A MULTIDIMENSIONAL VIEW OF JUDICIAL ACTIVISM. pdf

1: judicial activism | Definition, Types, & Facts | www.enganchecubano.com

A Multidimensional Vie My Searches (0) Print; Save; Email; Stefanie A. Lindquist and Frank B. Cross. in Measuring Judicial Activism. Published in print April.

See Article History Judicial activism, an approach to the exercise of judicial review , or a description of a particular judicial decision, in which a judge is generally considered more willing to decide constitutional issues and to invalidate legislative or executive actions. Although debates over the proper role of the judiciary date to the founding of the American republic, the phrase judicial activism appears to have been coined by the American historian Arthur M. Although the term is used quite frequently in describing a judicial decision or philosophy, its use can cause confusion, because it can bear several meanings, and even if speakers agree on which meaning is intended, they will frequently not agree on whether it correctly describes a given decision. The term activism is used in both political rhetoric and academic research. In academic usage activism usually means only the willingness of a judge to strike down the action of another branch of government or to overturn a judicial precedent, with no implied judgment as to whether the activist decision is correct or not. Activist judges enforce their own views of constitutional requirements rather than deferring to the views of other government officials or earlier courts. Defined in this way, activism is simply the antonym of restraint. It is not pejorative , and studies suggest that it does not have a consistent political valence. Both liberal and conservative judges may be activist in this sense, though conservative judges have been more likely to invalidate federal laws and liberals more likely to strike down those of the states. In political rhetoric activism is used as a pejorative. In the early 21st century one of the most-criticized Supreme Court decisions in the United States was in Kelo v. City of New London , in which the court allowed the city to exercise its eminent domain power to transfer property from homeowners to a private developer. Because judges may be called activist for either striking down government action or permitting it in Kelo they permitted it and because activism in political usage is always considered wrongful, this sense of activism is not the antonym of restraint. Less controversially, but less frequently, a judicial decision may be called activist in a procedural sense if it resolves a legal issue unnecessary to the disposition of the case. In the Anglo-American legal system, such pronouncements are called obiter dicta Latin: Procedural activism is generally considered improper at the federal level in the United States and in countries that follow the U. In other systems, however e. Complaints about activism have arisen in most countries where courts exercise significant judicial review, particularly within common-law systems e. Although in the U. In the first half of the 20th century, the Supreme Court tended to be more conservative than legislatures and was criticized by liberals for striking down progressive economic legislation notably elements of Franklin D. In the early 21st century, the Supreme Court tacked back to the conservative side and was criticized for striking down laws such as campaign finance reform see Citizens United v. Since neither conservatives nor liberals claim that judicial decisions should be based on politics rather than law, the debate over judicial activism does not take the form of arguments for and against. Instead, each side accuses the other of activism while denying that they themselves engage in it. However, the persistent difference of opinion among scholars and judges as to how the Constitution should be interpreted makes it difficult to demonstrate that any decision in a controversial case is the product of politics rather than law.

A MULTIDIMENSIONAL VIEW OF JUDICIAL ACTIVISM. pdf

2: Sessions: Judicial Activism Is 'Fundamentally Undemocratic'

This final chapter constructs a composite measure of judicial activism based on the components developed in prior chapters. First, the chapter places the justices in a two-dimensional space reflecting their levels of ideological activism and institutional activism.

