

How strict constructionism can be judicial activism

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This is a note on the term ‘judicial activism’, which is misused in subtle ways among pundits and politicians.

The key to how it is misused is the ambiguity of the terms liberal and conservative. I count five (5) distinct uses of these terms.

The first three are familiar to everybody. There’s the liberal/conservative scale regarding change in general, where the L team is forward-looking and the C team seeks stability. There’s the social scale, where liberals believe people should be left to do what they want, and conservatives seek a social order reminiscent of Norman Rockwell paintings. There’s the economic scale, where liberals believe some social services are necessary, and conservatives seek smaller government.

These three scales are only tenuously related. It is easy to find futurist social conservatives, social liberals for smaller government (aka libertarians), and any other combination of the above. But, with only the words *liberal* and *conservative* used for all three axes, there’s a strong—and clearly false—implication that one who is liberal on one axis is liberal on the others.

That said, let us move on to judges. Judges are often described as *constructionists* or *activists*, as if there is a single axis along which we measure judges. But as with liberal/conservative, it confounds a couple of concepts and just creates confusion. So, let’s make some definitions.

Constructionism There are two components to a law: the statute in the Constitution or as passed by Congress, and the interpretation of the statute by courts who had to contend with the law. One school of thought, *strict constructionism*, contends that one should focus as much as possible only on the statute as written, rather than subsequent interpretation. Congress wrote what it darn well intended the law to be, so why should later judges and pundits modify that intent?

The constructionist view bears much in common with the neoclassical economist’s viewpoint, that people are very rational and very capable of foreseeing the future. To the extent that this is correct, the constructionist claim (that Congress wrote what it intended the future to look like) works.

I work with patents, and patents are an excellent example of how constructionism and the hyperrational assumption can go horribly wrong. Thomas Jefferson wrote what is now 35 USC §101 (inventions patentable), and it hasn’t even been looked at since

1952. So: did the 1952 Congress, or Thomas Jefferson, intend that web page designs should be patentable? Even the Psychic Hotline would have difficulty with such a question, yet a strict constructionist has a simple answer: yes, they did intend so, because they would have said so otherwise.

The alternative is to look at more recent rulings and try to conform with those. My impression is that this is the modal type of judge: they try to rule in conformance with the law, but that includes equal measures constitution/statute and recent rulings. Let us call this the developmentalist approach; some call it the activist approach. The language typically used sets constructionist = conservative and activist = liberal.

As an aside, the constructionist view toward the U.S. Constitution is often characterized as interpreting the constitution the way the Founding Fathers intended it. But this is an incorrect phrasing. Jefferson again: “No society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation.” [Letter to James Madison, 6 Sept 1789] The statement ‘I am a strict constructionist, because I interpret the law the way a set of developmentalists did in 1776’ is somewhere between incoherent and ridiculous. Rather, the sane strict constitutional constructionist generally shoots for a direct reading of the words as written, outside of the context of colonial times.

Stare decisis This is legal Latin for “to stand by things decided”. That is, if judges past have decided that the law of the land is *X*, then ya don’t change it to *Y* unless there’s a darn good reason.

Different judges interpret the phrase *darn good reason* differently. Some overturn past rulings at the drop of a legal hat; others steadfastly stand by the past rulings, and just mumble something about ‘it’s a bad law, but it’s Congress’s job to change it’ in rulings that they aren’t happy writing.

There are two pairs of terms used to describe a judge’s attitude toward *stare decisis*. The first is liberal/conservative and the other is constructionist/activist, and once again, both pairs of terms don’t correspond to any of the above uses of these terms.

There are four possible combinations of liberal/conservative in the context of statute and *stare decisis*, and it’s worth going over all four, because they reveal an important asymmetry.

It may happen that the law as currently interpreted differs significantly from the law as written. This is common for a law written decades ago, due to simple drift in conditions and legal understanding. The first option in this case is to be a statute liberal and a *stare decisis* conservative. That is, a judge could be a conservative in the sense of maintaining the status quo.

When there is a difference between the status quo and the original statute from times past, it is impossible to simultaneously be conservative with regards to both. Of course, this doesn’t keep many judges from trying.

The next possibility is for a judge to be liberal with regards to both statute and *stare decisis*. Such a judge really is just making up the law. You won’t find a judge anywhere who claims such a position, though there’s endless debate as to whether some judges act like this. Therein lies the asymmetry between liberal and conservative: conservative on both scales is OK but usually impossible, but liberal on both scales is an abuse of



Figure 1: To revert to the means of judging in times past would be a radical, jarring change from the present. [Painting credit: Raphael: *The Judgement of Solomon*, c. 1518-19]

judicial power.

