Is Judicial Activism Bad?

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Introduction

My essay *Fundamental Rights Under Privacy in the USA,* at http://www.rbs2.com/priv2.pdf shows that the continued existence of some privacy rights (e.g., abortion) *and* the expansion of privacy rights (e.g., right to die and physician-assisted suicide) are both threatened by the recent appointment of federal judges who promise to interpret the U.S. Constitution strictly according to the original intent/meaning of its authors.

During the years 2004-2005 there has been a steady chorus by a few politicians in the U.S. Congress who condemn so-called "judicial activism"[1] by liberal judges who departed from the original meaning of the U.S. Constitution. I believe that these politicians' recent criticisms of judicial activism are just code words that pretend to provide a rational justification for the politicians' disagreement with the holdings in *Roe v. Wade,* as well as recent judicial attempts to give equal legal rights to homosexuals. Their criticism of liberal judges is partly political opinion and partly propaganda that does not withstand critical scrutiny, as explained below.

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[1] The first use of the phrase "judicial activism" has been traced back to Arthur M. Schlesinger, Jr., "The Supreme Court: 1947," *Fortune,* at 202, 208 (Jan 1947). Keenan D. Kmiec, Comment, "The Origin and Current Meanings of 'Judicial Activism'," 92 *California Law Review,* 1441, 1446, n. 22 (Oct 2004).

Because the phrase "judicial activism" is propaganda, it does not have a precise meaning, but is only intended as a criticism of so-called activist judges who allegedly misinterpret the U.S. Constitution. According to the various politicians and judges who use the phrase "judicial activism", there are three different proper ways of interpreting the Constitution:

1. "original intent" of the authors of the Constitution.
2. "original meaning" of the words in the Constitution, what the words meant to a reasonable person in the year 1790.
3. "strict construction" interprets the words in the Constitution literally, and tends to ignore historical documents about the intent of the authors.

These three methods do not always yield the same result, as briefly explained below, at page 7.

Originalism is Too Rigid

Insisting that the U.S. Constitution always be interpreted according to the original intent or original meaning of its authors is both *un*reasonable and too rigid, for the following four reasons.

1. U.S. Constitution is terse and *in*complete.

First, the U.S. Constitution is a rather terse document, containing 4611 words in the text plus an additional 482 words in the first ten amendments. It would be remarkable that such a terse document would specifically address *every* problem to arise in the next two hundred or three hundred years. There are a number of "unenumerated rights", which the U.S. Supreme Court has recognized as fundamental, but which are *not* explicitly mentioned in the Constitution: not only the various privacy rights,[2] but also the freedom to travel inside the U.S.A,[3] and the freedom of association.[4]

The Fourth Amendment prohibits "unreasonable searches and seizures". This constitutional language is vague, and the meaning of "unreasonable" must be interpreted by judges, according to a standard *not* mentioned in the Constitution.

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[2] Ronald B. Standler, *Fundamental Rights Under Privacy in the USA,* http://www.rbs2.com/priv2.pdf (Aug 1998).

[3] Ronald B. Standler, *Legal Aspects of Searches of Airline Passengers in the USA,* http://www.rbs2.com/travel.pdf (Dec 2004).

[4] *National Association for Advancement of Colored People v. State of Alabama ex rel. Patterson,* 357 U.S. 449, 462, 466 (1958); *Bates v. City of Little Rock,* 361 U.S. 516, 522-523 (1960); *Gibson v. Florida Legislative Investigation Committee,* 372 U.S. 539, 892-893 (1963); *Roberts v. U.S. Jaycees,* 468 U.S. 609 (1984); *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000).

2. U.S. Constitution is *not* always literally true.

Second, it is widely recognized that parts of the Constitution can *not* reasonably be interpreted literally. For example, a literal reading of the absolute prohibition against "abridging the freedom of speech" in the First Amendment would — ridiculously — prohibit punishing perjurers.[5] The U.S. Supreme Court has recognized numerous exceptions to the warrant requirement in the Fourth Amendment. The terse, general expression in part of the Constitution was necessary to get a consensus for the approval of the Constitution. If the Constitution had been specific and detailed, then every constitutional delegate, and every subsequent voter, would have found something that was objectionable, leading to delays and an eventual stalemate. One simply must trust that courts can interpret the Constitution properly, providing the detailed guidance needed by an evolving society.

3. U.S. Constitution was product of an old era.

Third, the U.S. Constitution was ratified in the year 1788 and the first ten amendments were ratified in the year 1791, when the United States was an agrarian economy. Since then, there have been numerous technological innovations that have created legal controversies that were *un*imagined by the authors of the Constitution. For example, effective contraceptive technology (e.g., vulcanized rubber condoms, diaphragms) was invented approximately one hundred years after the Constitution was written, so it is impossible for the authors of the Constitution to have an opinion about the legal right of people to use contraception. The telephone was invented long after the Constitution was written, so it is impossible for the authors of the Constitution to have an opinion about the legal right of government to wiretap telephones.[6] And since about 1950, modern medical technology has given man the ability to prolong dying for months or years, which creates a need for the legal right to die[7] and the legal right to physician-assisted suicide.[8] In contrast, the authors of the Constitution lived at a time when people got sick or injured and simply died a few days later, so they did not need such rights.