The authors propose a methodological shift that repositions the activism analysis more broadly as an analysis of judicial discourse. The authors contend that this methodological shift would allow for more rigorous empiricism in the literature and for an analysis that would open up the activist project to all constitutional court cases, whether impugned legislation is under scrutiny or not. Introduction In , Margit Cohn and Mordechai Kremnitzer articu- lated a multidimensional model of judicial analysis that attempted to measure the decision-making of constitutional Multi-Dimensional Analysis of Judicial Decision-Making courts by developing multiple indicia of measurement. The definition of judicial activism is itself often the subject of debate in the literature. The range of decision-making is the matter most contested in the extant literature Cohn and Kremnitzer Certainly, even a relatively simplistic exploration of judicial activism yields confounding questions about the nature of this judicial range of conduct. For example, has the judiciary exceeded its bounds, and thus behaved as an activist court, when it reverses legislative edict? Is a court being activist when it protects the liberty interests of an accused in the face of legislative persecution? What about when legislative edict and constitutional values clash â€" which interest supersedes the other? This confusing constellation of inquiries is often ignored in the political context in which charges of activism inure. Others might argue that what appears to be derogation of this fidelity is wholly justified in the context of a court that is protecting the constitutional rights of an accused Kelly and Murphy Others still may argue that any time the court lacks the expertise necessary to adjudicate it behaves 1 Muttart In the activism debate, indeterminacy flows. As a result, the study of judicial activism itself and the develop- ment of salient models has come under attack by some schol- ars as an inquiry beginning with a value-laden question in order to produce a value confirming answer Jochelson For instance, asking whether the court exceeded its powers by overturning the legislature, especially when the researcher answers the question on the basis of her own judgment, may be something of a leading question. This critique castigates an analysis of judicial activism as an inherently social conservative project destined to delight the political right. Here we imagine the creation of scales to determine the degree to which a Court speaks about its own activism along a series of activism dimensions. The posited methodological shift is the development of a multidimensional model of judicial discourse. The empir- ical results of such an investigation may provide interesting primary data for future theorizing, and thus reduce the lobbing of value judgments for another day. This is not a move that Cohn and Kremnitzer anticipated in their ori- ginal study, but we endeavour to make a persuasive case for this alteration in the coming pages. This paper is divided into three parts. Part I explores the de- velopment of the Cohn and Kremnitzer model and explores the literature that inspired their model. Part II reviews the model in more detail. Part III discusses the critiques of the model and our responses to these critiques, including the impetus for our modifications. Ultimately, we conclude that the adapted model may provide a new language of empirical exploration of legal decisions in Canada that moves the in- vestigation beyond the usual concerns of precedential effects of decision-making. In other words, we argue that the study of judicial activism is value laden and therefore its empirical measurement could result in tautological responses to value- driven questions. Shifting the discussion to a discourse analy- sis instead asks us to elucidate what interpretive values the court sees as pivotal in its approach to adjudication. We may ultimately find ourselves, at the cessation of the empirical project, grappling with the same contest over interpretive values, but we would be doing so in response to a new set of data, instead of positing the values as the starting and ending point of analyses. Even if one were to fail in elucidating any empirical significance, the coding exercise we envision would at least provide a new language of description for constitu- tional decision-making beyond measuring success or failure rates of a court. The development of this new language would do justice to the long line of activism investigations that have emerged since the middle of the twentieth century, while simultaneously deferring the political

discussion to a differ- ent point in the analysis. This might encourage something of an agnostic approach to the study of judicial activism which we prefer to reframe as a study of judicial discourse. It would, at the least, reorient the starting point of inquiry in a less value driven direction. A complete review of theory that underpins activist literature in general is beyond the scope of this paper. For our purposes, we merely seek to inform the reader of a brief his- tory of the knowledges that informed the originators of the multidimensional model of analysis. Certainly, a uniform definition of judicial activism is absent in the literature. Undoubtedly, the term has been marshaled on all sides of a particular argument in order to critique court jurisprudence, often in the constitutional realm. In some cases, the object of the criticism is the content of the decision, rather than the loftier, theor- etical question of the role assumed by the judiciary. The example of the United States reveals the flaws of this attitude. In the North American context we have seen arguments making the claim that a court has essentially derogated from the will of the legislature, thereby flouting the constitutional balance of governance powers established by constitutions Morton and Knopff At a more microscopic level, such claims often take aim at the mechanics of judicial decision-making and charge that a court has departed in its decision from the original intent of the legislature, a matter evidenced by the written legislation or constitutional text Manfredi Yet even such minutiae are often contested. For instance, some argue that original intent is a fiction, and that any such contention is plagued by indeterminacy Kelly and Murphy This conception of values is subject to its own indeterminacy and thus other attempts to describe activism have emerged. Hence, scholars began to scrutinize the concepts of judicial discretion, and a court could be described as activist under such accounts where it has exceeded the scope of its author- The Annual Review of Interdisciplinary Justice Research ity. Often, these critiques chastise a court for its activism when it relies on non-traditional, weak and limited, or under-theorized social science evidence Manfredi and Kelly To answer such concerns, scholars problematize the no- tion that a court is a final site of debate in these areas of contested social science evidence. Some scholars posit that a court is only a first site in a dialogue about constitutional issues between legislatures and courts Hogg and Bushell The dialogue here is apprised of players with different consti- tutional roles â€” legislatures wish to efficiently legislate, and courts are charged with guarding constitutional liberties. Each may thus have important contributions to the dialogue and the constitutional outcome of a particular constitu- tional issue Waluchow ; Kavanagh Of this agonistic relationship is borne the notion that rather than dialogue between institutional adversaries, the relationship between legislatures and courts is more akin to partnership, or even less simplistically, as one partnership in a network of complex institutional relationships involving numerous other government agencies, political partisans and society Cohn and Kremnitzer The notion of dialogue is further seated in conceptions of the court as guardians or custodians of constitutional val- ues. Perhaps when a court issues a decision emboldening constitutional values, it is behaving less activist and simply as a capable constitutional custodian Cohn and Kremnitzer Others would argue that constitu- tional fastidiousness in the context of such values would be more appropriate where the decision aligns with populist sentiment Tushnet Yet others argue that a court must be placed so as to guard constitutional values especially when constitutional fastidiousness means that vulnerable groups are being protected from majoritarian tyranny Mc- Multi-Dimensional Analysis of Judicial Decision-Making Lachlin Under such constructions, guardianship of the constitution must hold fast, even in the face of accusa- tions of deviation from the legislative agenda. In the development of the multidimensional model of analy- sis Cohn and Kremnitzer recognized the importance of the above arguments. Cohn argues for her composite model of activism: The model thus supports a com- posite view of judicial decision-making, which draws together the variety of ways that judges can impact on society. Once judicial involvement is considered as potentially balanced by other powers, its contribution can be considered against the potential threat of over- intervention and under-representation. On balance, the potential benefits of a participating judiciary have sustained and reinforced constitutionalist frameworks Cohn Canon had articulated six indicia of activism, which recognized that the import of a decision was more than its disposition â€” that other political stories are being told in a particular decision Canon Thus Cohn makes clear that she is less concerned with accounts of constitutional courts as inappro- priate actors, but rather in the analytics of courts as agents of liberal political theory. Hence Cohn and Kremnitzer develop an account apprised of three dimensions of analysis, some of which move

