JUDICIAL ACTIVISM
A TEMPEST, OR A TEMPEST IN A TEAPOT?

By Mark Franek

Judicial activism – the phrase – has been co-opted by political advocates of all stripes. It is used to describe a variety of suspected “beyond the powers” judicial activity. The debate has reached the highest court in the land. In the 2012 book “Reading Law: The Interpretation of Legal Texts,” Justice Antonin Scalia bemoans judicial activism and what he and his co-author describe as “the judiciary incrementally tak[ing] control of larger and larger swaths of territory that ought to be settled legislatively.” In an August 2013 interview with The New York Times, Justice Ruth Bader Ginsburg also invoked judicial activism, speaking of the current court and its conservative leanings: “If it’s measured in terms of readiness to overturn legislation, this is one of the most activist courts in history.” Finally, something Justices Ginsburg and Scalia can agree on: their colleagues down the hall are guilty of judicial activism.

DEFINITION AND BRIEF HISTORICAL SUMMARY

“Black’s Law Dictionary” defines judicial activism as “a philosophy of judicial decision-making whereby judges allow their personal 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.” The phrase was coined by Arthur Schlesinger Jr. (historian and social critic), who introduced it in a January 1947 Fortune magazine article. Schlesinger – portending decades of public debate about the term’s precise meaning and implications – failed to define the term and say whether it was good or bad for the court system and the country.

The practice of castigating the judiciary, however, is nearly as old as the republic. Thomas Jefferson, as early as 1804, referred to the federal judiciary as a “despotic branch” of government. Newly minted attorneys may recall Marbury v. Madison, that foundational constitutional law case about the infamous appointment of “midnight judges,” the undelivered commission letters, and a writ of mandamus that the court validated but never invoked due to a procedural error (lack of jurisdiction). Marbury established the Supreme Court as the ultimate arbiter of constitutional interpretation, trumping the authority of all lower courts and elected offices, including Congress and the president. Chief Justice John Marshall, author of the opinion, underscored: “It is emphatically the province and duty of the judicial department to say what the law is.” Marbury created the concept of judicial review, the very grinding wheel at the center of what would become the sprawling machine of the modern legal profession. Although
Jefferson never used the phrase “judicial activism” when railing against “despotic” federal judges engaged in the process of judicial review, he very well might have, had the term been in use.

THE CONTEMPORARY DEBATE

Today, judicial activism is often shorthand and a “dirty” phrase for a person’s view of a judicial ruling that does not align with his or her worldview. It is the dissenting opinion, writ large – Fox News versus MSNBC, Drudge Report versus Daily Kos. A less cynical view is that judicial activism describes an inherent tension in the judicial process itself. For example, before a judge issues a ruling, he or she must sip from the waters of stare decisis and then advance to the very crossroads of a new fact pattern and decide which way to go: How are these facts analogous to, or distinguishable from, what has gone before? Some commentators have argued that a judge cannot travel down this road and make choices while simultaneously and totally screening his or her judicial mind from the intricate nature of life’s experiences, including social and political influences.

Justice Scalia, however, has been a vocal critic of this “approach” and he has used the weight of his position to sound the alarm about judges who “improvise[] on the text to produce what they deem socially desirable results – usually at the behest of an advocate for one party to a dispute.” Most trial judges of all political persuasions, if asked, might espouse a different view of their decision-making processes. Any “improvising” is done in the course of finding a fair, efficient, and effective way to clear (or to stay one step ahead of) their often crushing caseload and avoid reversal on appeal. Socially desirable results and bowing to an advocate’s viewpoint are not part of the judicial equation in all but a rare outlier’s calculus.

In Justice Scalia’s framework, judicial activism must be combated by an interpretive principle called textualism, where words, “in their full context, mean what they conveyed to reasonable people at the time they were written – with the understanding that general terms may embrace later technological inventions.” Some have accused Justice Scalia of invoking a false dichotomy: either a judge is a textualist, or a judicial activist. His critics point out that no competent judge would dispute or fail to apply the basic tenets of textualism. The text is sacrosanct. But the processes of interpreting and applying the law, and then issuing a ruling or an opinion, sometimes require “gap-filling” and therefore some form of law creation.

