



### Judicial Activism Reconsidered

Like many catchwords, “judicial activism” has acquired so many different meanings as to obscure more than it reveals. Yet it is not a term that can simply be ignored as intellectually “void for vagueness,” for at the heart of it are concerns about the very meaning and survival of law. Abandonment of the term not being a viable option, clarification becomes imperative.

“Judicial Activism” and “Judicial Restraint” raise logically obvious but often ignored questions: Activism toward what? Restraint toward what?

Are judges deemed to be activist or restrained toward:

1. The current popular majority,
2. The legislature representing the current popular majority,
3. The statutes [laws] passed by present or past legislatures,
4. The acts of current or past executive or administrative agencies,
5. The meaning of the words in the Constitution,
6. The principles or purposes of those who wrote the Constitution,
- or
7. The legal precedents established by previous judicial interpretations of the Constitution?

Activism or restraint toward one of these does not imply the same toward all the others, and may in some instances imply the opposite toward some other or others. For example, a “restrained” jurist, attempting to hold fast to the “original intentions” of constitutional provisions, must actively strike down statutes passed by a legislature which repeatedly over-steps the bounds of those provisions. Conversely, an “activist” jurist may passively accept expansive legislative action of a sort deemed consist with general constitutional “values,” even if lacking specific constitutional authorization or entering a “gray area” of constitutional prohibitions.

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### Activism Is in the Eye of the Ideologist

Conservatives like to divide judges into liberal “activists” and conservative nonactivists who interpret the law rather than making it. Anyone who follows the courts knows that conservative judges are as activist as liberal judges —just for different causes. A new study of Supreme Court voting patterns confirms this and suggests that the conservative Justices Antonin Scalia and Clarence Thomas are actually more activist than their liberal colleagues.

Lori Ringhand, a professor at the University of Kentucky College of Law, examined the voting records of the Supreme Court justices from 1994 to 2005. Because judicial activism is a vague concept, she applied a reasonable, objective standard. In the study, which is forthcoming in Constitutional Commentary, justices were considered to have voted in an activist way when they voted to overturn a federal or state law, or one of the court’s own precedents.

The conservative justices were far more willing than the liberals to strike down federal laws — clearly an activist stance, since they were substituting their own judgment for that of the people’s elected representatives in Congress. Justice Thomas voted to overturn federal laws in 34 cases and Justice Scalia in 31, compared with just 15 for Justice Stephen Breyer. When state laws were at issue, the liberals were more activist. Add up the two categories, and the conservatives and liberals turned out to be roughly equal. But Justices Thomas and Scalia, who are often held out as models of nonactivism, voted to strike down laws in more of these cases than Justice Breyer and Justice Ruth Bader Ginsburg, the court’s two Clinton appointees.

By the third measure, overturning the court’s own precedents (for which data were available only up to 2000), the conservatives were far more activist. Justice Thomas voted to overturn precedent 23 times and Justice Scalia 19 times, while the court’s four liberals did so in 10 cases or fewer.

Activism is not necessarily a bad thing. The Supreme Court is supposed to strike down laws that are unconstitutional or otherwise flawed. Clearly, all nine justices, from across the political spectrum, believe this, since they all regularly vote to strike down laws. What is wrong is for one side to pretend its judges are not activist, and turn judicial activism into a partisan talking point, when the numbers show a very different story.

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