beyond a textual analysis of decision-making. The indicia are divided into three dimensions of analysis: Each dimension of activism represents a different paradigm for envisioning the activism of a particular court. Traditional visions of activism are a measure of judicial output as compared to previous legal norms or rules. The deviation from such norms is what establishes these dimen- sions as activist. This dimension consists of twelve indicia. Judicial stability measures whether a court deviates from its past decisions, or decisions of lower courts. Interpretation analyzes whether a court interprets legal text in light of the original meaning often held to be the intent of the drafters of the document of the constitutional text. Judicial reasoning explores whether a court expresses fidelity to legal procedures or whether the court uses reasonableness-based calculi to explain the reach of its decision. Threshold activism asks whether a court jumps threshold hoops in order to hear the substance of a case in spite of legal barriers to its jurisdiction. Obiter dicta asks how far a court is willing to expand its arguments beyond the legal issues raised in a given case. Comparative source reliance examines the extent to which a court will use extra-juris- dictional sources to reach a decision. Judicial voices situates activism as a function of the amount of dissenting opinions in the decision. Extent of decision asks about the implications of a decision in a particular area, with decisions of broad scope being more activist than narrowly tailored decision making. Finally, legal background asks whether clear legal tests precede the case and suggests that when courts need to use creative reasoning in the face of vague rules, activism is higher Cohn and Kremnitzer Each of these indicia represents well-worn political theory of judicial activism and asks whether the court has exceeded the trad- itional limits of its authority. Socio-legal deviation activism, the second dimension of an- alysis is based on post-decision dynamics, and is inspired by the dialogue model discussed in the previous section. The last dimension of analysis, core value activism, posits that where courts align with core values of the constitution they are behaving in a less activist fashion. The only factor developed by Cohn and Kremnitzer under this dimension is intervention and value content. Cohn and Kremnitzer explain that: Our third vision of activism considers the protection of core values as a relatively non-activist exercise, as it is a constitutional role of the judiciary. The utilities of this partici- pation outweigh the potential dangers - dangers that are essentially tempered, in constitutional democratic frameworks, by an effective power of the legislature over the judiciary and other societal restraining mechan- isms embedded in the constitutional network. We thus adhere to the argument that purely value free judicial decision-making is not only impossible, but also un- tenable. Hence, Cohn and Kremnitzer develop an understanding of activism in the third dimension that justifies the role of the judiciary as custodians of constitutions. The development of this third category places its authors as subscribing to the prudence of constitutional stewardship. The development of the multidimensional model was an important moment in activism scholarship. Its benefits are derived from its nuance. It provides more variables than pre- vious accounts. It also represents an interest in post-decision dynamics as an empirical endeavour. It equips us with a vision of activism that allows for guardianship of the consti- tution to militate against activism charges in the traditional visions of activism. Despite these possibilities, neither Cohn nor Kremnitzer has attempted to Multi-Dimensional Analysis of Judicial Decision-Making operationalize an empirical version of the model, and indeed, Cohn in her recent work has only utilized the model as a qualitative critique of a particular legal case Cohn ; see also Khosla Certainly there have been attempts to empiricize activism indicia in Can- ada for recent examples see Muttart , ; Ostber and Wetstein The literature reveals a willingness to interrogate the criteria qualitatively in singular case contexts but a reluctance to apply the model more broadly Muttart ; Khosla The critiques relating to the di- mensions countenancing controversial and contested judicial functions, or as distraction from more commonly understood narrow expositions of activism are potentially more damn- The Annual Review of Interdisciplinary Justice Research ing critiques. Hence, the model as developed by Cohn and Kremnitzer may be criticized as a reimagining of democratic court function in a manner which disrupts the traditional visions. This degree of latitude would undoubtedly trouble those who have a more traditional understanding of judicial activism scholar- ship. Would one use the judgment of the researcher, a notable constitutional scholar, or some other luminary?

