

It's Conservatives Now Who Are Judicial Activists: Why Environmentalists Should Be Alarmed.

The following editorial on judicial activism and the environment appeared in this month's inaugural edition of tompaine.com.

by John Echeverria, Director, Environmental Policy Project

Recent federal court decisions concerning our environmental laws cry out for a giant reality check on the recently renewed political debate about whether federal judges should be "strict constructionists" when it comes to deciding issues of constitutional law.

Governor George W. Bush last month revived a familiar GOP mantra when he declared that he would only appoint "strict constructionists" as opposed to "judicial activists" to the federal bench. This stance echoes similar statements by Bob Dole, the GOP standard bearer three years ago, as well as by paterfamilias George Bush I and the modern GOP's founding father, Ronald Reagan.

Governor Bush's political declaration has a kind of through-the-looking-glass quality all too familiar in modern American political life. While Bush and others on the political right decry judicial activism, in some arenas of constitutional law, particularly those affecting our environmental laws, it is GOP-appointed judges who are actually the most activist.

On the other hand, out of a habit of supporting an expansive approach to constitutional interpretation, which apparently served their ideological interests in the past befuddled democratic forces rise to the bait of defending the judiciary against charges of "judicial activism" even as their environmental protection gains, achieved through hard-fought battles in the political arena, are being taken away by GOP-appointed judicial activists.

Sensible conversation about the virtues and limitations of a "strict constructionist" approach to judicial interpretation calls in the first instances for an accurate understanding of how the federal bench is actually deciding real cases today.

In simplistic terms, a judge is said to be a "strict constructionist" if she resolves constitutional cases solely on the basis of the language and original understanding of the constitutional text. On the other hand, a judge who looks to other sources for interpretive assistance, such as some particular social or economic philosophy, is said to engage in judicial activism.

Governor Bush left undefined the specific rulings he thinks reflects judicial activism. But similar GOP pronouncements in the past honed in on the U.S. Supreme Court's expansion of the constitutional rights of the criminally accused under the leadership of Chief Justice Earl Warren in the 1950's and 60's.

Another favorite target has been the Court's decision in *Roe v. Wade*, which interpreted the Constitution to create a zone of privacy granting women the constitutional right to decide whether or not to terminate a pregnancy without state interference.

Whether or not these (now somewhat dated) judicial innovations can fairly be characterized as the product of an activist judiciary, it is undeniably true that the charge of judicial activism can, with at least equal fairness, be lodged against more recent judicial decisions that serve a so-called "conservative" philosophy.

This is particularly true in cases involving constitutional challenges to the authority of government to adopt and enforce environmental regulations. Consider the following examples.

Over the last decade, the U.S. Supreme Court has issued an unbroken string of decisions expanding public liability under the takings clause of the Fifth Amendment for environmental and land-use regulations that impinge on private property interests, undermining the ability of the government to adopt new environmental protection standards.

The takings clause states that "private property [shall not] be taken for public use, without just compensation." According to leading scholars on all sides of the ideological spectrum, the available historical evidence unequivocally shows that the drafters of the Bill of Rights intended the clause to apply only to direct appropriations of private property, and never intended the clause to apply to regulations under any circumstances.

In its recent decisions, however, the Court has established the takings clause as a significant new constraint on environmental regulatory authority. From the standpoint of a principled strict constructionist, this direction in judicial thinking would be simply indefensible.

The same is true of recent Supreme Court decisions limiting citizens' right to sue to enforce federal health and environmental laws.

There is a general academic consensus that the drafters of the Constitution intended Congress to have broad power to grant private citizens the right to bring suits in their own names to enforce federal laws. Nevertheless, over the last decade the U.S. Supreme Court, led by Justice Antonin Scalia, has erected new barriers which citizens must cross to establish their right to bring suit to enforce environmental laws.

The Court's recent decisions, for example, have severely undermined the Clean Water Act and the Endangered Species Act, and more particularly the role Congress intended for citizens in enforcing those laws, a result which a principled advocate of a non-activist judiciary should supposedly abhor.

Conservatives living in glass houses might start a move toward a more sensible debate by refraining from hurling rocks in the direction of the federal judiciary. Or perhaps liberals may wish to rethink a strategy based on warding off rocks tossed by others, and may wish to consider hurling a few of their own.

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