The Heritage Foundation
LEADERSHIP FOR AMERICA

LEGAL MEMORANDUM

No. 96 | JUNE 13, 2013

How to Spot Judicial Activism: Three Recent Examples

Elizabeth H. Slattery

Abstract

The courts have gradually abandoned their proper role of policing the structural limits on government and neutrally interpreting the laws and constitutional provisions without personal bias. Judicial activism occurs when judges decline to apply the Constitution or laws according to their original public meaning or ignore binding precedent and instead decide cases based on personal preference. Labeling as "activist" a decision that fails to meet this standard does not express policy disagreement with the outcome; it expresses disagreement with the judge's conception of his or her role in our constitutional system. Three recent cases illustrate how our Founding Fathers' vision of a government of laws and not of men is compromised when judges let their subjective policy preferences control their decisions.

> The role assigned to judges in our system was to interpret the Constitution and lesser laws, not to make them. It was to protect the integrity of the Constitution, not to add to it or subtract from it—certainly not to rewrite it. For as the framers knew, unless judges are bound by the text of the Constitution, we will, in fact, no longer have a government of laws, but of men and women who are judges. And if that happens, the words of the documents that we think govern us will be just masks for the personal and capricious rule of a small elite.
>
> —President Ronald Reagan[1]

Key Points

- Courts have an essential constitutional role of policing the structural limits on government and neutrally interpreting the law.
- Judicial activism occurs when judges decide cases based on their personal preferences and in spite of the text of the Constitution, statutes and applicable precedent.
- Labeling as "activist" a decision that fails to meet this standard expresses disagreement with the judge's conception of his role in our constitutional system, not policy disagreement with the outcome.
- Judges' subjective policy preferences may lead them to uphold unconstitutional laws that they favor or to strike down lawful ones that they oppose. In either case, judges abdicate their duty of fidelity to the law.
- Judges are not charged with deciding whether a law leads to good or bad results, but with whether it violates the Constitution and, if not, how it is properly construed and applied in a given case.

This paper, in its entirety, can be found at **http://report.heritage.org/lm96**

Produced by the Edwin Meese III Center for Legal and Judicial Studies

The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

Since the late 1930s, the courts have gradually abandoned their proper and essential role under the Constitution to police the structural limits on government and neutrally interpret the laws and constitutional provisions without personal bias. Many judges refuse to interpret the Constitution and statutes according to their original public meaning (or perhaps lack the understanding of how to do so).[2] Instead, they seek to impose their personal preferences. But a judge who looks beyond the text of the Constitution "looks inside himself and nowhere else."[3]

While the Supreme Court of the United States should interpret the laws and constitutional provisions according to their original public meaning, the lower courts—and state courts when dealing with federal constitutional rights—are bound by the precedents of the Supreme Court. To the extent that a case presents an unresolved question, lower courts should likewise give effect to the original public meaning of the text before them.

Although attempts to define "judicial activism" are often criticized as too broad, too partisan, or simply "devoid of content,"[4] a simple working definition is that judicial activism occurs when judges fail to apply the Constitution or laws impartially according to their original public meaning, regardless of the outcome, or do not follow binding precedent of a higher court and instead decide the case based on personal preference. The proper measure is not whether a judge votes to uphold or strike down a statute in any given case. Adhering to an original understanding of the law is the only way to consistently "minimize or eliminate the judge's biases."[5] At times, this means that judges must strike down laws that offend the Constitution.

Some scholars mistakenly argue that judges engage in judicial activism whenever they strike down a law,[6] but judges' subjective policy preferences could just as easily lead them to uphold unconstitutional laws that they favor as to strike down ones that they oppose. In either situation, judges abdicate their duty of fidelity to the law.

Judicial activism is therefore not in the eye of the beholder. In applying the law as it is written, judges may reach conclusions that are (or may be perceived to be) bad policy but are nonetheless correctly decided. Judges are charged not with deciding whether a law leads to good or bad results, but with whether it violates the Constitution and, if not, how it is properly construed and applied in a given case.[7] Labeling as "activist" a decision that fails to meet this standard expresses not policy disagreement with the outcome of a case, but disagreement with the judge's conception of his or her role in our constitutional system.

