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Actively Engaged

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Remember judicial activism? Of course you do. Not so long ago, Republicans lined up to denounce President Obama's two Supreme Court nominees as judicial activists before the ink was dry on their nomination papers. Writing in The Wall Street Journal right after Sonia Sotomayor's nomination in May 2009, Karl Rove advised fellow Republicans that although Judge Sotomayor would almost certainly be confirmed, Republicans should nonetheless seek to score points by "making a clear case against the judicial activism she represents." The next year, Sen. Orrin Hatch of Utah, undeterred by the fact that Elena Kagan, never having been a judge, was hard to describe plausibly as a judicial activist, explained his vote against her confirmation by saying that "Ms. Kagan's record shows that she supports an activist judicial philosophy."

The historian Arthur M. Schlesinger Jr., who more famously gave us the "imperial presidency," coined the phrase "judicial activism" in an article in Fortune magazine in 1947. But he did not precisely define it, and it's been clear ever since that the definition lay in the eyes of the beholder – nearly always a disgruntled beholder, since people rarely describe as "activist" a judicial outcome with which they are satisfied. Judicial activism is a protean concept that changes with the times.

So the fact that it is changing again is not in itself surprising. But change is too mild a word for the remarkable inside-out transformation that is now underway. Conservatives are lining up not to denounce judicial activism, but to embrace it – in fact, to demand it of judges whose duty is to "fully enforce the limits our Constitution places on the government's exercise of power over our lives." The obsession on the right with wiping the new health care law off the books has nothing to do with it, I'm sure. But what a difference a year or two makes.

Of course, before they can embrace judicial activism with a straight face, its new fans have had to rename it.

The new name is judicial engagement, as propounded by the Center for Judicial Engagement, the founding "declaration" of which I have quoted above. The center is a new offshoot of the libertarian Institute for Justice, which has made a name for itself and

its self-described "merry band of litigators" by bringing lawsuits on behalf of school choice and private property. Judicial activism in the name of liberty, it seems, is no vice.

In this new topsy-turvy world, judicial restraint, which used to be a good thing, is now bad. There is a "false dichotomy," the center's declaration informs us, "between improper judicial activism and supposedly laudable judicial restraint." Restraint means abdication by judges who fail to do their duty. "Striking down unconstitutional laws and blocking illegitimate government actions is not activism; rather it is judicial *engagement* – enforcing limits on government power consistent with the text and purpose of the Constitution."

If you have not yet seen the phrase judicial engagement used in a sentence – as I had not, until I came across it the other day in a series of posts on the Volokh Conspiracy legal blog – it's likely that you soon will. The Institute for Justice was ecstatic back in August when the judges of the United States Court of Appeals for the 11th Circuit, in declaring unconstitutional the individual insurance mandate of the Affordable Care Act, used the phrase on page 104 of the majority opinion, evidently for the first time in any judicial opinion. When Congress oversteps its limits, the appeals court said, "the Constitution requires judicial engagement, not judicial abdication."

Late last month, the Institute for Justice put out a critique of the Supreme Court, describing a court in a state of woeful abdication. From 1954 to 2002, the report said, 15,817 new laws were enacted, and the Supreme Court struck down only 103 – "or just *two-thirds of one percent*." Even worse, of 21,462 federal regulations adopted from 1986 to 2006, the Supreme Court overturned 121, roughly half of one percent. The institute's report also complained that the court is too respectful of its own precedents, observing disapprovingly that "the Supreme Court overturned precedents in just *two percent* of cases considered from 1954 to 2010."

As a libertarian organization, the Institute for Justice aims its fire at government economic regulations, particularly barriers to entry into various trades and professions. Ever since the New Deal, the Supreme Court has given Congress a wide berth when it comes to "mere" economic legislation. As long as defenders can assert some "rational basis" for a challenged statute, the courts will not interfere. It is this attitude of non-engagement that the institute and its allies are trying to change, urging the Supreme Court to apply to economic regulation the more exacting scrutiny that it now reserves for infringements on rights that modern constitutional theory deems more "fundamental."

The effort, newly visible, is not brand new. In 2007, the Cato Institute, another leading libertarian organization, published a book entitled "David's Hammer: The Case for an Activist Judiciary." Its author, Clint Bolick, a co-founder of the Institute for Justice, wrote that his goal was "to remove judicial activism from the realm of the epithet." While the power of judicial review might be seen as dangerous, he wrote, "that danger is not as great as its opposite: legislative and executive powers unchecked by judicial review." The problem with that sort of desirable judicial activism, he concluded, "is not too much of it but too little."

During the Kagan confirmation hearings in 2010, Republican senators on the Judiciary Committee, having denounced judicial activism days or even hours earlier in their press releases, worked hard to impress its virtues on the nominee when she appeared before them in person. “The American people are concerned about their courts,” Senator Jeff Sessions of Alabama lectured Ms. Kagan. “They’re concerned about a growing expansive government that seems to be beyond anything they’ve ever seen before. And they’d like to know what their judges might like to do about it.”

Senator Tom Coburn of Oklahoma spent nearly an entire question period trying to get the nominee to agree with him that if Congress passed a law requiring Americans to “eat three vegetables and three fruits every day,” the court should strike it down.

“Sounds like a dumb law,” said Ms. Kagan, who understood precisely what game was afoot. “But I think that the question of whether it’s a dumb law is different from the question of whether it’s constitutional, and I think that courts would be wrong to strike down laws that they think are senseless just because they’re senseless.”

The nominee’s reply did not please the Republicans, who posted on their portion of the Judiciary Committee’s Web site a video clip from the hearing under the heading: “Kagan declines to say gov’t has no power to tell Americans what to eat.”

There are few blessings to be found in today’s Washington, but maybe the embrace of judicial “engagement” will prove to be one, by sending the charge of “judicial activism” into political retirement. Or imagine this: that a nominee, ducking a senator’s question, instead of blathering about how the issue might come before the court sometime during the century, will smile sweetly and say, “Sorry, I can’t answer that. I’m engaged.”