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Reconsider Old Taboo

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■ JUDICIAL ACTIVISM

Reconsider old taboo

By Scott Dodson SPECIAL TO THE NATIONAL LAW JOURNAL

ONE OF THE highly charged issues in this election year is the constitutional amendment banning same-sex marriage. Supporters such as Professor Teresa Stanton Collett and Senator John Cornyn, R-Texas, have argued that the amendment is necessary to stop "activist judges" from "insert[ing] their personal political agenda into our nation's most important legal document, our U.S. Constitution," and because "activist judges are increasingly willing to disregard the text of the laws, as well as the political will of the people, in judicial efforts to remake the institution of marriage to suit the judges' particular political views." Even President Bush, in his nomination acceptance speech, said, "I support the protection of marriage against activist judges." Supporters have cited *Goodridge v. Department of Public Health*, which legalized same-sex marriage in Massachusetts, and *Lawrence v. Texas*, which struck down Texas' anti-sodomy law, as recent examples of activist decisions.

It is important to look critically at these charges of judicial activism. Are judges truly being activist, and, moreover, is activism even something that should be discouraged? The answers are far from clear. Careful readings of both *Goodridge* and *Lawrence* in fact give little indication of activism. *Goodridge* paid close attention to binding judicial precedent and the text of the Massachusetts Constitution. *Lawrence* looked carefully at the word "liberty" in the due process clause of the U.S. Constitution and followed progressive judicial precedent. Activism did not appear to be the judges' intent in either opinion.

Let's rethink activism

But suppose they are activist. Is judicial activism really so bad in cases like these? There are two principal objections to judicial activism: It is undemocratic and it risks governmental tyranny. The cries of judicial activism here do not fit comfortably into either objection.

True, it is less democratic for laws to be made by unelected judges rather than elected legislators (although most state court judges are elected). But does the fact that it is less democratic make it less desirable? The answer to that question, at least according to the Constitution's framers, is "not necessarily."

The framers purposefully declined to create a pure democracy and instead filled the government with counter-majoritarian principles designed to thwart the whims and temporary passions of a democratic majority. They created an unelected and relatively unaccountable federal judiciary precisely to ensure independence from majoritarian prejudices. At least as a matter of founding principles, judicial activism is not wrong simply because it may be at odds with the popular majority.

But, one might say, judges here are usurping power from the people (or their

elected representatives), and we should fear a tyrannical government of unelected, unaccountable, life-tenured judges.

Were judges being activist by aggrandizing power at the expense of individual rights and liberties, one might justifiably feel threatened. But the judicial activism charged by supporters of the amendment works the opposite result. *Lawrence* held that the states may not criminalize consensual, adult, private homosexual sodomy. *Goodridge* held that Massachusetts may not discriminate among opposite-sex and same-sex adult, unrelated couples to associate in the most historically intimate of ways. These decisions protect individual rights and civil liberties from legislative intrusion or discrimination. It is difficult to characterize such broadening of civil rights and freedoms as tyrannical.

There's a time for activism

Judicial activism may not be right or even desirable in most instances. Yet it has, in certain watershed moments, been the kick in the pants society needed. It was, after all, the independent, unelected and unaccountable U.S. Supreme Court that, in *Brown v. Board of Education*, had the courage (in large part because of its independence) to end the racist separate-but-equal doctrine and usher in an era of unprecedented tolerance and civil rights.

For those who think that the judicial activism of *Lawrence* and *Goodridge* is different than that of *Brown*, compare the above charges by supporters of the constitutional amendment with those of 96 Southern congressmen in 1956: "We regard the decision of the Supreme Court in the school cases as clear abuse of the judicial power. It climaxes a trend in the Federal judiciary undertaking to legislate in derogation of the authority of Congress, and to encroach upon the reserved rights of the states and the people...with no legal basis for such action...exercis[ing] their naked judicial power and substitut[ing] their personal political and social ideas for the established law of the land."

Perhaps it is time for another kick in the pants. ■

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Scott Dodson is an attorney in private practice in Washington. A more in-depth discussion of the amendment appears in his forthcoming article in the November issue of Arizona State Law Journal, "The Peculiar Federal Marriage Amendment."