A MULTIDIMENSIONAL VIEW OF JUDICIAL ACTIVISM. pdf

3: Measuring judicial activism in SearchWorks catalog

The multidimensional model advanced in the article is based on three distinct visions of judicial activism, which draw on a perceived role of the judiciary as participant in a complex network of.

See Article History Judicial restraint, a procedural or substantive approach to the exercise of judicial review. As a procedural doctrine, the principle of restraint urges judges to refrain from deciding legal issues, and especially constitutional ones, unless the decision is necessary to the resolution of a concrete dispute between adverse parties. As a substantive one, it urges judges considering constitutional questions to grant substantial deference to the views of the elected branches and invalidate their actions only when constitutional limits have clearly been violated. The requirement of standing, drawn from the federal court jurisdiction outlined in Article III of the Constitution , restricts access to court to those who can demonstrate a concrete injury, caused by the defendant, and redressable by a judicial decision. Federal courts will not hear suits pursuing generalized grievances or seeking abstract legal guidance, and this aspect of restraint is linked to the view of courts as institutions designed to resolve disputes rather than to promulgate legal norms. By contrast, in some other countries [e. Similarly, the doctrine of ripeness prevents plaintiffs from seeking judicial relief while a threatened harm is merely conjectural, and the doctrine of mootness prevents judges from deciding cases after a dispute has concluded and legal resolution will have no practical effect. Even if cases may properly be heard in federal court in the United States, judicial restraint offers limiting procedural devices. The canon of constitutional avoidance directs courts to decide constitutional questions only as a last resort. Thus, if a case may be decided on multiple grounds, judges should prefer one that allows them to avoid a constitutional issue. The canon of constitutional doubt advises courts to construe statutes so as to avoid constitutional questions. Last, if a constitutional issue must be faced, a restrained judge will presume the constitutionality of government action and strike it down only if the constitutional violation is clear. Restrained judges are also less willing to overturn the precedents of prior judicial decisions. Judicial restraint counsels judges to be cautious in enforcing their views of the meaning of the Constitution. It does not tell them how to arrive at those views, and it thus has no necessary connection to any particular method of constitutional interpretation. Arguments that a particular method of interpretation produces greater restraint are usually actually arguments that the method produces greater constraint on judges, leaving them less freedom to decide cases on the basis of their policy preferences. Judicial restraint has a long history in American legal theory and case law. Supreme Court decisions as early as Fletcher v. Early scholars also endorsed the idea; one notable example is Harvard law professor James Bradley Thayer â€” , who observed that a legislator might vote against a law because he believed it unconstitutional but nonetheless, if he later became a judge, properly vote to uphold it on the grounds of restraint. The general effect of judicial restraint is to allow the legislature and executive greater freedom to formulate policy. Its political valence has thus varied depending on the relative positions of the Supreme Court and the elected branches. In the first half of the 20th century, judicial restraint was generally invoked by liberals in the hopes of preventing courts from striking down Progressive and New Deal economic regulation. In the second half of the century, during the tenure of Chief Justice Earl Warren â€”69 , the Supreme Court began taking positions more liberal than the states and the federal government, and restraint became a common conservative political theme. Justices endorsing restraint during this period included John Marshall Harlan â€”71 and Frankfurter, who continued to endorse the principle even as its politics shifted around him. As with its political valence, judicial restraint does not have a consistent normative value. In general, restraint is typically considered desirable on the grounds that in a democracy elected officials should play the primary role in making policy. Courts that are insufficiently deferential to elected legislators and executives may usurp that role and unduly constrain democratic self-governance. On the other hand, protection of constitutional rights, particularly those of minorities, demands a certain degree of judicial assertiveness. United States , in which the court upheld race-based discrimination against Japanese Americans during World War IIâ€”fit this pattern.

