

Judicial Activism vs. Judicial Restraint:

A Closer Look at the Bork Nomination

During the summer and fall of 1987 more public attention has been focused on the professional responsibility of judges than in any period of recent memory. The confirmation battle surrounding Judge Robert H. Bork's appointment to the Supreme Court and his subsequent defeat have provoked a national debate about the professional standards of the judiciary. Nothing in the Bork nomination process can compare in importance to the Senate hearings, perhaps the first nationally televised seminar on judicial responsibility in our history. The centerpiece of those hearings was the testimony of Judge Bork himself, and the key issue in that testimony, to which the interlocutors returned again and again, was the debate over judicial activism and judicial restraint.

What Is "Judicial Activism"?

The terms "judicial activism" and "judicial restraint" have been staples of our political vocabulary for decades. They are used frequently, sloppily, and in a sloganeering fashion, and the first question that confronts us is whether they still mean anything at all (assuming they ever did). One cynical answer is that their meaning is all too clear: in current political discourse "judicial activist" is a euphemism for "liberal," "judicial restraint" for "conservative." Perhaps this is so; but such a narrow and partisan political reduction of the debate should be condemned. Talk of judicial activism and judicial restraint pretends to be about principle, not party politics. If the "principles" one appeals to are merely code-names for partisan positions, however, the aspiration to principled argument is a sham, a charade of high-mindedness.

It is, moreover, a charade that can hope to succeed only if the key terms "activism" and "restraint" at one time possessed some other, relatively non-partisan, and explicitly jurisprudential meaning that the current political debate is aping. It is that other meaning that we urgently need to understand.

The basic problem is that the terms do not have just one meaning; in our recent history alone it is possible to find at least seven different, only partially overlapping, uses of the term "judicial activism."

1. Particularly in the 1960s and 1970s, accusations of judicial activism were hurled in connection with the broad use by federal trial judges of their injunctive power to effect so-called "structural remedies" for constitutional violations. The most notorious and divisive structural remedy was court-ordered school busing and (more generally) court-supervised school desegrega-

tion. But structural remedies were also used to implement prison reform as a cure for Eighth Amendment violations, as when federal Judge Frank Johnson took over the entire Alabama prison system, and for other purposes as well.

2. This first sense is commonly confused with over-eagerness to strike down legislation on constitutional grounds. Actually they are very different. Structural remedies don't respond just to unconstitutional legislation, but also to other illegal practices that officials are unwilling to reform; and conversely, aggressive constitutional review implies nothing about the kind of remedy a judge chooses.

3. Aggressive constitutional review of legislation is itself frequently confused with judges creating new constitutional rights. The latter charge is a particularly bitter one, often leveled against the Warren Court by its critics; it surfaced frequently in the Bork hearings. Yet of all the meanings commonly attached to the term "judicial activism," this is the least useful and coherent. The reason is that talk of "new rights" simply begs the question. Any time a novel legal question appears before the Supreme Court, the winner emerges with a right that has never been explicitly declared before. If that is all that is meant by "new rights," the Court could avoid creating them only by going out of business. "New rights" must therefore mean something more like new general rights, such as the right to privacy. But the Court's opinion will attempt to show why even the "new" general right was implicit in prior law, and hence was *not* a novelty.

Thus, the criticism claiming that a court has engaged in creating new rights must simply be a confused way of saying that these rights were not implicit in the law, that is, that the judge interpreted the law incorrectly. If that is what is meant, why not just say so? It should be clear, moreover, that mistaken interpretation of the law is a danger that any judge can stumble into, including proponents of judicial self-restraint.

4. The most prominent meaning of "judicial activism" in the Bork hearings had to do with the theory of constitutional interpretation. A judicial activist in these terms is a judge who engages in making constitutional law that cannot be firmly tied to clear constitutional language or to the intent of the Framers. And Judge Bork insisted that he is a proponent of judicial restraint because he would not do this; instead he would interpret the Constitution by appealing to original intent. The debate between non-originalism (or, as lawyers call it, "non-interpretivism") and originalism

is thus another meaning of judicial activism versus judicial restraint, clearly distinct from the three we have just canvassed.

5. Non-originalism is in turn often confused with substituting the judge's own morality for the law. Clearly they are different. To say, as the non-originalist does, that constitutional interpretation must appeal to information or values not explicit in the language or the Framers' intent in no way suggests that those values must come from the judge's own morality. Some non-originalists tell the judge to look to community morality, or tradition, or to the evolving state of the law, all of which might be alien to the judge's own morality.