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[5] Ronald B. Standler, *Information Torts,* http://www.rbs2.com/infotort.htm (Feb 1998).

[6] Ronald B. Standler, *Response of Law to New Technology,* http://www.rbs2.com/lt.htm (May 1997).

[7] Ronald B. Standler, *Annotated Legal Cases Involving Right-to-Die in the USA,* http://www.rbs2.com/rtd.pdf (April 2005).

[8] Ronald B. Standler, *Annotated Legal Cases on Physician-Assisted Suicide in the USA,* http://www.rbs2.com/pas.pdf (May 2005).

Moreover, some of the authors of the U.S. Constitution — even enlightened men like Thomas Jefferson — owned slaves. Slavery became *un*constitutional only in the year 1870 (the 15th Amendment). And the U.S. Constitution was amended to permit women to vote only in the year 1920 (the 19th Amendment). If the original authors of the U.S. Constitution were wrong about black people and women, how many more mistakes did those original authors make? Interpreting the Constitution according to the original intent of the authors, or the original meaning of the words, leaves modern constitutional law stuck in the year 1790, in an antique era that was very different from modern society.

4. Judiciary is an Equal and Independent Branch of Government.

Fourth, there are three separate branches of government in the USA: (1) the executive, (2) the legislative, and (3) the judiciary. As is well known, there are an elaborate system of checks and balances on each branch of government by the other two branches, to prevent any one branch from becoming too powerful. There is no doubt by politicians in the executive and legislative branches that *they* can be creative. However, some politicians — when criticizing "judicial activism" by liberal judges — seem to deny judges the power to create new law, in response to social or technological change. As shown in the previous paragraphs, it is *un*reasonable to insist that the Constitution is either complete, can be interpreted literally, or can always be interpreted according to the original intent of the authors of the Constitution back in the year 1790. It is the *duty* of judges to develop the common law and interpret the Constitution.

Furthermore, looking at a history of constitutional law, one sees that so-called "activist judges" often had the courage to end *in*justices that were perpetrated by the other two branches of government. Indeed, because the politicians in the other two branches are both elected, those politicians often lacked the courage to confront bigotry, repression, or religious zeal of their constituents. That makes the federal judiciary, with its lifetime tenure, an important check and balance on the politicians in the two elected branches of government.

Quotations from U.S. Supreme Court Cases

Because quoting from opinions of the U.S. Supreme Court to justify their expansive reading of the U.S. Constitution is potentially a circular mode of reasoning, I refrain from providing a long list of quotations from justices of the U.S. Supreme Court. However, it is appropriate to remember the comments of a few justices at the time they were initially expanding privacy rights.

In the year 1961, the majority of justices at the U.S. Supreme Court refused to hear a case, *Poe. v. Ulman,* involving a state statute that prohibited the sale of contraceptives. Justice Harlan

wrote an eloquent dissent in *Poe* that later became the foundation[9] for the majority opinions in various cases involving privacy rights. Here is a brief quotation from Justice Harlan's dissent in *Poe:*

> Again and again this Court has resisted the notion that the Fourteenth Amendment is no more than a shorthand reference to what is explicitly set out elsewhere in the Bill of Rights. [citations to seven cases omitted] Indeed the fact that an identical provision limiting federal action is found among the first eight Amendments, applying to the Federal Government, suggests that due process is a discrete concept which subsists as an independent guaranty of liberty and procedural fairness, more general and inclusive than the specific prohibitions. [citations to six cases omitted]
>
> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.

Poe v. Ullman, 367 U.S. 497, 541-542 (1961) (Harlan, J., dissenting).

Second paragraph quoted with approval by the majority opinions in *Moore v. City of East Cleveland, Ohio,* 431 U.S. 494, 501 (1977) (plurality opinion); *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 849-850 (1992).

There is another two paragraphs from Justice Harlan's dissent in *Poe* that has been frequently quoted:

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.
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> It is this outlook which has led the Court continuingly to perceive distinctions in the imperative character of Constitutional provisions, since that character must be discerned from a particular provision's larger context. And inasmuch as this context is one not of words, but of history and purposes, the full scope of the liberty guaranteed by the Due Process Clause

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[9] See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 849 (1992); *Washington v. Glucksberg,* 521 U.S. 702, 756, n. 4 (1997) (Souter, J., concurring).

> cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, see [citations to six cases omitted] and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment. [citations to two cases omitted]

Poe v. Ullman, 367 U.S. 497, 542-543 (1961) (Harlan, J., dissenting).