Judicial activism can take a number of different forms. These include importing foreign law to interpret the U.S. Constitution, elevating policy considerations above the requirements of law, discovering new "rights" not found in the text, and bending the text of the Constitution or a law to comport with the judge's own sensibilities, to name just a few.[8] Rather

1. Ronald Reagan, Remarks at the Swearing-In Ceremony for Anthony M. Kennedy as an Associate Justice of the Supreme Court of the United States (Feb. 18, 1988).
2. The term "original public meaning" connotes a method of interpreting the Constitution to determine "the meaning ascribed by those Americans who originally ratified the relevant language.... Contrary to common caricatures, [it] does not require judges to be psychics capable of reading the founders' minds, nor does it require polling the founding generation to figure out what a majority of them thought about an issue.... [It] requires judges to interpret the Constitution with the goal of understanding the text first and foremost, parsing the words according to their common meaning at the time they were ratified." Elizabeth Price Foley, The Tea Party: Three Principles 169 (2012).
3. Robert H. Bork, *Keeping a Republic: Overcoming the Corrupted Judiciary*, Heritage Foundation Lecture No. 1147 at 4, *available at* http://www.heritage.org/research/lecture/keeping-a-republic-overcoming-the-corrupted-judiciary.
4. Kermit Roosevelt III & Richard W. Garnett, *Judicial Activism and Its Critics*, 155 U. Penn. L. R. 112, 117 (2006).
5. Bork, *supra* note 3, at 4.
6. *See, e.g.*, Cass R. Sunstein, Radicals in Robes 42–43 (Basic Books 2005) ("[I]t is best to measure judicial activism by seeing how often a court strikes down the actions of other parts of government.... Such decisions preempt the democratic process."); Jeffrey Rosen, *Are Liberals Trying to Intimidate John Roberts*, New Republic (May 28, 2012), http://www.newrepublic.com/article/politics/103656/obamacare-affordable-care-act-critics-response (Judges should give "deference to all laws passed by Congress...unless they violate principles that can be so clearly located in constitutional text and history that people of all political persuasions can readily accept them.").
7. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 944 (1983) ("We begin, of course, with the presumption that the challenged statute is valid. Its wisdom is not the concern of the courts; if a challenged action does not violate the Constitution, it must be sustained.").
8. *See* Judicial Activism, Heritage Foundation, http://www.heritage.org/initiatives/rule-of-law/judicial-activism.

than succumb to these temptations, judges should strive to put aside their personal views and policy preferences in order to maintain impartiality and render sound judgments according to the laws as written.

The concept of judicial activism is much easier to demonstrate with real cases than to describe in the abstract. Reasonable people may disagree about whether judges have properly carried out their duty in difficult cases, but some instances of activism are plain. When judges impose their own views instead of attempting to determine the original public meaning of a statute or constitutional provision, the Framers' vision of our republican democracy—famously, a government of laws and not of men—is compromised. Three recent examples demonstrate that this risk remains acute.

Contorting the Text: Trampling Free Exercise in Montana

The First Amendment guarantees the free exercise of religion, and in order to pass constitutional muster, laws that abridge religious practices must be facially neutral and generally applicable. A law that fails either requirement must be "justified by a compelling governmental interest and must be narrowly tailored to advance that interest" in order to stand.[9] With such a high bar, activist judges sometimes do great mischief to avoid this level of scrutiny.

In 2009, Montana amended its workers' compensation system to change the definition of "employer" to include religious organizations that receive payment for agricultural and manufacturing work completed by their members. That addition corresponds to precisely one organization: a religious community called the Hutterites that had previously been exempt from the workers' compensation system.

The Hutterites live communally, renounce individual ownership of property, and view labor as a form of religious exercise. Making legal claims against one another is forbidden by their church doctrine, and members sign a declaration stating that they agree to "resolve disputes within the Church, and not to seek redress before secular authorities whether related to secular or sectarian issues."[10] Thus, faithful Hutterites cannot receive wages for their work or file workers' compensation claims.

The Hutterites were exempt from the state workers' compensation scheme until the 2009 amendment, allegedly made at the behest of their competitors for construction jobs.[11] Although the law appears neutral on its face, there can be little doubt that it was enacted with the Hutterites in mind. The bill expanded the definition of "employer" to include "a religious corporation, religious organization, or religious trust receiving remuneration from nonmembers for agricultural production, manufacturing, or a construction project conducted by its members...."[12] The legislative history shows that "both the House and the Senate specifically discussed the impact [the amendment] would have on the Hutterite[s]," and the state Department of Labor "proposed [the amendment] to address complaints received about Hutterite colonies competing with other Montana businesses...without having to provide workers' compensation insurance."[13]

The Hutterites challenged the law as unconstitutionally abridging their free exercise rights, and a state district court agreed, finding that it had been enacted to single out the Hutterites. The Montana Supreme Court reversed that decision. It found that the law did not single out the Hutterites, but simply included them in the workers' compensation system that applies to every other employer—except for the 26 other types of employers that remained exempt.[14]

