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Judicial Activism and the American Right

Damon W. Root | April 11, 2012

In his recent comments urging the Supreme Court to uphold his health care overhaul as an act of deference to "a democratically elected congress," President Barack Obama also chided conservatives for abandoning the cause of judicial restraint. "I just remind conservative commentators that for years, what we've heard is the biggest problem on the bench was judicial activism or a lack of judicial restraint," Obama said. "Well, this is a good example." It's true that many conservatives have long preached judicial restraint. But those conservatives are not the only intellectual force at work within the larger conservative legal movement. Libertarian legal theorists, including NYU law professor Richard Epstein and Georgetown law professor Randy Barnett, have spent the last few decades making their own powerful arguments in favor of a principled form of judicial engagement. In Barnett's view, for example, rather than practicing judicial restraint, the courts should adopt a "presumption of liberty," meaning that the government should be required "to justify its restriction on liberty, instead of requiring the citizen to establish that the liberty being exercised is somehow 'fundamental.'"

Another key figure in the libertarian legal school is Roger Pilon, the director of the Cato Institute's Center for Constitutional Studies. In a superb new post at Cato's blog, Pilon offers his firsthand take on this longstanding debate over judicial activism:
In brief, the complaint about judicial activism emerged from what many conservatives saw as the "rights revolution" that was brought about by the Warren and Burger Courts, starting in the 1950s….

With the onset of the Reagan administration, however, and the advent of the Rehnquist Court in 1986, the conservative critique moved to center stage. In the hands of Attorney General Edwin Meese, Judge Robert Bork, and many others, it became a call not simply for "judicial restraint" but for "originalism"—for applying the law as understood by those who drafted or ratified it. That was an important shift, because the focus was now more squarely on the law itself, not more narrowly on the behavior of judges.

But that shift helped to bring out a split that had been growing on the Right. Back in the 1970s a few of us had reservations about the very “rights revolution” thesis. After all, America was conceived in the name of natural rights, so why were conservatives, in their critique of judicial activism, so hostile to such rights—and, of special importance, so deferential to the state and federal legislatures whose acts so often violated them? To be sure, the conservative critique of the Warren and Burger Court’s was often on the mark, but not always. Moreover, weren’t those conservatives, professing to be opponents of big government, ignoring the fact that it was the *political* branches—during the Progressive Era, the New Deal, and the Great Society—that had given us big government?

This is just a sampling of Pilon's superb post. The whole thing is well worth your time, including his argument for why many conservatives now "recognize that there is all the difference in the world between judicial activism and an active judiciary." Read it for yourself. And for even more on the judicial activism debate, check out my article “*Conservatives v. Libertarians*.”