Judge Richard Posner, who appears in several uncomplimentary footnotes in Justice Scalia’s most recent book, explains: “Judges defending themselves from accusations of judicial activism sometimes say they do not make law, they only apply it. It is true that in our system judges are not supposed to and generally do not make new law with the same freedom that legislatures can and do; [. . .] but the fact remains that judges make, and do not just find and apply, law.” Legal scholars may recognize here an echo of Oliver Wendell Holmes’s famous caveat: “I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.” Holmes’s metaphor was familiar in his day—the rules of the legal system dictate the decision in most cases, but when a gap in the law occurs, a judge must legislate. And there’s the rub. One person’s appropriate gap-filler is another person’s example of “judicial activism.”

SHIFTING THE CONVERSATION

A more fruitful approach hoists the discussion out of the entrenched camps of the binary debate (this ruling versus that ruling). Instead of getting mired in a case-specific (micro level) argument, the emphasis shifts to how people with leverage in the system—bench, bar, and corporate and community leaders—can expand “avenues to justice” on a case-management (macro) level. In the civil context, this approach or shift in the conversation is relatively new and reflects a growing movement to provide effective procedural safeguards and legal assistance in adverse civil proceedings where basic human needs are at stake (Civil Gideon”). This magazine recently highlighted (Winter 2014) the emerging success of the Philadelphia Bar Association’s Civil Gideon and Access to Justice Task Force, launched five years ago. Projects include the landlord-tenant Legal Help Center in Municipal Court, exploration of new representation initiatives in the Family Court Division, and the award
of an American Bar Association grant that has paved the way for public hearings across Pennsylvania on the dire need for legal help and possible solutions.

A program in the First Judicial District that predates these initiatives, called the Residential Mortgage Foreclosure Diversion Program, has received national attention. Under the rules adopted by the Philadelphia Court of Common Pleas, in 2008, and made permanent in 2009, no owner-occupied residential property in Philadelphia may be foreclosed on and sold by the sheriff’s office before the occurrence of a “conciliation conference” – a face-to-face meeting between the homeowner and the lender aimed at striking a workable compromise. Every homeowner facing a default is provided assistance from a housing counselor, and sometimes legal representation. This program, spearheaded by Judge Annette M. Rizzo and developed by then-President Judge C. Darnell Jones II, continues to help indigent, or temporarily indigent, residents of Philadelphia stay in their homes. There are many other examples of the judiciary using creative case-management systems to solve or mitigate persistent problems while simultaneously expanding access to justice. Such programs include but are not limited to “problem-solving courts” in Pennsylvania and beyond, such as veterans courts, drug courts, DUI courts, juvenile drug courts, girls court, and mental health courts. Only the most cynical critic would label these types of initiatives and programs as pejorative examples of judicial activism. Yet, in order to be successful, they require active and ongoing judicial leadership, collaboration among many stakeholders, and education both within the legal system and with the general public.

A TEMPEST IN A TEAPOT

The charge of judicial activism, regardless of who uses the moniker, is largely a tempest in a teapot. If the teapot could speak, it would whistle the truth: The notion that there is a syndicate of invidious black-cloaked judges huddled in their respective chambers, ignoring the law, and issuing ruling after ruling, based on their personal views about public policy, is a myth. Judges have a difficult job. Their primary concern is getting the rulings right, within the hierarchy and demands of judicial precedent and elected legislative judgment. When a gap in the law occurs, they fill it to the best of their ability as objective, apolitical decision-makers – realizing that no court can insulate itself entirely from all the contacts of life. Perhaps, during a quiet chat in the Supreme Court’s library, fourth floor, 1 First St., Northeast, Washington, D.C. (far from the madding crowd of pundits, politicians, and the rest of the legal community), this, too, is something Justices Scalia and Ginsburg can agree on.

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