In order to reach this result, the court had to look beyond the statutory text—far beyond. It stated that the "legislature did not conceive the workers' compensation system as a means to shackle the [Hutterites'] religious practices.... [It] simply add[ed] to the scope of the workers' compensation system

9. Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 531–32 (1993).
10. Big Sky Colony, Inc. v. Montana Dept. of Labor & Industry, 291 P.3d 1231, 1248 (2012) (Rice, J. dissenting).
11. Petition for Certiorari, Big Sky Colony, Inc. v. Montana Dept. of Labor & Industry at 6, __ U.S. __ (No. 12-1191), 2013 WL 1309087.
12. Montana Code Ann § 39-71-117(1)(d) (2009).
13. *Big Sky Colony*, 291 P.3d at 1248 (Rice, J. dissenting).
14. The Workers' Compensation Act exempts domestic workers, independent contractors, cosmetologists, and LLCs among others. Petition for Certiorari, Big Sky Colony, Inc. v. Montana Dept. of Labor & Industry at 20.

religious organizations that engage in commercial activities with nonmembers for remuneration."[15] But the amended law actually *does not* apply to commercial activities in general, which would reach other religious employers beyond the Hutterites. Instead, it targets religious employers that use a non-wage system, employ only their own members, and work in agricultural production, manufacturing, or construction—not any other commercial activities. As it happens, the sole employer that fits this new definition is the Hutterites.

In *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, the Supreme Court of the United States declared that the First Amendment protects against "governmental hostility which is masked, as well as overt" and that "[f]acial neutrality is not determinative."[16] The Court indicated that the "effect of a law in its real operation is strong evidence of its object."[17] On that basis, the Court struck down city ordinances banning the slaughter of animals that, although facially neutral, were aimed specifically at a religious group that practiced ritual slaughter. The Court explained that while the ordinances were put in language that was "the epitome of neutral," they blatantly targeted a single religious group. Hostility to a particular religion, the Court concluded, "cannot be shielded by mere compliance with…facial neutrality."[18]

The Montana Supreme Court, however, refused to apply that degree of scrutiny to the workers' compensation law in the absence of proof of a particular type of discriminatory motive (malice) because the "requirement that a religious corporation provide workers' compensation coverage for its members differs markedly from the outright ban of an activity central to [their faith]."[19] This turns the First Amendment on its head. Proof of *actual* animus is certainly sufficient—but is not required—to review a law under strict scrutiny.

Whatever uncertainty there may be in the Supreme Court's First Amendment jurisprudence, it is indisputably clear that government may not single out a religion for favored or disfavored treatment. The Montana workers' compensation law directly singled out the Hutterites and interfered with their religious exercise. This is precisely what the First Amendment prohibits, and the Montana Supreme Court misapplied the law to arrive at its preferred outcome.

Playing Legislator: Federal Drug Sentencing

Federal law imposes mandatory minimum sentences for defendants convicted of drug crimes that typically correspond to the type and amount of drug involved in the crime. Prior to August 2010, a defendant convicted of possession with intent to distribute five grams of crack cocaine was subject to a mandatory five-year minimum sentence, whereas a defendant would have to possess 500 grams of powder cocaine with the intent to distribute before he could be subjected to the same mandatory minimum sentence.[20]

In August 2010, Congress passed the Fair Sentencing Act, which reduced the disparity in sentencing between offenses involving crack cocaine and those involving powder cocaine from a ratio of 100-to-1 to a ratio of 18-to-1 in an effort to restore fairness to federal cocaine sentencing. Two years later, the Supreme Court determined that the Act applied to sentences imposed after August 2010 even if the offense was committed before that time.[21]

In *United States v. Blewett*, a three-judge panel of the U.S. Court of Appeals for the Sixth Circuit ruled that the new sentencing regime should apply to *all defendants* previously sentenced to mandatory minimum sentences for crack cocaine offenses because the application of the 100-to-1 ratio that

15. *Big Sky Colony*, 291 P.3d at 1237.
16. *Lukumi Babalu*, 508 U.S. at 534. Even where a statute is facially neutral, its "inevitable effect…may render it unconstitutional." United States v. O'Brien, 391 U.S. 367, 385 (1968) (upholding a criminal ban on the destruction of selective service certificates where the "governmental interest is unrelated to the suppression of free expression; and…the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.") *Id*. at 377. *See also* Grosjean v. American Press Co., 297 U.S. 233 (1936).
17. *Lukumi Babalu*, 508 U.S. at 535.
18. *Id*. at 534–37.
19. *Big Sky Colony*, 291 P.3d at 1236.
20. Dorsey v. United States, __ U.S. __, 132 S.Ct. 2321, 2326 (2012).
21. *Id*. at 2331.