A MULTIDIMENSIONAL VIEW OF JUDICIAL ACTIVISM. pdf

4: Justiciability and Judicial Activism - Oxford Scholarship

This paper reviews the development of a multidimensional approach to the study of judicial activism as conceived by Cohn and Kremnitzer in The paper explores the mean- ing of judicial activism briefly before exploring the development of the.

In basic terms, judicial activism occurs when a judge presiding over a case allows his personal or political views to guide his decision when rendering judgment on a case. The topic of judicial activism has been a source of controversy in the U. To explore this concept, consider the following judicial activism definition. Definition of Judicial Activism Noun Court rulings made based on political or personal views of the judges presiding over the case. However, a man named Arthur Schlesinger, Jr. Schlesinger was a specialist in American History, and was well known for his study of 20th century American Liberalism. Since the term first hit the political-judicial stage, it has been a point of controversy. This is especially interesting, as Schlesinger never truly defined the term. Law professor and leading constitutional scholar, David A. Strauss, has offered his opinion that judicial activism can take at least three forms. In , a group of parents, on behalf of their children, filed a lawsuit against the Board of Education of the City of Topeka, Kansas. The parents had attempted to enroll their African-American children in the closest neighborhood school that year, but were refused enrollment. The suit requested that the school district reverse its policy of racial segregation , in which the district operated separate schools for black and white children. The plaintiffs in the case claimed that racial segregation resulted in inferior facilities, accommodations, and treatment of their children. Ferguson , a case that upheld state laws requiring segregated transportation on trains. When the parents appealed their case to the U. Supreme Court, the Court ruled that segregation of whites and blacks in school was indeed unconstitutional, as it was harmful to black students. This ruling flew in the face of the legal doctrine of stare decisis , which requires judges to uphold prior rulings of higher courts. Ferguson, which was a similar case, the Supreme Court overruled it. This ruling on desegregation of public schools came with considerable resistance, as opponents of the ruling believed that the Court had relied on statistics and social theories, rather than on established law. This meant to them that the Supreme Court Justices had acted outside of its powers by creating new law. They argued that the court should use its power to adapt existing laws to address problems in current society. Toward the end of the 20th century, the U. Supreme Court was seen as a powerful judicial body exercising greater activism than ever before. Conservatives criticized many of the justices, claiming they struck down many state and federal laws based on their own liberal political beliefs. The history of judicial activism shows us however, that both liberals and conservatives are known to take part in, and benefitting from the practice, while accusing the other group of doing so. What is Judicial Activism The judicial system in the United States is a system that provides courts with the power and authority to administer justice, though that justice must be within the bounds of the law. As some laws in the U. While the judicial system is not authorized by the U. Constitution to make laws, it applies the facts of each case to the existing laws in order to reach a decision that ensures justice is served. In some cases, the court is required to make a decision about how a law should be applied to the particular circumstances in reaching its decision. When a court does not confine its rulings to interpretations of the law that other reasonable judges would make, it may be seen as creating law from the bench, rather than applying existing laws. Similarly, judicial activism is sometimes seen in the form of making a ruling on an issue that is not specifically brought to the court in a present case. Louanne and Chuck have an existing child custody and child support order that was issued when they divorced five years ago. Louanne, who has custody of the children every day, save for the two weekends a month they visit their father, applies to the court for an order increasing the child support amount. When the case goes before the court, the issue that is to be considered by the judge is whether or not an increase in child support is appropriate when using the mandated formula for child support calculations. Judge Jones, who pays a hefty amount of child support himself, decides that the father should have more time with his children. In this example of judicial activism, the judge has made a ruling based on his personal opinion or feelings. He disregarded the usual process for determining child custody, which involves an investigation into what

