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## The Arena

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Dec. 21, 2011

**Driving the Conversation:**

**Arena Ref:** [David Mark](#)

Can Gingrich rein in 'judicial activists'?

#### **Roger Pilon, Vice President for Legal Affairs, Cato Institute :**

As I wrote in the [Daily Caller](#) a week ago, Newt Gingrich's attack on the judiciary in chapter nine of his *21st Century Contract with America* is a mass of constitutional confusions. It's a direct assault on judicial review and on "judicial supremacy," in particular - the idea that it falls to the courts to say what the law is. Newt would have us believe that that idea was invented by the Supreme Court in its 1958 decision in *Cooper v. Aaron*, where a unanimous Court told Arkansas officials resisting a school desegregation order that they couldn't "nullify" a Court decision. But the power of courts to say what the law is far predates that decision. It's implicit in our written Constitution with its independent judiciary. It was discussed explicitly and at length in the *Federalist Papers*. And it was secured by the Court in 1803 in *Marbury v. Madison*.

There's no question that courts do not always decide cases correctly. That's why we have review by higher courts, which doesn't always solve the problem either. But the answer, in an imperfect world, is not to abolish whole circuits, as Gingrich threatens to do with the Ninth Circuit. It's to have better judges and better judging - plus better education at all

levels about our constitutional system, which is too often woefully lacking, even in our law schools. If the errors of this sometime historian contribute to a better understanding of our system, they'll have served a purpose. But if this is a serious proposal for governing under our Constitution, it's deeply misguided - and dangerous besides.