existed under prior law amounts to racial discrimination under the Equal Protection Clause of the Constitution. The two defendants in the *Blewett* case—whose offenses and sentencing occurred before passage of the Fair Sentencing Act—argued for retroactive application of the new 18-to-1 ratio to their sentences. Neither defendant challenged the constitutionality of denying retroactive application of the Fair Sentencing Act to individuals sentenced under the old 100-to-1 regime; nonetheless, the court engaged in its own fact-finding and independent analysis of the issue.

The Equal Protection Clause guarantees to all people equal protection under the law,[22] and it requires proof of discriminatory intent.[23] The court recognized that the 100-to-1 ratio did not violate equal protection when Congress adopted it in 1986 because there was "no intent or design to discriminate."[24] However, the court asserted, "the discriminatory nature of the old sentencing regime is [now] so obvious that it cannot seriously be argued that race does not play a role in the failure to retroactively apply the Fair Sentencing Act."[25]

This decision is a textbook example of how judges can usurp the legislative role and put policy considerations above the requirements of law. Reasonable people may disagree about whether *Congress* should have provided a mechanism for those sentenced under the old regime to have their sentences reduced, but the court exceeded its constitutional role by acting as a policymaker. Rather than follow binding precedent, the court relied on "statistical facts and the widespread congressional consensus [in the passage of the 2010 law]" as proof that the "intentional maintenance of discriminatory sentences is a denial of equal protection."[26] In so ruling, it attempted to distinguish Supreme Court cases holding that statistical proof of discriminatory impact is *not* sufficient to demonstrate an equal protection violation and also that showing a discriminatory purpose is essential because it indicates that the "decision-maker...selected or reaffirmed a particular course of action...'because of,' not merely 'in spite of,' its adverse effects."[27]

The court provided no support for the claim that denying retroactive application of the 18-to-1 ratio to all defendants previously sentenced violates equal protection; in fact, in April 2013, another Sixth Circuit panel held that the Fair Sentencing Act is "not retroactive to defendants...who were originally sentenced before its effective date."[28] Likewise, the Supreme Court addressed this situation in *Dorsey v. United States*, noting that "the ordinary practice is to apply new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced."[29] The Sixth Circuit had also previously determined that the disparate impact of the 100-to-1 ratio "may not alone support a finding of invidious discrimination."[30] In yet another case, the Sixth Circuit stated also that "[e]very court of appeals to address the issue has upheld the [100-to-1] ratio in the face of similar constitutional challenges."[31]

In short, instead of interpreting the law and following applicable precedents, the *Blewett* court simply disregarded the prior case law of both the Supreme Court and the Sixth Circuit in order to reach its preferred outcome.

Abusing Precedent: Oklahoma Abortion Regulation

In 2011, Oklahoma passed a law restricting the use of abortion-inducing drugs to those methods

22. While the Equal Protection Clause forbids states from denying equal protection, it has been incorporated against the federal government by the doctrine of reverse incorporation through the Fifth Amendment Due Process Clause. *See* Bolling v. Sharpe, 347 U.S. 497 (1954).
23. *See* Washington v. Davis, 426 U.S. 229, 242 (1976) ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.").
24. United States v. Blewett, __ F.3d __, slip op. at 8 (6th Cir. 2013).
25. *Id.* at 4–8.
26. *Id.* at 8.
27. McCleskey v. Kemp, 481 U.S. 279 (1987); Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979).
28. United States v. Hammond, 712 F.3d 222 (6th Cir. 2013).
29. *Dorsey*, 132 S.Ct. at 2335.
30. United States v. Reece, 994 F.2d 277, 278 (6th Cir. 1993).
31. United States v. Muse, 250 F.App'x 700, 701–02 (6th Cir. 2007).

approved by the U.S. Food and Drug Administration (FDA). Thus, the law prohibits off-label uses that are not approved by the FDA, such as administering the drug without proper medical supervision or beyond 49 days' gestation. This law did not affect a woman's ability to obtain a surgical abortion; it only regulated medical abortions (those involving the use of abortifacients), which are less common and more likely to have adverse side effects if not properly administered.[32]

Abortion advocates challenged the law in state court, arguing that it violated several provisions of the state constitution and seeking a declaration that the state constitution grants an unfettered right to abortion. The state district court struck down the statute as facially unconstitutional, declaring that it "serve[s] no purpose other than to prevent women from obtaining abortions and to punish and discriminate against those women who do."[33] The Oklahoma Supreme Court agreed in a cursory one-page opinion, stating that it was "not free to impose its own view" in light of the decision by the Supreme Court of the United States in *Planned Parenthood of Se. Pa. v. Casey*.[34] That was the sum total of its reasoning.

