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Judicial activism and tomorrow's courts

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Judicial activism, properly understood, is the use of court power to invalidate legislative or executive acts, or to establish legal rules without legislative or executive initiation.

In today's politically charged environment, one's attitude toward judicial activism seems to depend on the perceived leanings of the judiciary. When liberals rule the roost, conservatives object to activist judges who discover rights, such as a national right to abortion, that conservatives oppose. But when conservatives dominate, liberals object to activist judges who overturn rights that liberals favor. Bottom line: Judicial activism has become a pejorative term – a camouflage for the substantive aversions of both liberals and conservatives.

On the other hand, should we conclude that judicial activism – although frequently condemned by both parties – is actually a good thing? Yes, if activism means willing engagement in applying the law and the Constitution to scrutinize the acts (or omissions) of the executive and legislative branches. No, if activism means rendering legal judgments based on a judge's public policy preferences.

Activism can be appropriate even if it means finding rights that are expressed nowhere in the Constitution. That's precisely what judges are instructed to do by the Ninth Amendment, which states that we "retain" rights beyond those that are enumerated – e.g., rights, such as travel, that we possessed even before our government was formed. That type of activism is essential if the courts are to be our final bulwark against overreaching government.

Courts are not authorized to endorse entitlements, such as federalized welfare, which are neither expressed in the Constitution nor traceable to our common law and natural rights heritage. Judges have a responsibility to invalidate all laws that do not conform to the Constitution. Courts would be derelict if they endorsed unconstitutional acts merely because they were passed by our elected representatives.

The opposite of activism – judicial restraint – commands that courts indiscriminately defer to the decisions of Congress and state legislatures. Yet blanket judicial deference removes the courts from the meticulously crafted system of checks and balances that was designed by the Framers to prevent abuse of power. As a result, government at all levels has grown in surprising and virtually unchecked ways. In practice, judicial restraint has mutated into judicial abdication, with predictable effect: More government power and fewer constitutionally protected individual rights.

Ideally, the judiciary should neither be immutably active nor passive. It should be vigorously engaged in securing our rights and limiting government power. When the legislative or executive branch exceeds its legitimate enumerated powers or fails to enforce constitutionally guaranteed rights, the courts have the authority, indeed the duty, to intervene. By contrast, judicial intervention would be inappropriate if a judge were to overturn a law simply because, as a policy

matter, he disapproved of the legislative outcome. Rather than decide cases according to subjective value judgments, judges should be following objective standards for interpreting laws and constitutional provisions. Results-oriented jurisprudence, focused on reaching a particular outcome, may be proper for a legislator, but not for a judge. His role is to apply the law, not impose his policy preferences.

The trick, of course, is to distinguish proper from improper judicial intervention. That task is complicated by laws that are often unclear – either because the legislature has not done its job or has intentionally left gaps for the courts to fill; or because the meaning of the law depends on the meaning of the Constitution, which can also be unclear. Members of the court must, therefore, have a theory of the Constitution – about separation of powers, federalism, limited government, and individual rights – and a consistent allegiance to that theory.

The lesson is straightforward: Judicial engagement is essential to maintaining our liberties. Judges must honor our founding principles – expansive personal freedom coupled with tightly constrained legislative and executive powers – which have preserved and protected this nation for more than 230 years. That theory of constitutional jurisprudence charts the course to a free citizenry and a government bound by the chains of the Constitution.

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