



*"Call it 'legislating from the bench,' if you will, but on this occasion I should like to repeal the First Amendment."*

## What is Judicial Activism?

***"The interpretation of the laws is the proper and peculiar province of the courts. ... Whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former."***

– Alexander Hamilton, Federalist No 78

### Introduction

Judicial activism refers to court decisions that arguably go beyond applying and interpreting the law and extend into the realm of changing or creating laws, or going against legal precedents. Arguably these decisions are made based on the judges' personal philosophies or political affiliations. When a judge makes a court ruling that is not in accordance with constitutional or statutory law or legal precedent, that judge may be said to be "legislating from the bench." When a judge is thought to hold back from being a "judicial activist," he or she may be said to have exercised judicial restraint.

In the United States, a system of "checks and balances" is imposed to prevent any one of the three branches of the federal government (i.e., the executive branch, the legislative branch, and the judicial branch) from becoming too powerful. Under the separation of powers doctrine,

Congress has the power to create laws whereas the judicial branch is charged with applying the law, and interpreting those parts of the law that might have been drafted in a vague way. Where that line between legal interpretation and creation of the law is, is often a matter of vigorous legal debate. Often those arguments lie upon political lines.

Those who believe in dynamic evolution believe the Constitution should be interpreted in the context of other decisions. This is often called judicial precedence. In such cases, other judges have set a pattern that is meant to be followed.

Article 3, Section 1, of the U.S. Constitution says, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Article 3, Section 2, provides that the "judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." Thus, the justices of the U.S. Supreme Court have the power to interpret the Constitution, and laws and treaties of the United States, in response to cases that come before the Court.

### History

In 1796, in *Ware v. Hylton*, the Supreme Court held a Virginia statute void because it violated a 1783 peace treaty with Great Britain. In *Marbury v. Madison* (1803) the Supreme Court declared a federal law unconstitutional. These cases established the power of judicial review in the Supreme Court—the power to declare acts of the state governments and of the legislative and executive branches of the federal government null and void if they violate provisions of the Constitution. Since the early 19th century, debate has continued over how federal judges should use their powers. Should they practice restraint, or should they actively expand the scope of the Constitution in their interpretations of law, treaties, and constitutional provisions?

## **Judicial restraint**

Those who advocate judicial restraint believe the courts should uphold all acts of Congress and state legislatures unless they clearly violate a specific section of the Constitution. In practicing judicial restraint, the courts should defer to the constitutional interpretations of Congress, the President, and others whenever possible. The courts should hesitate to use judicial review to promote new ideas or policy preferences. In short, the courts should interpret the law and not intervene in policy-making.

Over the years eminent Supreme Court Justices such as Felix Frankfurter have called for judicial self-restraint. In *West Virginia State Board of Education v. Barnette* (1943), Frankfurter said, "As a member of this Court I am not justified in writing my opinions into the Constitution, no matter how deeply I may cherish them. ... It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench."

## **Judicial activism**

Sometimes judges appear to exceed their power in deciding cases before the Court. They are supposed to exercise judgment in interpreting the law, according to the Constitution. Judicial activists, however, seem to exercise their will to make law in response to legal issues before the Court.

According to the idea of judicial activism, judges should use their powers to correct injustices, especially when the other branches of government do not act to do so. In short, the courts should play an active role in shaping social policy on such issues as civil rights, protection of individual rights, political unfairness, and public morality.

Chief Justice Earl Warren (who served from 1954 to 1969) and many members of the Warren Court, such as William O. Douglas, practiced judicial activism when they boldly used the Constitution

to make sweeping social changes promoting such policies as school desegregation and to insure that all Americans had the opportunity to vote and to participate in U.S. society. In 1956 Justice Douglas wrote, "[T]he judiciary must do more than dispense justice in cases and controversies. It must also keep the charter of government current with the times and not allow it to become archaic or out of tune with the needs of the day."

## **Arguments against judicial activism**

Opponents of judicial activism argue that activist judges make laws, not just interpret them, which is an abuse of their constitutional power. The issue, they claim, is not whether social problems need to be solved but whether the courts should involve themselves in such problem solving. By making decisions about how to run prisons or schools, argue the critics of judicial activism, the courts assume responsibilities that belong exclusively to the legislative and executive branches of government.

Critics of judicial activism worry that court decisions that so freely "interpret" the meaning of the Constitution will undermine public confidence in and respect for the courts. Justice Byron R. White wrote in *Bowers v. Hardwick* (1986), "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable [knowable] roots in the language or design of the Constitution."

In addition, critics point out that federal judges are not elected; they are appointed for life terms. As a result, when judges begin making policy decisions about social or political changes society should make, they become unelected legislators. Consequently, the people lose control of the right to govern themselves. Further, unlike legislatures, courts are not supposed to be open to influence from interest groups. As a result, the courts may not hear different points of view on complex social issues. In legislatures, by contrast, elected officials are responsive to such interests.

Finally, opponents of judicial activism argue that judges lack special expertise in handling such complex tasks as running prisons, administering schools, or determining hiring policies for businesses. Judges are experts in the law, not in managing social institutions.

Opponents of judicial activism point to the constitutional principle of separation of powers (the division of power among the executive, legislative, and judicial branches of the federal government) and federalism (the division of power between the states and the federal government) to justify judicial restraint. They claim that judicial activism leads to unconstitutional intrusions of federal judicial power into the duties and powers of the executive and legislative branches of government and into the state governments. In *Griswold v. Connecticut* (1965), Justice John M. Harlan wrote, "Judicial self-restraint... will be achieved... only by continual insistence upon... the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms."

Arguments for judicial activism Supporters of judicial activism argue that it is necessary to correct injustices and promote needed social changes. They view the courts as institutions of last resort for those in society who lack the political power to influence the other branches of government.

Supporters of judicial activism point out that the courts often step in only after governors and state legislatures have refused to do anything about a problem. For example, neither state legislatures nor Congress acted to ban racially segregated schools, trains, city buses, parks, and other public facilities for decades. Segregation might still exist legally if the Supreme Court had not declared it unconstitutional in 1954.

Supporters of judicial activism also mention that local courts and judges are uniquely qualified to ensure that local officials uphold the guarantees of the Constitution. In fact, with a few exceptions, district court judges have written most of the

decisions affecting local institutions. For example, an Alabama judge took over the administration of the prison system in that state because he decided that the conditions in the prisons violated the Constitution's prohibition of "cruel and unusual punishments." Similarly, a Texas judge, a man born and raised in the Lone Star State, ordered sweeping changes in the Texas prison system. And a Massachusetts judge, himself a Boston resident, ordered massive school desegregation in that northern city. In each case, the district judge adopted an activist solution to a problem. But each pursued an activist course because he felt that only such measures would enforce the dictates of the Constitution.

Judicial activists argue that the courts do not create policy as legislatures do. Judges inevitably shape policy, however, as they interpret the law. And, they argue, interpreting the law is the job of the courts. Chief Justice Earl Warren put it this way: "When two [people] come into Court, one may say: 'an act of Congress means this.' The other says it means the opposite. We [the Court] then say it means one of the two or something else in between. In that way we are making the law, aren't we?"

Finally, judicial activists argue that the framers of the Constitution expected the courts to interpret the Constitution actively in order to react to new conditions. As Justice Frank Murphy wrote in *Schneiderman v. United States* (1943), "The constitutional fathers, fresh from a revolution, did not forge a political strait-jacket for the generations to come."

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**Montana Citizens Guide to the Courts:**

<http://www.restoring-america.com/Documents/Guide%2520to%2520Montana%2520Courts.pdf>