The Oklahoma Supreme Court decision is a classic example of judges abusing precedent by amplifying past errors and committing precedential revisionism. The court expanded the holding in *Casey* to arrive at the judges' desired result of preventing nearly *any* regulation of abortion.

In *Casey*, the Supreme Court of the United States established an "undue burden" standard for determining whether a law violates the right to an abortion recognized in *Roe v. Wade*. *Casey* involved a challenge to a number of state law provisions regulating abortion, such as requiring informed consent and a 24-hour waiting period, and the only one found to be an "undue burden" was a spousal notification requirement. While the Supreme Court reaffirmed the right to abortion, it also acknowledged that states have "legitimate interests from the outset of pregnancy in protecting the health of the woman and the life of the fetus that may become a child."[35] By comparison, the Oklahoma legislature passed a modest law to address the harms to women associated with off-label uses of abortion-inducing drugs. It did not attempt to ban all uses of such drugs or otherwise restrict surgical abortions. In order to dispose of this case, the Oklahoma Supreme Court mischaracterized and expanded *Casey* by claiming that it "determined the dispositive issue presented in this matter" when, in fact, the cases involved very different regulations.[36]

Oklahoma is not the only state to pass laws regulating the use of abortion-inducing drugs after the *Casey* decision. In 2004, Ohio passed a law criminalizing any use of the abortion-inducing drug RU-486 that was not in compliance with FDA regulations, and the U.S. Court of Appeals for the Sixth Circuit upheld the district court's determination that there is "no evidence that [the law] would impose an undue burden on a woman's ability to make the decision to have an abortion."[37]

Thus, the Oklahoma Supreme Court should have engaged in a more rigorous (or at least *some*) analysis of the law rather than essentially holding that *Casey* prevents states from regulating abortion in any way, even if a law is intended to prevent harm to women receiving abortions. In addition to its precedential revisionism, the Oklahoma Supreme Court's decision expanded errors made by the Supreme Court of the United States in both *Casey* and *Roe v. Wade*,

32. *See generally*, Maarit Niinimäki et al., *Immediate Complications After Medical Compared With Surgical Termination of Pregnancy*, 114 Obstet. Gynecol. 795 (2009). In 2011, the FDA reported more than 2,000 cases of severe adverse side effects and 14 deaths from medical abortions. FDA, Mifepristone U.S. Postmarketing Adverse Events Summary Through 4/30/2011, RCM 2007-525 (2011).

33. Petition for Certiorari, Cline v. Oklahoma Coalition for Reproductive Justice at appendix 7, __ U.S. __ (No. 12-1094), 2013 WL 2352228.

34. Cline v. Oklahoma Coalition for Reproductive Justice, 292 P.3d 27 (Okla. 2012); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

35. *Casey*, 505 U.S. at 846.

36. *Cline*, 292 P.3d at 27.

37. Planned Parenthood Sw. Ohio Region v. DeWine, 2011 WL 9158009, *17 (S.D. Ohio 2011) *affirmed by* 696 F.3d 490 (6th Cir. 2012) (internal citations omitted).

which even some supporters of abortion rights acknowledge.[38]

Conclusion

The term "judicial activism" refers to errors in a judge's method of analysis and is not simply a criticism of a case's outcome. When a judge puts policy considerations above the requirements of law, bends the text of the Constitution or laws to comport with his or her own sensibilities, or otherwise angles for particular results in a case, that judge has stepped outside the proper constitutional role of policing the structural limits on government and neutrally interpreting the laws and the Constitution.

Striving to interpret laws in light of their original public meaning is not necessarily an easy task, but it is the surest way for judges to resist the temptation to stray from the text and resort to judicial activism. The Framers of the Constitution intended that the United States would be a government of laws, not of men, but each "activist" decision chips away at this design, bringing us closer to a robed oligarchy.

*—**Elizabeth H. Slattery** is a Senior Legal Policy Analyst in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation.*

38. *E.g.*, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. Rev. 375, 385 (1985) (describing the decision as "[h]eavy-handed judicial intervention [that] was difficult to justify."); John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920, 935 (1973) ("What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution."); Laurence H. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 8 Harv. L. Rev. 1, 7 (1973) (stating of the decision that "the substantive judgment on which it rests is nowhere to be found.").