6. Seventh Circuit Judge Richard A. Posner has proposed another meaning for judicial activism/judicial restraint in his award-winning book *The Federal Courts*. For Judge Posner, judicial restraint should be defined as the attempt to limit the power of the courts over other governmental institutions while judicial activism is the attempt to increase the power of the courts vis-a-vis the other branches. Non-originalism and "the judge's own morality" can be pressed into the service of either activism or restraint as Posner understands these.

7. Last (and least), some critics equate judicial activism with result-oriented judging, that is, tailoring legal principle to fit the judge's prior convictions about how he wants the case to come out. But this is simply abusive: it equates judicial activism with prejudice or with infidelity to law.

Evaluating Judicial Activism

Is activism a bad thing? As our discussion so far

should make clear, that will depend on what you mean by "activism." We can simplify the problem by considering just three principal meanings of "activism": Judge Posner's notion of courts increasing their own power over other governmental institutions; non-originalist constitutional interpretation; and moralistic judging.

Judge Posner thinks that we need judicial restraint today because activist decisions, in his sense, cannot meet a "publicity test" he proposes: "a decision is principled if and only if the ground of decision can be stated truthfully in a form the judge could publicly avow without inviting virtually universal condemnation by professional opinion." And, Judge Posner believes, no judge could come right out and say that he or she was attempting to increase the power of the courts over other governmental institutions.

Here Posner appears to have blurred the distinction between the *aim* of a decision and its *side-effects*. It is true that no judge could publicly avow that he had decided a case *in order* to enhance the power of the courts—we do not easily tolerate judicial empire-building. But more typically the enhancement of judicial power over other institutions is not the aim or ground of decision—it is an incidental side-effect. Judge Johnson did not run the Alabama prison system for the sake of running the prison system, but because officials refused to correct constitutional violations: that, not a desire to grab power, was the ground of Johnson's decision. And so it is in the end unclear that judicial activism emerging merely as a by-product of the courts' decisions fails the publicity test after all.

While other stronger arguments on behalf of judicial restraint could be offered, Posner himself is quite con-



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"If you please, Mr. Justice, would you mind not saying, 'Of course we could be wrong?'"

vincing in rebutting many of them. He points out that judicial activism does not make big government bigger, since the courts' extra power comes at the expense of other governmental branches; that even though courts are not majoritarian or representative institutions, this shows only that it is a mistake to think of our constitutional system as majoritarian and representative, since the Constitution obviously created the courts; and that while courts are not very good at running institutions such as prisons, other branches of government may not be any better. At best, "judicial self-restraint is a contingent, a time-and-place-bound, rather than an absolute good," because in some historical situations the other branches of government are badly in need of checks and balances while in others they are not.

Original Intent

What of the debate between non-originalism and originalism, which figured so prominently in the Bork hearings? Originalists, recall, insist that vague constitutional provisions be filled in by appealing to the intent of the Framers, whereas non-originalists will look to values or information found elsewhere, for example in our present-day moral understanding.

At first glance, originalism seems very persuasive, little more than insisting that when you read an eighteenth-century novel and come across an unfamiliar word you should look it up in an eighteenth-century dictionary rather than a contemporary Webster's. For what is a document other than the concrete expression of its authors' intentions?

Nevertheless, there are powerful objections to appealing to Framers' intent. The primary problem is an obvious one. Even if we can find out what individual Framers intended, how can we figure out the "group intention" of the Framers as a collective body? There is no such thing as a group mind, and we may suspect that there is no such thing as a group intention either. To construct a group intention out of information about

can be determined only by making a lot of conventional or even arbitrary choices. But that proves that the originalist, no less than the non-originalist, is incapable of answering a constitutional question without importing a lot of contemporary theoretical baggage into the enterprise. And we are likely to be a lot more confident about the values the non-originalist appeals to,

To construct a group intention out of information about individual intentions we will need some rule of combination. Do we count the intentions of Framers who opposed a measure? What of those who supported it but only as a regrettable compromise?

such as our contemporary moral understanding, than we are about how to answer the various questions concerning group intentions. So the originalist may well turn out to be marching us onto a shakier and more controversial limb than the non-originalist.

An even more devastating problem for the originalist arises from the fact that Framers' intentions can be concrete or general, and these may be incompatible. Take a simple example based on the Seventh Amendment guarantee of a jury trial for civil matters involving more than \$20. On its face, nothing could be clearer. But suppose we ask whether we should interpret this in 18th-century dollars or today's dollars. In today's dollars the amount of money would be much higher.

Let us try to answer the question by appealing to Framers' intent. Their *concrete* intent could not be clearer: to guarantee jury trials if more than \$20 was at issue. But their *general* intent might have been this: to make sure that jury trials would be available when the amount at issue was significant, but to permit courts or legislatures to deny jury trials for trivial disputes. For at the close of the 18th century \$20 was a significant amount of money. Nowadays, however, a \$20 litigation is almost too trivial even for small claims court; so if we respect the Framers' concrete intention we violate their general intention, and vice-versa.

