

BASIC FACTS ABOUT JUDICIAL ACTIVISM

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Of all the daunting problems facing the country today, none has more profound implications for the rights and freedoms of individual Americans than judicial activism.

Because most judicial-activist decisions advance a liberal agenda, some on the Left are seeking to redefine “judicial activism” to say that court decisions that happen to be conservative are activist decisions. It is critical to remember that the rule of law is where cases are decided by a dispassionate application of neutral legal principles.

Judicial activism is whenever a judge abandons principled neutrality to make the result in a case support the judge’s policy preferences. Although this usually results in a liberal outcome, such as striking down Nebraska’s partial-birth abortion ban in 2000 or Texas’ sodomy statute in 2003, it is equally true that it could be used to advance a conservative agenda. In short, judicial activism is whenever a judge usurps the policymaking role of elected leaders, and cloaks that policymaking in a legal decision.

The most egregious form of judicial activism is when a judge declares the outcome the judge wants to be dictated by the U.S. Constitution, completely removing the issue from the democratic process by making elected leaders unable to affect the result through passing a new law.

Courts have a strictly-limited role in a constitutional democratic republic.

- We are not a pure democracy, where majority-rule prevails. We are a republic, where leaders represent citizens. The democratic part of our government is that citizens choose our representatives through elections.
- But we are not a pure republic, because our branches of government are created by the U.S. Constitution, and so elected leaders can only do what the Constitution allows them to do.

In such a system, judges must faithfully interpret any enacted law—whether a regulation, a statute, or the Constitution—in accordance with the original meaning of its words.



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- Court should not merely apply the text, because the meanings of words can change over time. Nor should courts use original intent, as it empowers courts to selectively choose speeches or writings that support an outcome the judge personally prefers.
- The Constitution was written to be understood by people of ordinary intelligence at the time it was adopted, and it is the words themselves—not anyone’s intention regarding words, that We the People adopted as a sovereign act when the Constitution was ratified.
- Thus, the original meaning of the Constitution’s words is the only legitimate meaning that a judge is empowered to give to those words.

The Constitution is a family-friendly document, but also one that leaves most family matters to the states, to be decided by local leaders that better reflect the voters’ values and that will be more responsive to those voters. This emphasizes the need for federalism, and the critical role that both federal and state courts play in preserving and protecting American families.