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Looking For Judicial Activists? Check The Footnotes

By **Christopher Collier and Michael Arndt** (November 18, 2020, 5:56 PM EST)

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As long as the U.S. Supreme Court has existed, there have been claims of judicial activism. Thomas Jefferson feared Justice John Marshall's early opinions were activist, and would turn the judiciary into a despotic branch of government. Sen. Robert La Follette, R-Wisc., a disgruntled progressive Republican at the turn of the 20th century, lamented that the judiciary took power never granted and which was "greater than that entrusted to the courts of any other enlightened nation."

The attacks on judicial activism have continued in our day. Before the Republicans' recent success in filling over a third of the federal bench, Sen. Ted Cruz, R-Texas, argued that the U.S. Constitution was under sustained attack from "an arrogant judicial elite."

The controversies surrounding the nominations to the Supreme Court of U.S. Circuit Judge Merrick Garland of the U.S. Court of Appeals for the D.C. Circuit and Justices Brett Kavanaugh and Amy Coney Barrett have further contributed to the debate. Sen. Chris Coons, D-Del., argued that Justice Barrett's nomination would usher a new chapter of "of conservative judicial activism [that] could touch virtually every aspect of modern American life."

These charges of judicial activism are so common that many conclude they amount to little other than thinly veiled disagreements with the outcome of case. As U.S. Circuit Judge Frank Easterbrook, of the U.S. Court of Appeals for the Seventh Circuit, says: "Activism just means Judges Behaving Badly — and each person fills in a different definition of 'badly.'"[1]

While judicial activism is certainly ill-defined, the charge's persistence suggests a widespread agreement[2] on the ideal. We want judges to be neutral, nonpolitical arbiters of disputes. The activism charge persists because the ideal remains: Judges who cannot resist imposing their personal and political agendas into cases are less desirable than those who can resist.

Activism is inconsistent with the judiciary's conservative function in our system. Given the agreement on the desirability of nonactivist judges, and the propensity for dissatisfied litigators and commentators to claim activism so much as to blur the term's meaning, we need to develop neutral principles to spot judicial activism.

This is not a new idea. We are accustomed to asking Supreme Court nominees to identify a ruling that they personally disliked as a way of assessing their judicial restraint, their nonactivism. On this score, Justice Antonin Scalia was fond of telling folks that, personally, he wished we could throw "bearded weirdos" who burned American flags in jail, but, as a justice, he voted to invalidate a law that punished flag burning. The constitution's First Amendment, he explained, constrained his ability to reach his personally preferred outcome.

Certainly memorable, this type of anecdote has been hard to replicate as a prospective gauge or retrospective assessment of judicial activism. Justices — or potential justices — are likely to reveal personal preferences only in limited circumstances, and as they see fit. Justice Scalia loved talking about the flag-burning case, but justices are usually mum on politically salient issues outside their official opinions in live cases.

But rather than relying on justices to report their examples of judicial restraint, which requires an honest sharing of political opinions that may be hard to come by, we can instead look to their opinions — and, more specifically, the footnotes.

Lawyers have long argued, discussed and joked about the import and propriety of footnotes in judicial opinions. Robert A. James discussed how the "footnote argument," the insistence that footnotes lack precedential force, was almost always used as an argument of last resort and tended to be unsuccessful.[3]

Nearly 50 years ago, the U.S. Court of Appeals for the Ninth Circuit held that precedent could be found anywhere in an opinion:

> The appellees would down-grade the significance of that language because it appears in a footnote. We think that the location, whether in the text or in a footnote, of something which the writer of an opinion thinks should be said, is a matter of style which must be left to the writer.[4]

This is certainly the majority view; entire bodies of law have flowed from a footnote. Most memorable, of course, is Justice Harlan Stone's footnote four from U.S. v. Carolene Products Co., where he articulated when the court should depart from the presumption that statutes were constitutional.

Though few doubt footnotes' precedential force, many have long decried their use, length and potential for mischief. In her concurrence in Doucet v. Jantzen Inc., Judge Cynthia Woodard of Louisiana's Third Judicial District noted that footnotes have been described by scholars and judges as "excrement in the corridors of academe," abominations, "phony excrescences" and even akin to interrupting coitus to run downstairs and answer the doorbell.[5]

To be sure, footnotes surely have some role in judicial opinions. Justice Scalia's playful suggestion that dictionary-approved "Wyomingite" should be discarded in favor of "Wyoman," for example, would look out of place in the body of an opinion.[6] Likewise, exhausting tete-a-tetes between the majority and the dissent are best relegated to footnotes.[7]

Most of the critics' concern revolves not around these occasional indulgences, but around so-called substantive footnotes. As foremost footnote critic and longtime U.S. Circuit Judge Abner Mikva of the U.S. Court of Appeals for the District of Columbia Circuit warned, when the "meat" of an order is diverted to the foot of the page, "the footnote [has] acquired its full capacity for mischief."[8]

The concern is that footnotes allow reframing, thumbing the scale for future related cases or amplifying a tangential political point of view. In short, the substantive footnote allows for activism. And, as Notre Dame law professor Samuel Bray points out, this can even take the form of an ostensible disavowal.

He provides an everyday example to make the point: Consider someone saying, "I love my brother, but I am not saying anything about his cooking."[9] The reader knows that the speaker is talking about his brother's cooking despite the disclaimer. The implication trumps literal meaning.