Justice Harlan's remark about there being no formula for due process was quoted with approval in the following opinions of the U.S. Supreme Court: *Moore v. City of East Cleveland, Ohio,* 431 U.S. 494, 501 (1977) (plurality opinion); *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 849-850 (1992). Justice Harlan's remark about freedom from "purposeless restraints" was quoted with approval in the following opinions of the U.S. Supreme Court: *Moore v. City of East Cleveland, Ohio,* 431 U.S. 494, 502 (1977) (plurality opinion); *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 848 (1992).

Conclusion

There is a small set of U.S. Supreme Court opinions that nearly everyone now believes were wrongly decided.[10] There is a larger set of U.S. Supreme Court opinions that offend many liberals. There is another set of U.S. Supreme Court opinions that offend many conservatives. It is all right to disagree with opinion(s) of the U.S. Supreme Court. Indeed, it is inevitable that decisions rendered by human judges will sometimes be erroneous. Having nine justices on the U.S. Supreme Court, helps prevent errors that a single judge acting alone, might make, but history shows that even a majority of five or more judges can sometimes make erroneous rulings.

But, as argued above in this essay, judges sometimes need to make new law, and judges have the right to be creative in ways perhaps not intended by the authors of the U.S. Constitution. Condemning so-called "judicial activism" is propaganda that is not supported by critical thinking. To answer the question posed in the title of this essay, judicial activism can be appropriately used by both conservative judges and liberal judges, to settle disputes fairly and to protect freedom of minorities.

I believe that freedom and liberty are fundamentally Good, even if many individual people will misuse their freedom. One of the founding values of the USA was a distrust of government and a trust in individual people. Those founding values can continue in the future, only if "activist judges" have the courage to stop the majority (or stop a minority with substantial political power) from imposing restrictions on a minority, in the name of religious conformity, bigotry, or

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[10] For example, *Dred Scott v. Sandford,* 60 U.S. 393 (1856); *Plessy v. Ferguson,* 163 U.S. 537 (1896); *Olmstead v. U.S.,* 277 U.S. 438 (1928); *Toyosaburo Korematsu v. U.S.,* 323 U.S. 214 (1944).

repression. For those reasons, I favor a continuation of existing privacy rights and an expansion of new privacy rights, to limit the power of government and to preserve freedom for individual people.

Further Reading

In looking at webpages on the Internet, I found one webpage that contained a good example differentiating strict constructionist, original intent, and original meaning:

> Suppose that a Constitution contained (which it obviously does not) a provision that a person may not be "subjected to the punishments of hanging by the neck, beheading, stoning, pressing, or execution by firing squad". A Strict Constructionist would likely interpret that clause to mean that the *specific* punishments mentioned above were unconstitutional, but that other forms of capital punishment were not [unconstitutional].
>
> However, ... one originalist would look at the context in which the clause was written, and might discover that the punishments listed in the clause were the *only* forms of capital punishment in use at that time, and the only forms of capital punishment that had *ever* been used at the time of ratification. Faced with the same problem, this originalist might therefore conclude that capital punishment *in general* — including those methods for it invented since ratification, such as the electric chair — was unconstitutional.
>
> Another originalist may look at the text and see that the writers created a list. He would assume that the Congress intended this to be an exhaustive list of objectionable executions. Otherwise, they would have banned capital punishment as a whole, instead of listing specific means of punishment. He would rule that other forms of execution are constitutional. This is why many originalists can come to completely different conclusions.

http://en.wikipedia.org/wiki/Original_Intent Quotation made on 12 Oct 2005, the Wikipedia is an evolving document and may change.

Scholars of constitutional law have examined the history of the writing of the U.S. Constitution and found that there is often no single intent by the authors of that Constitution, because the authors were a diverse group of men. That finding dooms the "original intent" method of interpretation. What remains is the "original meaning" method, which is sometimes called the *interpretivist* method.

Scholarly treatises on constitutional law commonly contain chapters on various ways of interpreting the constitution. For example, Ronald D. Rotunda & John E. Novak, *Treatise on Constitutional Law,* Chapter 23 (2d Ed. 1992). Law reviews contain many articles on the topic of how the U.S. Constitution should be interpreted. The following articles are particularly excellent:

- John Hart Ely, "Constitutional Interpretivism: Its Allure and Impossibility," 53 Indiana Law Journal 399 (Spring 1978). Also Ely's subsequent book, *Democracy and Distrust,* Harvard University Press (1980)

- Paul Brest, "The Misconceived Quest for the Original Understanding," 60 Boston University Law Review 204 (March 1980).

- Terrance Sandalow, "Constitutional Interpretation," 79 Michigan Law Review 1033 (April 1981).

- H. Jefferson Powell, "The Original Understanding of Original Intent," 98 Harvard Law Review 885 (March 1985).

This document is at **www.rbs0.com/judact.pdf**
My most recent search for court cases on this topic was in September 2005
first posted 29 Sep 2005, on the day that John Roberts became Chief Justice of the U.S. Supreme Court.
revised 21 Oct 2005