

Widener University Delaware Law School

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Using Activism Appropriately

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Using activism appropriately

Welcome to Bench Press, a new column on the Supreme Court and the Constitution. I will be writing periodically about controversial constitutional cases before the Supreme Court. Occasionally, I'll focus more broadly on local issues implicating constitutional law.

The column is called "Bench Press" because it is media ("press") coverage of judges (who are referred to as the "bench")

ALAN E. GARFIELD because of the raised area in courtrooms where they sit). But the name also refers to the mental workout I hope you will get from reading the column. As you'll see, many constitutional issues are brain-teasers with compelling arguments on both sides.

Yet judges must choose sides in these debates, and their choices have real consequences – even, as in the decision whether to stay an execution, the difference between life and death.

If the column has a theme, it is why a nation based on popular sovereignty allows nine unelected judges to overturn laws enacted by politically accountable representatives. Put simply, if most Americans want to make flag burning illegal, why can five justices – a simple majority of the Supreme Court – say they can't? Yet that's exactly what five did when striking down a Texas flag desecration law in 1989.

Who did these justices think they were? Were they merely applying the Constitution's text? Not likely.

The First Amendment says "Congress shall make no law ... abridging the freedom of speech." It doesn't make clear whether conduct like flag burning is "speech." And it certainly cannot be read literally to mean "no law" can abridge speech. Otherwise,



perjury, false advertising and copyright laws would be unconstitutional. Yet if government can regulate speech in those contexts, why can't it regulate flag burning?

Were the justices following the framers' intent? Don't count on that either. It's not even clear whose intent they would follow.

The First Amendment, as an amendment to the Constitution, had to be passed by two-thirds of both houses of Congress and ratified by three-fourths of the states. So whose intent of these hundreds of people would prevail?

If justices aren't doing what the Constitution actually says or following the framers' intent, how are they deciding these cases? Are they merely imposing their personal values on the rest of us?

Conservatives like to say that's what liberal justices do when they practice "judicial activism" instead of "judicial restraint." But students of constitutional law know judicial ac-

tivism is a two-way street.

In the early 20th century, President Franklin Delano Roosevelt railed against conservative justices for being activists. When the Supreme Court struck down Roosevelt's New Deal legislation, he decried the court for acting like a "super-leg-

islature" amending the Constitution through "judicial say-so."

In more recent years, conservative and liberal justices alike have been activists. Indeed, it's hard to say who were more activist: those who found a constitutional right to abortion or those who stopped the Florida recount and effectively proclaimed George W. Bush president.

The point is that all judges are activists at times. The question is not whether they should be but when they should be. Under what circumstances should judges use their power of "judicial review" to find unconstitutional actions taken by the politically accountable branches of government?

One theory is that judges should use this power to protect minority groups. After all, without a judicial check, our democratic system would produce the tyranny of the majority.

But even that theory only goes so far. We undoubtedly want the court to strike down oppressive majoritarian laws like Jim Crow segregation in the South. But the court can't always protect minority rights at the majority's expense. That would let the minority tail wag the majority dog. Surely the court doesn't have to strike down antipolygamy laws merely because a minority religious sect objects.

These are the types of questions we will wrestle with this year. If you're eager to begin, start pondering an issue being argued before the Supreme Court this week. The question is whether movies showing actual cruelty to animals are speech protected by the First Amendment.

What do you think? Should brutal dog fight movies be considered "speech" under the First Amendment? And even if they are, should Congress still be able to regulate them to discourage cruelty to animals? But, most important, why should nine justices have the final say on these questions and not our elected representatives?

Stay tuned.

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