custody arrangements will be in the best interests of the child. Louanne has the right to appeal the decision on the basis that it was inappropriate for the court to make such a change to custody, and therefore to deny the request for a modification to the child support order. There is a good chance the appellate court would agree, and return the case to the family court for the proper actions to be taken. Some people view judicial activism as an opportunity for proactive judges to correct certain legal injustices, and to establish public policy that better serves the needs of modern-day society. Other people see it as a way for certain political groups to, through judicial activism by sympathetic judges, avoid the legislative process for creating laws, which enables them to bypass public opinion. In such a case, the concern is that judicial activism overturns or ignores existing laws, which damages the democratic rule of law. Judicial Restraint Judicial restraint is commonly considered to be the opposite of judicial activism. Judicial restraint embraces the belief that judges should narrowly interpret existing law and constitutional interpretations, adhering to prior interpretations or congressional acts in making decisions. When exercising judicial restraint, judges refrain from exercising their powers to make judgments based on their own personal or political views. The goal of judicial restraint is largely to maintain a balance within the governmental branches. Example of Judicial Activism Every day, judges at every level of the U. This necessitates a balancing act of interpreting existing law, referring to existing case precedent, and ensuring that justice is brought in each individual case. Many judges feel that some laws, include case precedent, need to be updated to better suit modern social structure. Taking on this responsibility , by interpreting and applying the law differently, or even by sidestepping the law entirely, amounts to judicial activism. Federal Sentencing for Drug Convictions is Example of Judicial Activism Before August , a defendant convicted of possessing 5 grams of crack cocaine, with the intent to distribute, faced a mandatory five-year prison sentence. On the other hand, the same person possessing grams of powder cocaine, with the intent to distribute, faced the same mandatory sentence according to federal law. In , however, Congress passed the Fair Sentencing Act, which reduced the disparity between convictions for possession of crack cocaine and powder cocaine, to ensure more fair sentencing. It is known that the chemical composition of the drug is the same, regardless of its form. It is also widespread knowledge that the majority of offenders receiving maximum penalties for possession of crack cocaine are African American. In , the Supreme Court ruled that the Fair Sentencing Act applied to any sentences imposed after it was passed in August , even if the charges were made before that date. Shortly after that, two people who were convicted and sentenced prior to the August effective date of the Act, filed suit in the U. Court of Appeals for the Sixth Circuit. These defendants, in the case of United States v. The three-judge panel of the appellate court, after engaging in their own fact-finding mission, declared that the new mandatory sentencing should apply to all offenders previously sentenced for these crimes. This ruling came was made on the belief that the prior application of law constituted racial discrimination under the federal Equal Protection Clause , contained in the Fourteenth Amendment to the U. Related Legal Terms and Issues Authority â€" The right or power to make decisions, to give orders, or to control something or someone. Congress â€" The legislative branch of the United States federal government , composed of the House of Representatives and the Senate. Defendant â€" A party against whom a lawsuit has been filed in civil court, or who has been accused of, or charged with, a crime or offense. Discrimination â€" The practice of unfairly treating different categories of people, especially on the grounds of ethnicity, national origin, gender, race, religion, and sexual orientation. Judgment â€" A formal decision made by a court in a lawsuit. Legal doctrine â€" A set of rules or procedures used to make decisions in court cases. Doctrine is often established through precedent, or prior rulings on similar cases. Precedent â€" An earlier event or case ruling that is used as an example or guide for future court case rulings in similar circumstances. Stare Decisis â€" A legal principle when points in litigation are based on precedent. Welcome all discussions Please indicate if you are a lawyer.

A MULTIDIMENSIONAL VIEW OF JUDICIAL ACTIVISM. pdf

5: Judicial activism: A Glossary of Political Economy Terms - Dr. Paul M. Johnson

A multidimensional view of judicial activism. Publisher's Summary Measuring Judicial Activism supplies empirical analysis to the widely discussed concept of judicial activism at the United States Supreme Court.

