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Driving the Conversation:

Isn't "judicial activism" a phony issue? Don't both sides care more about the result than how it is reached?

"'Judicial activism'" is not at all a phony issue, and conservatives will and do accept policy results they do not like when they are grounded in the text and history of the Constitution."
Steven G. Calabresi

Roger Pilon, Vice President for Legal Affairs, Cato Institute:
... Charges of judicial activism and (unwarranted) restraint come down, in the end, to differences about the law.

No, judicial activism is not a phony issue, although it is often true that "both sides" (there may be more than two) care more about the result than about how it is reached.

"Judicial activism," properly understood, stands for the idea that in deciding a case a judge applies something other than the law – his own values, his conception of "evolving social values," his sense of a "just result," and so forth. By contrast, "judicial restraint" has two senses. Ideally, it stands for the idea that the judge applies the law, and only the law, that is to be applied in the case before him – he "restrains" any inclination to do otherwise and acts as most of us believe a neutral judge should act when deciding a case.

But the term has often been used by conservatives, and more recently by liberals as well, to stand for the idea that a judge should be deferential to the political branches and should overturn legislation or executive branch actions only in exceptional cases. As such, this "restraint" is a species of "judicial activism" because it can, depending on the law at issue, amount to a judge's ignoring the law in favor of his preference for democratic decision making.

Clearly, then, the question whether a judge is an activist or is improperly restrained turns on the law at issue – and that is the question that ultimately determines the matter. To charge a judge with "judicial activism" may mean simply that you disagree with him about what the law is. To take a relatively simple recent example, in 1995 the Supreme Court decided a case called United States v. Lopez. The five conservative justices held that when Congress passed the Gun-Free School Zones Act in 1990, which prohibited the possession of a gun within 1,000 feet of a school, it had exceeded its authority under the Constitution's Commerce Clause, which authorizes Congress to regulate interstate commerce. Congress was regulating guns in an intrastate context, Chief Justice Rehnquist said, not interstate commerce. Under our Constitution, that was the province of the states, not of the federal government. Liberals charged the Court with "judicial activism" because, since the New Deal, they had read the Commerce Clause as authorizing Congress to regulate anything that "affected" interstate commerce, and arguably guns at school affected interstate commerce. Thus, the activism charge followed simply from a different reading of the law. And, had one vote switched, conservatives might have charged Court liberals with the restrained form of activism – with wrongly deferring to Congress and ignoring the law (the Constitution's limits on the scope of congressional power and its reservation of power to the states).

One could go on with many other examples involving both powers and rights, but the point to be noticed, again, is that charges of judicial activism and (unwarranted) restraint come down, in the end, to differences about the law. Sometimes those are honest differences, where the law may in fact be unclear or otherwise indeterminate. At other times the differences involve intellectual evasion or just plain dishonesty, with one side or both (or more) making up the law. That is why, if law is to be more than politics, it is crucial to have a theory of the matter. To do his job well, a judge must have a well-grounded understanding of the roots of the law in both theory and history. Regrettably, that kind of grounding is too little taught today in law schools and is rarely gained in practice. As a result, we find that too often politics trumps law, thus undermining the rule of law that is essential for a free society.

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