If this sounds far-fetched, please remember that Judge Bork invoked the same argument in his testimony. Senator Specter asked whether, given his commitment to originalism, Judge Bork would have had to vote against the *Brown* decision, since the historical evidence suggests that the framers of the Fourteenth Amendment did not intend it to preclude school segregation. Judge Bork replied that their *general* intention was to ban race discrimination; their *particular* belief was that separate-but-equal was not invidious race discrimination; but, since we are convinced that they were wrong about the particular belief, we respect their general intention by rejecting their concrete intention.

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individual intentions we will need some rule of combination. Do we count the intentions of Framers who opposed a measure? What of those who supported it but only as a regrettable compromise? Or because of log-rolling? As Ronald Dworkin points out, moreover, it seems up for grabs whether to count a Framer's *hopes* or his *expectations* about how a clause will be interpreted as his intentions. The moral is that "Framers' intent"

Now, in fact this line of argument amounts to abandoning originalism—first because it picks and chooses among the historical views of the Framers, taking some seriously while rejecting others, but second because it seeks a general intention, an overarching idea that is largely independent of the historical minutiae. How do we determine the general intention of a provision? The best evidence, it seems, is in the language of the provision itself, understood in such a way as to yield a plausible general principle. We reconstruct the Framers' general intention, that is, by finding the most reasonable reading of their language we can; but at this point originalism has simply become non-originalism, and the debate is over. For now we see that even the originalist must interpret ambiguous constitutional language in such a way that it seems most reasonable.

Most reasonable to whom? Isn't this simply smuggling in the judge's own values? A first reply to this ultimate objection is that the alternative to the judge interpreting vague language according to his or her own standards of what is most reasonable is the judge interpreting vague language according to his or her own standards of what is *less* reasonable—and that seems merely perverse.

A more satisfactory reply is that it is indeed wrong for judges simply to cite some value as though it were an authority like a statute or prior case: that would be usurpation. Rather, a judge shows that a principle is reasonable by reasoning to it rather than from it—by argument rather than by fiat.

Can values be established by argument, by reason? Well, we do argue with others about questions of value, and sometimes we even persuade or are persuaded. That suggests that the answer is yes. Some, however, including Judge Bork, deny that values are susceptible to reasoned discourse. In his best-known work of constitutional theory, Bork wrote: "There is no principled way to decide that one man's gratification is more worthy than another's or that one form of gratification is more worthy than another. . . . [T]he judge has no basis other than his own values upon which to set aside the community judgment embodied in the statute. That, by definition, is an inadequate basis for judicial supremacy."

Can value-judgments be the conclusions of reasoned arguments, or are they simply expressions of "gratification," the brute fact that one thing pleases me and another does not? This is the oldest, and perhaps still most unsettled, question of moral philosophy. It is a surprising yet reassuring fact that the issue of judicial activism, on its surface an intensely practical matter of public concern, may ultimately turn on this subtle and disturbing question of moral theory. Surprising, because we do not often expect that theory will matter so much; reassuring, because it convinces us that even apart from its undeniably crucial political aspect, the public debate over judicial activism turns on a matter of perennial importance.

—David Luban

Excluding the Elderly: A Reply to Callahan

Setting Limits: Medical Goals in an Aging Society (New York: Simon and Schuster, 1987) is the latest word on how to treat the problem of geriatric care for growing ranks of older Americans. In this thought-provoking and ambitious book, Daniel Callahan defends a proposal to disenfranchise the elderly from government support for life-extending medical services once they have reached a natural life span. The proposal includes two key components: first, persons who have attained a natural life span are not entitled to receive government-financed life-extending medical treatment; second, once a natural life span is reached, government should only pay for medical care devoted exclusively to improving quality of life by relieving pain and suffering.

The springboard for Callahan's discussion is an indictment of contemporary culture, which he thinks fails to furnish a true picture of the meaning and

significance of old age and death. Some, the "modernizers of old age," believe that the physical processes of aging should be aggressively resisted and that the aged ought to remain actively involved in life and persistently struggle against decay and demise. This group is galvanized by the medical profession and the impressive biomedical technology it flaunts. A closely aligned group, the "anti-ageists," deplore the ageism of social policies that exclude the old. Demanding "age equity," they aim to remove the social and political obstacles to carrying out the modernizers' mission.

According to Callahan, both modernizers and anti-ageists are motivated by an idealized picture, which casts old age as "a kind of endless middle age." This suggests to Callahan that their goal is not modernizing old age but banishing it and in the process dismissing the important questions we as a society need to address: e.g., what is the significance of old age? what