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Editors

Encyclopedia of
ACTIVISM *and*
SOCIAL JUSTICE



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JORDAN, BARBARA (1936–1996)

Barbara Jordan was one of the United States' most eloquent spokespersons on issues of racial, economic, and social justice from the 1970s through the 1990s. Elected to the U.S. House of Representatives in 1972, Jordan served three terms as congressperson from Texas's 18th District and became nationally recognized for her integrity and moral eloquence.

Jordan was born February 21, 1936, in Houston. Her formidable oratorical skills were displayed early, as Jordan was an award-winning debater at Phyllis Wheatley High School and later at Texas Southern University. After graduating from Texas Southern, she entered Boston University Law School in 1956. She returned to Houston after graduating law school and established her own practice.

Jordan worked for John F. Kennedy's presidential campaign in 1960. She attended to her own practice, ran two losing campaigns for the Texas House, and served as administrative assistant to a Harris County (Texas) judge before winning election to the Texas Senate in 1966. She was committed to rectifying economic injustice, but she was also a pragmatist, and worked with both liberals and conservatives. As a state legislator, Jordan helped establish the first Texas minimum-wage law and pushed through legislation that raised workers' compensation payments.

In 1972 Jordan was elected to the U.S. House from Houston's 18th congressional district. Jordan became a champion of labor and the working class. She was also a member of the judiciary committee. Her July 25, 1974, speech on Watergate combined mastery of the Constitution with moral indignation and made her a nationally recognized name.

While in Congress Jordan advocated successfully for the addition of a civil rights stipulation to the Crime Control and Safe Streets Act, the funding arm of the Law Enforcement Assistance Administration. She also

fought successfully in 1975 for a more comprehensive version of the Voting Rights Act. Jordan cemented her national stature with a riveting keynote address at the 1976 Democratic National Convention. Jordan at times frustrated members of the Congressional Black Caucus with her support of issues important to Texas, but she always considered herself a professional politician first and was loathe to be typecast.

Just as Jordan's national status was at its apex, however, she retired from politics in 1979. She had been diagnosed with multiple sclerosis in 1973 and constantly battled poor health. In the 1980s and 1990s she taught law at the University of Texas and was a staunch critic of the Reagan presidency. She provided key opposition testimony to the nomination of conservative judge Robert Bork to the U.S. Supreme Court in 1987.

Jordan gave a keynote address at the 1992 Democratic National Convention. She was awarded the Presidential Medal of Freedom by President Bill Clinton in 1994. She died on January 17, 1996, at the age of 59.

—Gregory Geddes

See also Carter, James Earl; Civil Rights Acts

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JUDICIAL ACTIVISM

Judicial activism is an expansive exercise of judicial discretion, where a court preempts or extends existing precedent, principle, or policy. Common to all definitions of judicial activism is the concept of judicial overreaching—a daring use of judicial power to effect social change (policy making). A more neutral term would be *judicial intervention*.

First coined by Arthur Schlesinger, Jr., in a January 1947 *Fortune* magazine article (featuring a hypothetical dialogue between the “Champions of Self-Restraint” and the “Judicial Activists”), the term *judicial activism* typically carries a pejorative connotation—“judges making law” (although case law is judge-made law) or “judges behaving badly.” Thus the term *judicial activism* most often appears in the context of judicial critique. Critics disfavor judicial activism as a creature of judicial intrusiveness that, under the pejorative view, undermines representative democracy through judicial autocracy. Judicial activism arguably subverts past precedent and perverts legislative intent (under a separation of powers analysis) through legal artifices, where judges wield excessive interpretive latitude. Activist judges, critics say, exercise their judicial discretion contrary to their principals (i.e., as agents for legislators in applying the law) in favor of their principles (i.e., as agents for social policy considerations). Positively, judicial activism may be regarded as legal adaptation to social change by evolving principles drawn from constitutional text and precedent and applying core constitutional values progressively. (*Black’s Law Dictionary* adds “progressiveness” to its definition of “judicial activism.”)

