



Judicial Activism vs. Judicial Restraint

I. Judicial Activism

- Use of court's opinion as instrument of solving social, economic, political problems
- "Guardian ethic"-guardian of people
- Examples of Judicial Activism
 - Striking down Texas law of flag burning in *Texas v. Johnson*, 1989
 - Striking down line item veto in *Clinton v. New York*, 1998
 - Striking down Florida recount in *Bush v. Gore*, 2000
 - Striking down death penalties for mentally retarded in *Atkins v. Virginia*, 2002
 - Striking down Texas sodomy law in *Lawrence vs. Texas* 2003

II. Judicial Restraint

- Allow states and other 2 branches to solve social, economic, political problems
- Only act-clear constitutional questions
- Merely interpret, not make law
- Decide cases- **original intent of Founders**
- Only 23 cases of judicial review prior to 1900

Historical Review

- John Marshall and the Growth of Judicial Review
 - *Marbury v. Madison* (1803) established judicial review—courts determine constitutionality of acts of Congress
 - Established the power of the judicial branch above others
- Prior to 1937: Conservative court-struck down reform-minded laws (min. wage, banning child labor)

Historical Review

The "Nine Old Men"

- FDR administration & ND v. conservative court
- Court packing plan
 - Congress
 - Expand size – re-create make up of court
- Switch in time that save nine
 - Chief Justice Evans Hughes
 - Assoc. Justice Owen Roberts

Warren Court (1953-1969)

- Most active in policy-shaping in history
- *Brown v. Board of Education* (1954)
 - Doctrine of "separate but equal" inherently unequal"
 - Over-ruled *Plessy v. Ferguson* (1896)
- *Miranda v. Arizona* (1966)
 - Extension of B of R to protect citizens against state govt actions
- *Baker v. Carr* (1962)
 - "one man, one vote"
 - Involvement of court in redistricting
- Critics
 - Called for impeachment of Chief Justice Earl Warren
 - Claimed non-elected doing the job of elected

Burger Court (1969-1986)

- Conservative
- Nixon appt Chief Justice Warren E. Burger as his "strict constructionist"
- *Roe v. Wade* (1973)
 - Unconstitutionality of state prohibitions on abortion
- *United States v. Nixon* (1974)
 - Executive Privilege over-ruled
- Called for busing to end de facto segregation
- Narrowed defendant's rights but kept *Miranda*

Rehnquist Court (1986-2006)

- Conservative
- Not a revolution of reversals, but slowly chipping away at activist decisions
- No longer in role as special protector of individual liberties and civil rights for minorities
- Typically deferred to the will of majority and rules of government

IV. Restraints on Judicial Power

- Courts make decisions, do not enforce
 - Courts cannot “create” cases
 - Cases must come to Court
 - Presidential appt. of judges
 - Stare Decisis
 - THE CONSTITUTION
 - Congress
 - Senate confirmation
 - Impeachment
 - Increase # of courts and judges
 - Amendments (SC struck down income tax late 19th, Congress 16th Amendment)
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