Such is often the case when a justice writes that the present opinion does not express an opinion on X — which is often joined with characterization of X. These ostensible disclaimers serve many functions — including hinting at future decisions, or offering invitations for how to get some other issue squarely before the court. Thus footnotes can be used to facilitate activism, or a judge's long-term project unrelated to specific issues of a particular case.

These foreshadowing footnotes work similarly to ironic process theory, a psychological phenomenon often demonstrated by asking groups of people to not think of pink elephants for 30 seconds. Without fail, people who never thought about pink elephants before cannot make it 30 seconds without considering them. In psychology, the deliberate attempt to suppress the thought makes it more likely to surface.

For these footnotes in legal opinions, the end result is similar: The disclaimer concerning what the case isn't about attracts attention to that future case not before the court. The footnotes — the mousehole in the house of the opinion, to borrow the metaphor from the court's statutory

interpretation canon — are great places to look for judicial activism.

But this gauge of judicial activism is not without faults. For starters, the temptation for activism increases as a judge rises in the judicial hierarchy, and the activism may not be detected until it's too late. Second, the charge of activism is, almost by default, advanced by a person out of power in a particular situation. So the minority party claims a president's nominee is an activist: How interested are majority party senators in a neutral means by which to evaluate the claim?

Likewise, following a particular holding, the charge of activism is unlikely to result in rewriting. In these ways, looking for pink elephants in footnotes may be little different than widely-accepted — if not always followed — judicial norms of only deciding live cases, not commenting on cases likely to come before the court, and the like. If those cannot cabin justices' temptation to don their legislative hats, what is the use of reading the footnotes? Maybe none.

On the other hand, the pink-elephants-in-footnotes approach provides a neutral way to assess activism — and, perhaps more importantly, curb it in the future. As an example, if we look to footnotes, we might notice the increasingly common trend of judges carving out idiosyncratic views unnecessary to the disposition.

Justice Ruth Bader Ginsburg, to take a recent example, was a part of a 9-0 majority with the exception of one footnote, and wrote a concurrence to "resist [a party's] attempt to cabin" a law.[10] Justice Scalia likewise joined a unanimous opinion save for three footnotes that discussed legislative history, which he found irrelevant to questions of statutory interpretation.[11]

This same impulse results in peculiar holding descriptions like the following: "THOMAS, J., filed an opinion concurring in part, in which GORSUCH, J., joined. GORSUCH, J., filed an opinion concurring in part, in which THOMAS, J, joined." The writing credit matters, and the ostentatious show of disapproval of tangential points make sense, where justices are interested in developing a personal jurisprudence, a gospel according to Justice Scalia or Justice Ginsburg.

While consistency and stability are good, the care to emphasize the justice's personal approval or disapproval of tangential points is problematic. At best, it is an unfortunate creep of the cult of personality from pop culture and politics into the judiciary. At worse, it is fertile ground for judicial activism — a space that can be used to twist the present case toward a larger, personal project. We casually talk of justices playing the long game without a tinge of fear.

While of considerable concern at the Supreme Court, the problem is not unique to the country's highest court. In the past month in our native Georgia, the state Supreme Court issued an opinion in Johns v. Suzuki Motor of America Inc., with a footnote that stated:

> Some of us are concerned that although Alexander spoke in broad terms about the elimination of questions of negligence in strict products liability claims, the issue may be more nuanced than that opinion (and similar broad statements in other cases) acknowledged.

The footnote ended by noting how that matter did not affect the outcome of the case before the court.[12]

These brief references are not examples of rampant activism. Instead, they are caution flags, indicating an environment very amenable to activism. The line between a useful or clarifying aside and an activist plot in footnotes will inevitably be hard to draw in each instance. But by paying attention to the opportunities for activism in the footnotes, we may decide on neutral principles to assess activism — and, ideally, new norms to constrain the ever-present, natural inclination of judges and justices to aggrandize their power.

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[1] Sen. Lindsey Graham, R-S.C., made the same point during Justice Elena Kagan's confirmation process: "It seems to be an activist judge is somebody that rules the way we don't like."

[2] This is not unanimous. Some academics, including Vanderbilt's Professor Suzanna Sherry, believe a little judicial activism is necessary and desirable.

[3] He did so in a footnote. The quick read is a delight and can be found here: http://www.greenbag.org/v2n3/v2n3_articles_james.pdf.

[4] Phillips v. Osborne , 444 F.2d 778, 782 (9th Cir. 1971); see also H. Jefferson Powell, Reasoning about the Irrational: The Roberts Court and the Future of Constitutional Law, 86 Wash. L. Rev. 217, 228, n. 37 (2011).

[5] Doucet v. Jantzen Inc. , 804 So. 2d 650, 655-56 (Woodard, J., concurring)

[6] https://www.scotusblog.com/2016/03/tribute-the-justice-who-said-he-hated-writing/.

[7] https://www.theguardian.com/law/2014/jun/17/supreme-court-justices-kagan-scalia-gun-control-footnotes.

[8] Abner J. Mikva, Goodbye to Footnotes, 56 U. Colo. L. Rev. 647, 648 (1985).

[9] https://reason.com/2017/06/10/equity-at-the-supreme-court/.

[10] https://www.supremecourt.gov/opinions/19pdf/18-1171_4425.pdf.

[11] https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/04/29/a-unanimous-opinion-except-for-three-footnotes/.

[12] https://www.gasupreme.us/wp-content/uploads/2020/10/s19g1478_sub2.pdf.