Judicial review admittedly poses an inherent countermajoritarian conundrum: why should nine unelected judges (in the United States, state judges are elected, but federal justices are appointed) have the ultimate authority over the majoritarian will? As Alexander Bickel points out in his classic, *The Least Dangerous Branch*, judicial insulation from *popular will* (elections) permits the judiciary to be faithful to the *sovereign will* (the Constitution). Viewed as a “living document,” the Constitution is susceptible to progressive interpretations. Indeed, few would deny the fact that *Brown v. Board of Education*, under Chief Justice Earl Warren, stands as positive example of judicial activism that has changed the course of American social history for the better. That landmark decision was a reflex of what Ronald Dworkin has called “strong” discretion versus “weak” discretion, where a court will effectively nullify or refashion government laws and state action. In the context of international law, comparative studies of judicial activism

in other countries illustrate the strategic role that judicial intervention plays in world affairs.

In the American system, the U.S. Constitution is the foundation of the rule of law. All legislation, litigation, and enforcement must, therefore, act within constitutional limits. What those constitutional norms and limits are is often a vexed question, a matter of interpretation. Judicial activism in the American context is often characterized as the polar opposite of judicial restraint or strict construction, which strictly applies the U.S. Constitution and statutes, and does not “legislate from the bench.” On the other end of the spectrum is judicial inactivism, which operates to preserve the status quo, with judicial restraint somewhere in between. Judicial activism is typically characterized as “broad” (as opposed to “narrow”) construction. Through artful interpretive techniques, judicially activist decisions creatively apply case-law precedents, juridical principles, and/or social policies to reach controversial, if not an otherwise impossible results. Such negative estimates of judicial activism carry over into the various frameworks of analysis that have been proposed as methodologically elegant approaches to judicial activism.

A highly influential analytical framework is Bradley Canon’s six dimensions of judicial activism: (1) *Majoritarianism* (where a court judicially negates policies adopted through democratic processes); (2) *Interpretive Stability* (where a court alters earlier court decisions, doctrines, or interpretations); (3) *Interpretive Fidelity* (where a court interprets constitutional provisions contrary to the clear intentions of their framers or the clear implications of their language); (4) *Substance–Democratic Process Distinction* (where a court makes substantive policy that overrides the democratic process); (5) *Specificity of Policy* (where a court establishes policy itself as opposed to leaving discretion to other agencies or individuals); (6) *Availability of an Alternative Policymaker* (where a court supersedes existing principle by overriding the policy concerns of other branches of government). Common to each of these dimensions is the notion of judicial usurpation. Other typologies of judicial activism inject this same pejorative view into their respective paradigms.

The framework of analysis proposed by William P. Marshall categorizes the “seven sins” of judicial activism: (1) *Counter-Majoritarian Activism* (reluctance of courts to defer to decisions of democratically elected branches); (2) *Non-Originalist Activism* (failure of courts to defer to touchstones of originalist interpretations, such as strict [i.e., narrow] fealty to the original meaning of constitutional text or to the original intent of the Framers); (3) *Precedential Activism* (failure of courts to defer to judicial precedent); (4) *Jurisdictional Activism* (failure of courts to adhere to jurisdictional limits on their own power); (5) *Judicial Creativity* (creation of new theories and rights in constitutional doctrine); (6) *Remedial Activism* (use of judicial power to impose ongoing affirmative obligations on the other branches of government or to take governmental institutions under ongoing judicial supervision as a part of a judicially imposed remedy); (7) *Partisan Activism* (use of judicial power to accomplish plainly partisan objectives). One obvious implication is that any one of these seven judicial sins may prove “deadly” to the proper functioning of a democracy.

More recently, a fivefold typology was developed by Keenan Kmiec, to wit: (1) decisions that strike down arguably constitutional actions of other branches; (2) decisions that ignore precedent; (3) decisions that “legislate from the bench”; (4) decisions that depart from accepted interpretive methodology; and (5) decisions that involve result-oriented judging. In the political arena, on March 3, 2004, the Senate Committee on the Judiciary Subcommittee on the Constitution, Civil Rights, and Property Rights held a hearing titled “Judicial Activism vs. Democracy: What Are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws?” Here, judicial activism is clearly opposed to democracy. And in its “Nominee for the Supreme Court of the United States” 2005 questionnaire, the U.S. Senate Committee on the Judiciary has outlined the salient characteristics of judicial activism as a judicial tendency to (1) provide problem-solution rather than grievance-resolution; (2) use the individual plaintiff as a means for extending far-reaching orders to broad classes of individuals; (3) impose broad, affirmative

duties upon state and society; (4) to relax jurisdictional requirements such as standing and ripeness; (5) act as an administrator with continuing oversight responsibilities over other institutions. While useful in some respects, this analysis reinforces the judicial activism/self-restraint antinomy. Others argue that “principled judicial activism” can serve as a corrective to long-standing judicial problems.