The next option is to be a statute liberal and a *stare decisis* conservative. There are people like this in many contexts: folks who insist that the U.S.A. once had a decidedly Christian government (a claim that is itself up for dispute) and therefore the present government should be devoutly Christian as well; folks who insist that the only good music is the kind they heard in high school; folks who insist that all families must consist of a mother, father, and at least two children because that's how it had to be on the farm. Such people are radically liberal, in the sense that they oppose the status quo in favor of something different, which happens to have been the status quo at one point in the past.

Judges of this type are often called judicially conservative. Yup, a judge who rules for changing the status quo when faced with a conflict between statute and rulings is called judicially conservative, and a judge who prefers to maintain the status quo is typically called judicially liberal. It's things like this that make people learning English as a second language hate it so much.

Patent law is a good example of judicial conservatism/status quo liberalism. The circuit judge who decided that software and business methods should be patentable

(Judge Giles Rich) was very vehemently constructionist in citing statute and reading it as literally as possible. As such, he was massively activist, because he overturned a century's worth of *stare decisis*, including several rulings from the Supreme Court.

You know I am not happy with Judge Rich's ruling, but there are other cases of activist constructionists, the most salient being those who ruled in *Brown v Board of Education*, whom we all love to death. So even after we have acknowledged that the scales of liberal/conservative with respect to statute and liberal/conservative with respect to *stare decisis* are entirely different scales, and after we've pegged a judge on both, we still won't know whether their rulings are liberal/conservative with respect to the social and economic scales that people actually care about.

Gay marriage The term activist judge¹ has been bandied about by certain individuals, invariably as a derogatory term, but without clarifying to which of the above two sometimes contradictory definitions the speaker is referring. But the confusion is typically deliberate, and implies that any activism in the sense of interpreting laws based on judicial understanding must be of the radical form of arbitrarily revising law.

[The activism question often comes up in judicial hearings as well, where judges often attempt to characterize themselves as strict constructionists, implying that this is a good thing. But it seems preeminently clear that a good judge makes an effort to balance statute and recent rulings in every situation. The Constitution just doesn't say anything about computer-generated pedopæliac images², so for a judge to claim that he considers only the constitution in deciding such an issue is to say that the judge feels at liberty to just make stuff up.]

Not to accuse President Bush of simplistic thinking, but to say that any judge that does not strictly follow statute is rewriting the law is simplistic. Such a claim only works when the law as written is entirely and perfectly appropriate to all situations, even decades later—and remember that a case appears before a higher court only when there is some sort of open question, ambiguity, or controversy about the law as written. Thus, any high court judge that isn't braindead is an activist in the first sense of re-interpreting statute as written; if we insist that that means activist in the sense of inventing law, then we can only conclude that all judges are activist in the derogatory 'hijacking the law' sense used by folks such as the guy linked above.

But why be abstract when we have an easy example? The term 'activist judge' is the term preferred by people complaining about gay marriage. The big ruling in the gay marriage issue was *Goodridge v Department of Health*, which was the ruling in Massachusetts that allowed same-sex civil unions—and did so via an allegedly strict constructionist reading of the equal protection clause in the MA constitution, no less.

With regards to statute, there is clearly ambiguity because nobody ever bothered to strictly define the meaning of marriage, just as Jefferson didn't specify whether web pages should be patentable. You could ask what the word *marriage* meant in 1776, in which case you'd probably find gay marriage was not intended by the law—and neither was marriage between whites and nonwhites.

As for overturning *stare decisis*, I'm no expert on MA marriage precedent, but giving a casual look 'round, I am unable to find claims that *Goodridge* was in contra-

¹<http://www.whitehouse.gov/news/releases/2006/10/20061030-4.html>

²<http://supct.law.cornell.edu/supct/html/00-795.ZS.html>

diction of past court rulings. For so many claims that this is an activist court, you'd think somebody would find the ruling that they were supposedly contradicting. Rather, marriage law in the U.S.A. has been a slow slide toward disaggregating marriage into a series of social services (especially given the strict interpretation of the "no establishment of religion" clause in the Constitution), and *Goodridge* fell right into that by interpreting the civil union as such a bundle of social services.

So what we get here is that the court in *Goodridge* wasn't actually activist at all in either the statute or *stare decisis* sense. It read directly from the MA constitution using a plain English understanding of the language about equality under the law, and did not seem to disagree with past court rulings. So we conclude what many of you have probably been thinking all along: that the term 'activist judge' in this context really is just a polysyllabic way of saying 'socially liberal'.

Now, there's a specific reason for conservative rhetoricians to confound all five axes and claim that liberal on one means liberal on the other four, which returns to the asymmetry discussed above: if a judge is liberal on both judicial axes at once, then that judge is just making up law.

This is the crux of the implicit argument in the term 'activist judge'. If we start with the false premise that a judge who is liberal on one axis is also liberal on all four other axes, then we get the false conclusion that all socially liberal judges are just making up the law, and so the only good judge is a socially conservative judge.