Searching for Meaning with Sniffer Dogs Richard Jochelson Introduction 1 In the Charter era, activism scholarship has tended to focus on the degree of inter- ventionist intrusions by a court into the domain of the legislature. In , Margit Cohn and Mordechai Kremnitzer articulated a highly complex and nuanced 2 approach to studying the activism of courts. The approach advanced was multi-factorial, highly specialized, and more broadly drawn than most previous approaches to activism. The Cohnâ€"Kremnitzer model, because of its comprehen- sive nature, provides an important opportunity to rethink activism scholarship in two ways. First, the comprehensive nature of the model allows us to examine a fuller spectrum of activism indicia. For instance, asking whether a court departed from the original constitutional intent of a document is really a dual enterprise. I argue that activism scholarship can be reconstructed as a battle over such core constitutional principles. That is not to say that activism scholarship in unimportant; rather, its bluntness may mute important debates that arise from the details of a legal case. Public response, media coverage, and government response to two 4 5 Supreme Court cases, Kang-Brown and A. However, these por- trayals ignored the fact that the Supreme Court of Canada had, once again, used the ancillary powers test to create new police powers that previously did not exist in law. The mechanism of the ancillary powers doctrine allows for judicial creation of previously unknown police search powers. In these cases, the majority of the Court found that the searches in question were unreasonable. A differently constituted majority, however, allowed for a common law power to search using sniffer dogs, on grounds of suspicion 7 and without a warrant. This countenancing of ancillary powers in the absence of legislative input raises concerns about the proper role of courts in creating new police powers a matter that is a project for its own dedicated article. However, and more fundamentally, this context provides an interest- ing substrate upon which to problematize the utility of activism scholarship. I will use the multidimensional model to examine the judicial reasoning used by the Court to reach its disposition, rather than the disposition itself. This will necessarily require a micro-analysis of the decision beyond the dis- position. I argue that the Cohnâ€"Kremnitzer model reveals useful information about decisions but that it can be further contextualized for this function. I also argue that the dimensions inherent in this account of activismâ€"and, by extension, other scholars making pronouncements about improper activism or judicial restraintâ€"can be better situated. These are values that we often take for granted, but their meaning remains elusive. Searching for Meaning with Sniffer Dogs Canadian constitutional context, yet its exact content is both hotly contested and evolving. That the disposition itself was activist, or not, not only may be hard to determine, even using mul- tiple factors, but may distract us from more fundamental philosophical ques- tions that exist in the minutiae of judicial reasoning. In Part I below, I explore a brief history of the activism scholarship that led to the development of the Cohnâ€"Kremnitzer model. In Part II, I review the development of the ancillary powers calculus. Cohn and Kremnitzer have cautioned against analysis of activism in an 8 individual case. I accept this caution, but my apprehension here has more to do with my scepticism as to the utility of judicial activism as a value in and of itself. A Brief History of Activism A. The genealogy of the Cohnâ€"Kremnitzer model Here I review the activism literature that was central to the development of the Cohnâ€"Kremnitzer model. Others charge that acti- vism is at its highest when judges depart from the original intent of the 12 Constitution in adjudication of matters. The primacy of original intent is often buttressed by claims that such intent is informed by moral universality, 13 permanence, and societal consensus. Under such an approach, judicial activism scholarship is an investigation into the limits of judicial dis- cretion when that discretion is exercised outside of the normal judicial range 9 Kent Roach, The Supreme Court on Trial: Judicial Activism or Democratic Dialogue Toronto: A Comment on Newfoundland Treasury Board v. Broadview Press, at 34 â€" 53; C. David Forte Lexington, MA: Challenge and Reform Cambridge, MA: Harvard University Press, , , Manfredi, Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism Toronto: Searching for Meaning with Sniffer Dogs 18 of expertise. The use of poorly under-

stood social-science evidence by courts in the furtherance of subjective judi- 20 cial pronouncements is an expansion of traditional judicial boundaries. The Court is part of complicated political-legislative machine that is interwoven and interconnected with other branches of government. When a court acts, other branches of government are subsequently pressed into action. Hence, some scholars have argued that what ought to be interrogated is not the activism of the courts per se but, rather, its interactions with other institutions. Constitutional dialogue is based, in part, in the opposing inter- ests of the players: Some scholars have described the courtâ€"legislature interaction not so much as a dialogue but as a partnership; the Court and Parliament, on this view, each contributes its say, using its own unique perspective, to advance 24 the legal landscape. Other scholars situate the dialogue in increasingly complex contexts between and amongst other government agencies, political 25 players, and society at large. Bushell Thornton, and W. The Living Tree Cambridge: While for some scholars this indeter- minacy suggests that meaning ought to be constructed through populist deter- mination, others argue that if such values do exist, a court that upholds them is 26 behaving in a less activist fashion. Chief Justice McLachlin has argued that what some have 28 called activism is, in fact, modern democracy in action. Cohn and Kremnitzer acknowledge that analysing the criteria discussed above can provide insight into judicial activism. Cohn and Kremnitzer instead draw from B. Princeton University Press, , 11 â€" See also Brannon P. University of Toronto Press, , 59 â€" Cases, Notes and Materials, 8th ed. Juriliber , Duckworth, , ; Hogg et al. Halpern and Charles M. First, it provides more variables, and hence more nuance, than previous accounts of activism. Second, it represents a melding of activism scholarship with post-decision dynamics such as dialogue theory. Cohn and Kremnitzer identify 17 species of activism that can be placed into three broadly drawn dimensions. I will discuss some of the relevant species in my analysis; for now, I will describe the broadly drawn dimensions. I have chosen the development of the ancillary powers test, as rendered in the sniffer-dog cases decided by the Supreme Court of Canada in , as the site of multidimensional analysis because the jurisprudential tools used in 40 these cases have been the subject of activist-based critique in the past. Before we can apply the multidimensional model, we need to educate ourselves on the ancillary powers calculus that culminated in the recent sniffer-dog cases. The Court transposed what was originally a British test into the Canadian jur- isprudence, using it for the purpose of creating new police powersâ€"a matter never contemplated in the British jurisprudence. The random-stop power was the subject of a series of cases until its nature and scope were 45 fully delineated. Proceed with Caution or Full Stop? The Queen, [] 2 S. Ladouceur, [] 1 S. Hufsky, [] 1 S. Mellenthin, [] 3 S. Godoy, [] 1 S. Mann , 3 S. Clayton, SCC 32 [Clayton]. In Kang-Brown and A. Not all species will be relevant to this discussion, and so I shall omit those that do not directly apply. By framing this issue as nar- rowly as possible, perhaps we can ascertain a determinative conclusion on activism. Rather, the majority followed its precedent stead- fastly. On a different reading of the sniffer-dog cases, however, one can argue that while the Court relied on past doctrine, through the application of 47 Godoy; Clayton; Mann; A. This equivocal reading of Kang-Brown and A. Further, this construction is unlikely to proceed from a value- neutral orientation. If this species of activism is subject to too many extra-jurisprudential factors, perhaps other traditional factors might yield important information about activism. For instance, a court heeding the original intent would be acting in a restrained manner. In the context of sniffer-dog searches, the indeterminacy problem of orginalism arises. One interpretation of this history, rendered by James Stribopoulos, is that s. Yet this species of activism is subject to the same critiques raised earlier: Cohn and Kremnitzer note that majoritarianism and autonomy are indicia that measure whether a court is interfering with policies set by democratic 54 Ibid. Searching for Meaning with Sniffer Dogs 58 processes i. Here again, our analysis of the sniffer-dog cases yields equivocal results. On the one hand, the police power to conduct sniffer-dog searches is marked by a parliamentary void. This is because the ethic of the prin- ciple of legality dominates the discussion. In other words, nuanced analysis of this contention must wait for the third dimensionâ€"assessment of core con- stitutional values. Cohn and Kremnitzer also discuss rhetoric the expression of broader pos- itions and values extra-legally and the use of obiter dicta extra-dispositional 60 prose as indicia of activism under the traditional vision: In Kang-Brown and A. Consider the fol- lowing exchange. Justices LeBel, Fish, Abella, and Charron write, These considerations lead me back to the central question in the present appeal: The common law has long been

