



Everything Jersey

## Radio clowns have distorted the notion of judicial activism

By Paul Mulshine/The Star Ledger

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Liberals all over America are in a huff. They're screaming that the conservatives on the Supreme Court engaged in "judicial activism" by throwing out campaign-finance law in the Citizens United decision. Here, for example, Jonathon Alter of Newsweek **writes** of the recent decision "instead of ruling narrowly, the Roberts Court—in a new standard for judicial hypocrisy—struck down the laws of 22 states and the federal government."

Or read the rantings of **this liberal** who somehow construed the Citizens United case as judicial activism.

"In contrast, for a perfect example of genuine judicial activism, look no further than the case of Hillary – the Movie, officially known as Citizens United v. Federal Election Commission, only instead of so-called liberal activists, this merely represents the most recent example of blatant activism committed by the ultraconservative five-justice majority of the United States Supreme Court."

Where did these characters ever get the idea that it is "activism" for the court to do what the court was set up to do: Negate a law that violates the Constitution?

From the radio clowns, that's where. By the "radio clowns" I mean all of those salesmen who go on the radio and pretend to be conservatives, Rush Limbaugh, Sean Hannity, Mark Levin and so on.

These guys are not conservatives. Conservatism, in either its paleo- or libertarian forms, recognizes natural elites. And these radio clowns spend most of their time braying against elites. That's because they're populists. And populism is a form of liberalism.

So it's not surprising that the definition such characters have of "judicial activism" is the same as that of the liberals. When I reviewed a Laura Ingraham book a few years ago, for example, I noted that she went straight from railing against judges who "invalidate democracy at the state and federal level" to attacking the notorious Kelo decision on eminent domain.

What did the court do wrong in that decision? It *failed* to invalidate the decision by the Democratically elected leaders of New London, Connecticut, to take the land of homeowners.

Ingraham, who once clerked for a Supreme Court justice, should know better. But she is an emotional rather than a logical thinker, and emotional thinkers group things by their emotional appeal. "I don't like that decision," such a person thinks, "so it must be an activist decision."

Perhaps the most misguided radio talker in this area is Levin. Levin has spent years masquerading as a spokesman for the strict construction of the Constitution. But when Ron Paul ran for the presidency in 2008, Levin flew into a huff at the idea that a politician could actually interpret the Constitution as written. Note in the clip above when Levin makes the astounding assertion that "The framers were not libertarians," despite the fact they authored what is by any measure the most libertarian document in human history to that point.

When Levin is not busy attacking "statism" but **defending Medicare**, he is banging out books about the judiciary. I confess to not having read any for the simple reason that if I'm going to read such books, I will devote my time to reading those by such serious scholars as **Randy Barnett** instead of salesmen like Levin.

It is enough to read interviews with such characters to see where they go astray. In this interview with **National Review Online** Levin was asked about the origins of judicial activism and offered this insight:

"Activist Supreme Courts are not new. The *Dred Scott* decision in 1856, imposing slavery in free territories; the *Plessy* decision in 1896, imposing segregation on a private railroad company ..."

From the standpoint of activism, these decisions are opposites. In *Dred Scott*, the court invalidated a law enacted by Congress. In *Plessy*, the justices upheld a law enacted by the Louisiana legislature.

And quite obviously the *Plessy* decision did not "impose" segregation on anyone. In ***Plessy***, the court did exactly what Levin claims to want it to do, which was refuse to intervene in a decision by a lower level of government. In this case the duly elected legislature of the state of Louisiana had decided to require segregation in rail travel. The court simply refused to "seize authority" from the legislature, as he argued it shouldn't. That may have been a bad decision, but it could not be called an activist decision for the simple reason that, as in *Kelo*, the court declined to act.

If you read the whole interview you will see that Levin simply lumps in all decisions he dislikes under the heading "activist," even though in some cases the judges remove authority from elected officials and in some they refuse to remove authority from elected officials. Read this laundry list and try to sort out those in which the court acted and those in which it declined to act:

"As I state in the book, activist judges have taken over school systems, prisons, private-sector hiring and firing practices, and farm quotas. They have ordered local governments to raise property taxes and states to grant benefits to illegal immigrants; they have upheld severe limits on political speech, promoted racial discrimination in admissions policies, endorsed the seizure of private property without just compensation, struck a federal ban on partial-birth abortion, and intervene in the electoral process."

I realize many deluded sorts actually take such characters seriously. If you have read this far and still believe such characters as Levin espouse conservative legal philosophy, stop right here. Go to the ***Volokh Conspiracy***. There you can read intelligent commentary by Eugene Volokh, Randy Barnett and others who have an actual understanding of the constitution and the issues at hand.

As for the definition of activism espoused by Levin, Ingraham et al., it is the same as the liberal definition. They just disagree emotionally on which cases fit under it.

As for the conservatism definition of activism, that is entirely different. We conservatives view judicial activism as the creation of new government power. It is not "activism" for a court to negate a power-grab by politicians. The proper definition of activism applies not to courts that negate powers of government but to courts that create new government powers, such as the New Jersey Supreme Court did when it granted itself the power to distribute school funding.

The court has no constitutional power to distribute school funding. But the court took that power from the Legislature. That's activism.

Simple, isn't it? So why don't these wannabe conservatives get it? Because They're populists. And populism is a form of liberalism. It elevates the collective will of the masses over the individual. And the masses are an emotional mess, just like those who pander to them

As for the populists on the radio, listen to them when they're trying to sell you gold coins or tell you which ambulance-chasing law firm to hire for your fake

asbestos-injury claim. Then, they are sincere.

Otherwise, just listen and laugh.

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