4.19: Judicial Activism / Judicial Restraint

AP U.S. GOVERNMENT
The justices must interpret the Constitution in regards to the issue. They must decide what the language means of an act. In a way, justices are “making” law when deciding how it applies to actions (not addressed by Congress).
What is the most powerful policy tool?

- Tools:
  - Judicial review: declaring if laws are Constitutional or not
  - can change the path of a nation (Dred Scott v. Sanford)
  - can springboard civil rights (Brown v. Board)
The Idea of Judicial Review

- Only in the United States do judges play so large a role in policy-making.
- Judicial Review: the right of the federal courts to rule the constitutionality of laws and executive actions.
  - Chief judicial weapon in the checks and balances system.
  - Since 1789, the Supreme Court has declared over 160 federal laws unconstitutional.
Judicial Philosophy

- Early days, argument was about strict construction vs. loose construction
- Today it is on activism or restraint
Debate: How should the Constitution should be interpreted?

1. Strict Constructionist: judges are bound by wording of the Constitution = judicial restraint

2. Activist/Loose Constructionist): judges should look to underlying principles of Constitution = judicial activism

3. Not a matter of liberal versus conservative
   a. A judge can be both conservative and activist, or liberal and strict constructionist
   b. Today: most activists tend to be liberal, most strict constructionists tend to be conservative
Judicial Activism
Judicial Activism

- **Judicial activism** is the term used to describe the actions of judges who go beyond their constitutionally prescribed duties of applying law to the facts of individual cases, and "legislate" from the bench.

- These judges create new constitutional rights, amend existing ones, or create or amend existing legislation to fit their own notions of societal needs.
Judicial Activism

A. Philosophy that the courts should take an active role in solving society’s problems.

B. Courts should uphold the “guardian ethic:” they act as a guardian of the people.

C. Examples of judicial activism:
   1. Striking down a Texas law that banned flag burning (Texas v. Johnson, 1989) and then striking down a congressional law that banned flag burning (US v. Eichmann)
Debates about Judicial Activism

- Detractors of judicial activism charge that it usurps power of the legislature, thereby diminishing the rule of law and democracy. They argue that an unelected judicial branch has no legitimate grounds to overrule policy choices of duly elected representatives, absent a real conflict with the constitution.

- Defenders of judicial prerogatives say that many cases of "judicial activism" merely exemplify judicial review, and that courts must uphold the constitution and strike down any statute that violates the constitution. They say that it is the duty of courts to protect minority rights and to uphold the law, notwithstanding the political sentiments of the day, and that constitutional democracy is far more than just majority rule.
Judicial Philosophy

- Protection is justices job! *(Ex: look at how long it took to overturn separate, but equal!)*
- Court needs to be watchdog
  - striking down death penalty cases for mentally retarded
  - striking down TX law that banned flag burning
- *Texas v. Johnson (1988)*
Views of Judicial Activism

Supporters

a. Courts should correct injustices when other branches or state governments refuse to do so

b. Courts are the last resort for those without the power or influence to gin new laws

Critics

a. Judges lack experience in designing and managing complex institutions
   - schools, prisons, etc

b. Initiatives require balancing policy priorities and allocating public revenues

c. Courts are not accountable because judges are not elected
   - Takes “we the people” out of the equation; immune to popular control.
Judicial Restraint
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- **Judicial restraint** is a theory of judicial interpretation that encourages judges to limit the exercise of their own power.
  - It asserts that judges should hesitate to strike down laws unless they are obviously unconstitutional. It is sometimes regarded as the opposite of judicial activism.
Judicial Restraint

A. Philosophy that the courts should allow the states and the other two branches of the federal government to solve social, economic, and political problems.

B. Federal courts should act only in those situations where there are clear constitutional questions. They should otherwise defer to elected lawmakers.

C. Courts should merely interpret the law rather than make law.

D. Suggests that the courts should follow original intent of Founders: decide cases on basis of what the Founders wanted.
In the area of Constitutional Law, a judicially restrained judge will first look to the language of the Constitution for guidance. Should the language be unclear, the judge would try to define the intent of the Framers of the Constitution in order to decide how best to apply that intent. Finally, if the intent of the Framers in a given area of Constitutional Law remains unclear, the restrained judge will defer to what he or she thinks the Framers meant and try to expand the least on what is considered Framers' intent. By doing so, the judicially restrained judge takes great care to defer to constitutional language or, failing that, to the intent of the Framers of the Constitution. This form of judicial review invites the least amount of "invention" in constitutional law, something a restrained jurist always tries to avoid.
Judicial Restraint

- Want to leave the development of new policies to others (2 branches & states)
- Not their responsibility (areas like affirmative action, state law)
- Facilitate, don’t interfere
  - Courts ruled ag. Constitutional right of assisted suicide
Restraint vs. Activism / Strict vs. Loose
Judicial Self-Restraint vs. Activism

- Today these conflicting (and enduring) postures are sometimes characterized as
  - **Strict construction / original intent:**
    - Look only at the literal meaning of the words in the Constitution and/or evidence of the intent of the framers
  - **Loose construction / evolving interpretation:**
    - The Constitution is a flexible and evolving document whose operational meaning changes as society changes.
    - For example, what are the implications of the Freedom of the Press clause of the First Amendment for movies, television, and the internet?

- Judicial self-restraint vs. activism (and strict vs. loose construction) is not necessarily a “conservative” vs. “liberal” conflict.
  - Yes, there was the “liberal activist” Warren Court of the 1950s and 1960s.
  - But (as we shall see) there have been “conservative activist” courts in the past (and in increasing respects that label characterizes the contemporary USSC).
Laymen’s Terms

- **Loose Construction of the Constitution:**
  - Anything not specifically prohibited is OK – the documents is flexible

- **Strict Construction of the Constitution:**
  - Government/courts can only do exactly what the Constitution says and no more
Historical Developments
Historical developments

A. In 20th century, prior to 1937, liberals complained about the conservative Court being too activist when it struck down various reform-minded laws (e.g., minimum wage, banning child labor).

B. FDR responded with his “court-packing” attempt in 1937 → failed, but the Court, in its famous “switch in time that saved nine,” began to accept New Deal legislation.

C. Now, it was the conservatives who began to complain about the liberal Court being too activist, especially with the advent of the Warren Court (1954-1969). Conservatives began to complain about the Court’s judicial activism in:

1. Rights of the accused, e.g., requiring the police to issue “Miranda warnings”

2. Civil liberties, e.g., of prohibiting prayer in school

3. Political issues, e.g., Baker v. Carr, 1962 e.g. allowing court intervention in redistricting
Historical developments

D. The Burger Court (1969-1986) was less activist than the Warren Court, but still upset conservatives with decisions such as Roe v. Wade.

E. We have now come full circle because the Rehnquist Court (1986-2005) was accused by liberals of being too activist – when it overturns liberal precedents, liberals accuse the Court of being excessively activist.

F. Similar views are held about the Roberts Court (2005-present).
Restraints on judicial power

A. Courts can make decisions, but not enforce them.
B. Courts cannot reach out and take cases, but must wait for the cases to come to them.
C. Courts can rule only on real, live controversies. They cannot “create” cases.
D. Presidential appointments of judges.
E. Congress
   1. Senate confirmation of judges
   2. Impeachment and removal