viewed as a law of liberty.

6: Judicial Review vs Judicial Activism vs Judicial Overreach - Clear IAS

Judicial Activism in the House of Lords 97 On a socio-legal level, these three functions support ï¬•fteen parameters, which can be used to assess judicial contribution in its various forms.

7: Judicial activism - Wikipedia

One of the important dimensions to judicial activism identified in Chapter 2 involves the judiciary's "institutional aggrandizement" at the potential expense of the other branches of the federal government or at the expense of the state governments.

8: Multidimensional View of Judicial Activism - Oxford Scholarship

The article addresses the question of the role of the judiciary in the constitutional democratic state through an analysis of the concept of judicial activism. The multidimensional model advanced in the article is based on three distinct visions of judicial activism, which draw on a perceived role.

9: Judicial Activism - Definition, Examples, Cases, Processes

Multidimensional Analysis as a Window into Activism Scholarship: Searching for Meaning with Sniffer Dogs (Can. Jour. of Law & Society,) Judicial Activism: A.

A MULTIDIMENSIONAL VIEW OF JUDICIAL ACTIVISM. pdf

What price free speech? March 12, 1996: not all of the dogs are homeward bound Aldiss, B. W. Incentive. Roy Harley Lewis presents Theatre ghosts. Outlander diana gabaldon bud The history of spain The quest for national identity : the Russian geographical society Saving the Tooth Fairy The garden passage V. 2. Major cheese groups. Esquire the handbook of style The digital writing workshop People of God Series and Timelines 08 chapter 2. shodhganga Steven alter information systems Letters on spiritual subjects and divers occasions Capital and rates of return in manufacturing industries Dental management of thalassemia patient Does an ipad files System analysis and design notes for bca The Crest and the hide, and other African stories of heroes, chiefs, bards, hunters, sorcerers, and commo Pfin 4 student edition Financially Focused Project Management Practical neurology visual review Bung Karno pada dunia The man beneath the gift Cheap lives and dear limbs The Bath fables on morals, manners and faith. From Private to General Diagnostic Imaging Expert What are some common forms of spiritual deception? Anyone can be Financially Free Bathtime on Sesame Street Uncle Leighton : / Retaining wall design project They say i say chapter summaries Nursing care planning guides, set 5 The I AM! Affirmation Book Eighteenth century silver tea tongs Three bears on vacation