When is judicial activism beneficial—or at least a necessary evil? First, principled judicial activism must be based on legal principle and not left to mere judicial discretion. Moreover, judicial activism, in some cases, may be justified through recourse to certain judicial principles that, arguably, are akin to a theory of judging known as “virtue jurisprudence.” These judicial principles are:

1. *Principled Implicationism*: The Founding Fathers added the Ninth Amendment to protect “unenumerated rights.” The Ninth Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Supreme Court struck down an 1879 Connecticut statute banning the prescription and sale of contraceptives for violating an unenumerated right that the Court called the “right of privacy” of married persons. Writing for the majority, Justice William O. Douglas spoke of “specific guarantees in the Bill of Rights” as having “penumbras, formed by emanations from those guarantees that help give them life and substance.” Based on this principle, the *Griswold* Court found that “[v]arious guarantees create zones of privacy.” These are rights on which the Constitution is technically silent. Whether seen as tortured logic or as enlightened reasoning, implied-rights implicationism is an expansive view of the Constitution that provides further safeguards of individual freedoms not explicitly contemplated by the Founders yet wisely foreseen by them.

2. *Principled Minoritarianism*: Reflexive deference to Congress is not always a virtue. Proponents see principled judicial activism as a necessary intervention for representative failure, as in cases involving laws

that discriminate against minority groups. Professor Ronald Dworkin, a longtime advocate of a moral reading of the American Constitution, sees courts as uniquely empowered to develop sound constitutional guidelines and to propound constitutional principles that guarantee rights, especially those of discrete and insular minorities. While principled minoritarianism does not favor minorities, it gives a special regard to them whenever they may be adversely affected by the majoritarian democratic process and especially where there has been a violation of equal protection.

3. *Principled Remedialism*: Related to principled minoritarianism is the equitable principle of remedialism, where a court has discretion to fashion a remedy to right an injustice. Affirmative action falls under this rubric. So long as an identifiable “sunset clause” is attached to each remedy, as former Justice Sandra Day O’Connor has reasoned, affirmative action programs may go far in rectifying social imbalances with historical origins. Such programs invariably create new problems while trying to solve old ones, however.

4. *Principled Internationalism*: Increasingly mindful of international law as an emerging and overarching legal regime, principled judicial activists may find themselves more apt to situate their decisions within a globalized context, invoking comparative law as a methodology and exercising some deference to the reach of international law. Looking to persuasive precedents from international law, courts that render decisions that implicate foreign policy will often be charting new territory with respect to domestic law.

As applied to international law, judicial activism is a horse of a different color. Not only does the context change, but the legal connotations as well. In the widening global arena and in the emerging body of international law, judicial activism may be regarded as a form of delegated policy making. As the principal judicial organ of the United Nations system, the International Court of Justice (ICJ)—often referred to as the *World Court*—decides disputes over the proper interpretation of the U.N. Charter (arguably similar, in many respects, to a constitution), and its decisions are final for international law worldwide. In *Certain*

Expenses of the United Nations, 1962 I.C.J. 151, July 1962, for instance, the ICJ introduced a novel concept by establishing the legal basis for modern peacekeeping missions. Because peacekeeping missions were not originally in the U.N. Charter, the ICJ effectively progressed international law by interpreting the U.N. Charter to include peacekeeping missions. This is classic judicial activism in the active creation of law at the supranational level of international law and with global ramifications.

On one extreme, *judicial activism* has become a term of opprobrium, demonized as judicial tyranny. On the other extreme, judicial activism is lionized as judicial liberation. Critics of judicial restraint see conservative judicial philosophy as a cramped vision of the court’s role in creating a more just society. In the final analysis, some judicial independence is needed to promote the rule of law while accommodating social change. Thus, if there is such a thing as “principled judicial activism,” it must, above all, be judicious.

—Christopher G. Buck

See also Affirmative Action; Bill of Rights; *Brown v. Board of Education*; Democracy; International Criminal Court; Warren, Earl; World Court

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