Judicial Activism vs. Judicial Restraint

Rachel Totten Keith

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Dr. Michelle Payne, J.D.

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Dr. Michelle Payne
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Judicial Activism vs Judicial Restraint: Ambiguity on the Political Front

I thought judicial activism meant when a judge makes a ruling that interprets a law according to his or her personal political beliefs that may even be considered "legislating from the bench." My research proves this is just one of the many definitions of judicial activism in use today and that its use has become (arguably) a pejorative term used by both sides of the political spectrum when questioning judges' decisions, specifically, the Supreme Court's decisions.

According to attorney and policy analyst Arlene M. Roberts, Black's Law defines judicial activism as

> a philosophy of judicial decision-making whereby judges allow their persona; views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent.

So, according to this definition, if a judge dissents, then he or she could be accused of judicial activism.

"Judicial restraint is the idea that judges should defer to the will of lawmakers whenever possible, turning to the U.S. Constitution on only the rarest of occasions in order to nullify a duly-enacted law," according to Damon Root, senior editor of *Reason* magazine and author of the book *Overruled: The Long War for Control of the U.S. Supreme Court*. So, according to this definition, judicial restraint is when a judge goes with the majority and agrees the law enacted by Congress or the President or precedent is lawful.

So, if one is accused of judicial activism only according to how one votes, not according to how one believes, then what is the big deal? And how can you predict how one judge is going to vote versus another? And if the Supreme Court is going to defer to lawmakers and their decisions ultimately in the spirit of true democracy, then what is the point of the Supreme Court? Isn't the purpose of the Supreme Court defined nicely in the Constitution, further, defined in *Marbury v. Madison*? "The Supreme Court can and should declare what the law is, even in difficult or politically sensitive cases" (Kmiec 1466).

"'Judicial restraint' could refer to confining oneself to following the meaning of the text of the Constitution (and of statutes) — by which is meant its original meaning — whether this leads to upholding or invalidating properly enacted statutes," writes Georgetown Law Professor Randy Barnett in *The Washington Post*. He calls this judicial *constraint*.

In the case of the Affordable Care Act, or *National Federation of Independent Business v. Sebelius*, Chief Justice Roberts was considered to have used judicial restraint when he deferred to the law enacted by Congress in 2010, which is what he promised to do when sworn into the Supreme Court as Chief Justice in 2005. This is funny to me, because he voted in support of legislation that is typically unpopular with conservative voters, who also prefer judges that rule on the side of *restraint*. But one could also say that finding the Affordable Care Act another means of Congress levying taxes is a stretch and could be considered judicial activism according to my first definition.

In the legalization of gay marriage, or *Obergefell v. Hodges*, many consider the Supreme Court's finding that state-level bans on issuing marriage licenses to gay couples was unconstitutional. This overturned a precedent set in 1971, *Baker v. Nelson*. The Supreme Court also struck down the Defense of Marriage Act in 2013 that had been in place since 1996. Both of these acts of the Supreme Court have been criticized as judicial activism, as have many civil rights cases, including desegregation of public schools in *Brown v. Board of Education of Topeka*, which overturned *Plessy v. Ferguson*. It is precisely this act of overturning precedent that many find to be the defining term of judicial activism, especially in cases of evolution of thought, as our Constitution and laws are perceived as being timeless.

But is it really activism in the case of correcting an unconstitutional law? Chief Justice Roberts says no. Referring to Brown v. Board, Roberts said regarding stare decicis "the Court in that case, of course, overruled a prior decision. I don't think that constitutes judicial activism because obviously if the decision is wrong, it should be overruled. That's not activism. That's applying the law correctly" (qtd. in *Wikipedia*).

So, depending on who is talking and who they are talking about, what constitutes judicial activism is going change according to the speaker's political beliefs and if they want to throw suspicion on the legitimacy of that judge's ruling. This is unfair as we have seen by the difference in definition that can be applied. It appears that depending on the view you take, one term can be used interchangeably for the other, depending also on your purpose.

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