

When Judges and Justices Throw Out Tools: Judicial Activism in *Rucho v. Common Cause*

Judge James Wynn, Jr.
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I. Introduction

- a) “Judicial activism” is a widely used term, but is not well-defined
- b) Proposed definition: a court or judge engages in judicial activism when, in deciding a case, the court or judge eschews use of a tool traditionally used to adjudicate that type of case
 - i) Doing so eliminates a constraint on the court’s exercise of its decisional discretion

II. Previous definitions

- a) Origin of the term: Arthur M. Schlesinger, Jr., *The Supreme Court: 1947*, in the January 1947 issue of Fortune magazine
 - i) The idea existed earlier, but he appears to have coined the term
 - ii) Schlesinger split the Court into justices who wanted to use the judicial power to implement their vision of the social good, and those who wanted to leave such decisions to the legislature
- b) Judicial activism took on a pejorative meaning in the ensuing decades
 - i) For example, President Nixon’s 1968 campaign suggested that increased crime was a direct result of decisions by “activist judges”
- c) Previously proposed definitions
 - i) Outcome-focused definitions: striking down statutes; overturning precedent; policymaking discretion
 - (1) But it’s not clear why these are “activist,” except when the speaker disagrees with the outcome. Courts plainly must take these actions sometimes.
 - ii) Process-oriented definitions: reaching out to decide issues not before the court; failing to follow a preferred interpretive method
 - (1) Sometimes, a maximalist opinion may constrain the court *more* (in the sense of constraining the court in the future)
 - (2) If “activism” is simply about failing to follow a certain interpretive method, it has no independent meaning

III. My definition: throwing out tools

- a) Courts are activist when they categorically or *sub silentio* reject a well-established mediating principle
 - i) Doing so increases the circumstances in which it is permissible for the judge to exercise discretion—and thus, increases opportunities for deciding cases based on his or her own policy preferences
 - (1) Discretion is of course necessary in some cases; that is part of judging. But the unnecessary exercise of discretion is activist.
 - ii) Doing so also risks treating litigants differently (in the instant case versus other contemporary cases, or in the instant case versus previous cases)
- b) Of course, some mediating principles simply don't apply in some types of cases. And sometimes, different principles may point in different directions, meaning the judge must determine how much weight to give each principle. In that case, the judge is not activist as long as he or she is transparent about his or her choices.
 - i) Transparency makes clear to the political branches how the courts are interpreting the political branches' policy decisions
 - ii) Transparency deters critics from reading illegitimate motives into decision-making
 - iii) Transparency resolves the issue that there may be divergent opinions over what constitutes an appropriate interpretive tool
 - (1) To the extent a tool is disputed, transparency contributes to the conversation over whether or not it's appropriate

IV. Examples

- a) Textualism's rejection of legislative history
 - i) Legislative history is a longstanding tool for interpreting statutes
 - ii) Congress views legislative history as its work product
 - iii) Textualism's categorical rejection of this long-recognized tool expands the universe of situations in which the textualist judge may exercise his or her own discretion
 - (1) Relying on legislative history cabins the available interpretations
 - iv) Of course, textualists would argue that they are *less* activist than those who rely on legislative history
 - (1) Textualists argue that the text of the statute alone will constrain courts' discretion

- (a) This has not been my experience
- (b) The text of the statute can't anticipate every single application—especially today, with rapid social, economic, and technological changes
- (2) Textualists argue that legislative materials are diverse enough to allow selective reliance on supportive texts by activist judges
 - (a) But there are well-established principles regarding how courts should use legislative history
 - (i) Certain forms of legislative history are given more weight
 - (b) As Professor William Eskridge has noted, “[f]rankly, a result-oriented jurist will refuse to be constrained under any approach, and a modest and diligent jurist will be constrained under either the new textualism or the traditional approach”¹
 - (i) So, there’s no real gain from throwing out the long-established tool of legislative history
- b) *Rucho v. Common Cause*
 - i) Partisan gerrymandering case in which the Court claimed to be acting with judicial restraint when it held that such cases were beyond judicial competence and thus nonjusticiable
 - ii) But in fact, under my definition, the Court was being activist, in that it threw out numerous applicable tools:
 - (1) Fairly characterizing the parties’ arguments
 - (a) The Court concluded that partisan gerrymandering claims “invariably sound in a desire for proportional representation” (which is not constitutionally required)²
 - (b) But the plaintiffs’ claims were not about proportional representation; states’ natural political geography often precludes such proportionality
 - (c) Rather, the plaintiffs relied on partisan symmetry, which analyzes whether a districting plan allows supporters of each party to translate votes into seats with equal ease

¹ William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 675 (1990).

² *Rucho v. Common Cause*, 139 S. Ct. 2484, 2499 (2019).

- (d) Also, in analyzing the plaintiffs' claims under Article I, § 2, the Court merely said that this was an objection more properly grounded in Article IV, § 4, which was nonjusticiable
- (2) Accepting a district court's findings of fact unless clearly erroneous
 - (a) The Court concluded that judges could not possibly predict how a particular districting map would perform in future elections—but the trial court found the plaintiffs had demonstrated that they could reliably predict how the district map would perform in future elections
- (3) Accounting for prior relevant decisions
 - (a) In analyzing the plaintiffs' claims under the Elections Clause (Article I, § 4), the Court failed to discuss its prior Elections Clause opinions
 - (b) In analyzing the plaintiffs' claims under the First Amendment, the Court did not explain how its holding was consistent with prior holdings about how the government may not impose election regulations that enhance some voices over others
- (4) Deciding only the issues before the Court
 - (a) By adopting a blanket rule of nonjusticiability, the Court appears to have been considering the full range of possible cases—not merely the extreme case actually before it
- (5) Transparency
 - (a) The Court framed its holding as an Article III mandate, thus appearing to rely on the classical political question doctrine. But its actual analysis emphasized prudential considerations, evoking the prudential political question doctrine—which is a matter of discretion, not Article III jurisdiction.
 - (b) The Court claimed that there were no judicially manageable standards—at the very moment when several trial court panels were converging on a judicially manageable standard

V. Conclusion

- a) The tools of the judicial trade are crucial to judicial independence and have been developed over generations. They should not be discarded lightly.