and the balance of power, and it is the duty of judges to defend the constitution.

Activist judicial decisions lack legitimacy and undermine public confidence in the system. Our citizenry can discern a results-oriented mentality. The authority of the judicial system depends upon the appearance, as well as the reality, that it has conformed to the rule of law.

Activism is undemocratic and threatens our system of representative self-government. It destroys the delicate balance of the separation of powers: the legislative branch enacts law, the executive enforces law, and the judicial interprets and applies the law to particular circumstances. Activism denies the authority of the legislature to pass laws not otherwise forbidden by the constitution. Legislatures have the right to pass bad or ill-advised laws, and if a legislature does, the laws it passes can just as easily be corrected by the legislature or the voters. Judge-made law is difficult to correct, especially if made at the appellate level.

Activism threatens the independence of the judiciary. It substitutes a judge's personal perspective for that of a deliberative, representative body, which is accountable to the voters every couple of years. Many judges have life terms or lengthy terms of office; they are not easily replaced if they make poor public policy. Moreover, because the legislative body has the power to define and limit the jurisdiction of the judiciary, the legislature may decide to react by further defining and limiting the court's jurisdiction, where it otherwise would not have done so.

Legislative enactments are the product of a consideration of policy-based data from many sources. Judicial decisions are governed by strict rules of evidence, in which only the evidence submitted by the parties may be considered. The differences between the legislative and judicial processes are akin to the differences between the "legislative" rule-making by owners of the National Football League and the "judicial" rulings of the NFL referees during the course of a particular football game. It should be obvious that "activist" referees overstep their authority when they choose to disregard rules that the NFL owners have designed to make the game function the way the owners want it to function. Similarly, if activist judges ignore the legislative and constitutional rules that are designed to make our nation function the way the "owners" – the citizens – want it to function, then those activist judges overstep their authority. When citizens want to change the rules that govern how our nation should function, they do so by electing or lobbying their representatives or by changing the written words in the state or federal constitutions. When citizens want the existing rules applied, they go to a judge.

An activist judge is without a compass or embedded guidelines. Activism makes the law unpredictable. Lawyers cannot confidently advise their clients on a particular course of action or area of law. The unpredictability of the law can have disastrous consequences on the economy and on the ability of all citizens to order their lives.

Activist judges politicize the branch of government which should be apolitical. Activist judges exceed their authority if they strike down a constitutional law, and are derelict in their duty if they do not strike down a law which is unconstitutional. Activist judges, in effect, shred the constitution. Where the outcome of a case depends on the political preferences of the particular judge assigned to the case rather than the law, it makes us a nation of men, not laws, and puts freedom at risk.

To alleviate the problem, our nation must elect or appoint judges who have the proper judicial philosophy of restraint. The electing or appointing authority, whether it be the voters, the president, the governor, or some special body, must seek out judges who understand the constitutional framework and are faithful to it. If the system of checks and balances is thrown off-balance, a power grab will ensue. The legislative and executive branches will be forced to engage in undesirable measures to attempt to counteract or wrest the usurpation of their functions by the judicial branch. The public, and especially the media, must be educated about the threats to freedom by an activist judiciary. The picture must be painted in real terms – activist judges can be detrimental to the political left as well as the political right. For example, a conservative judge who upholds a statute that makes it a crime to use ad hominem verbal attacks on a sitting president would also be using judicial activism to achieve the result. Our youth must be taught basic civics once again, and the constitutional framework of separation of powers and the proper role for each branch of government must be emphasized.