



Written by [Thomas Sowell](#) on February 9, 2011

The “Judicial Activism” Ploy

Now that two different federal courts have declared ObamaCare unconstitutional, the administration’s answer is to call the courts guilty of “judicial activism.”

Barack Obama has a rhetorical solution for every problem. Remember the repeated claims of “shovel-ready” projects that needed only federal stimulus money to get started? Last year the President quietly admitted that there were not many “shovel-ready” projects, after all.

But the phrase served its political purpose at the time — and that was obviously all that mattered. Now, in the wake of rulings by two different courts that ObamaCare is unconstitutional, rhetoric is being mobilized again, without any fussy worries about facts.



“Judicial activism” is a term coined years ago by critics of judges who make rulings based on their own beliefs and preferences, rather than on the law as written. It is not a very complicated notion, but political rhetoric can confuse and distort anything.

In recent years, a brand-new definition of “judicial activism” has been created by the political left, so that they can turn the tables on critics of judicial activism.

The new definition of “judicial activism” defines it as declaring laws unconstitutional.

It is a simpler, easily quantifiable definition. You don’t need to ask whether Congress exceeded its authority under the Constitution. That key question can be sidestepped by simply calling the judge a “judicial activist.”

A judge who lets politicians do whatever they want to, whether or not it violates the Constitution, never has to worry about being called a judicial activist by the left or by most of the media. But the rest of us have to worry about what is going to happen to this country if politicians can get away with ignoring the Constitution.

The Tenth Amendment to the Constitution says that the federal government can do only what it has been specifically authorized to do by the Constitution. Everything else is left to the states or to the people themselves.

Nevertheless, back in 1942, the Supreme Court said that because the federal government has the right to regulate interstate commerce, the Department of Agriculture could tell a farmer how much wheat he could grow, even if the wheat never left his farm and was consumed there by his family and their farm animals.

That case was a landmark, whose implications reached far beyond farming. If the meaning of “interstate commerce” could be stretched and twisted to cover things that never entered any commerce, then



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“interstate commerce” became

just a magic phrase that could make the Tenth Amendment disappear into thin air.

For more than half a century, courts let Congress do whatever it wanted to do, so long as the politicians said that they were regulating interstate commerce.

But there was consternation among politicians and the media in 1995, when the Supreme Court said that carrying a gun near a school was not interstate commerce, so that Congress had no power to regulate it — even though states had that power.

Howls of protest went up from politicians and the media because the Supreme Court voted 5 to 4 in favor of an ordinary common-sense reading of the Constitution, instead of the clever word games that had been used for so long to circumvent the Tenth Amendment.

ObamaCare is another piece of Congressional legislation for which there is no federal authority in the Constitution. But when someone asked Nancy Pelosi where in the Constitution there was any authority for passing such a law, her reply was “Are you kidding?”

Two federal courts have now said that they are not kidding.

The ultimate question is whether the Supreme Court of the United States will back them up. That may depend on how soon the case reaches the Supreme court.

If the issue wends its way slowly up through the Circuit Courts of Appeal, by the time it reaches the Supreme Court, Obama may have put more of his appointees there — and, if so, they will probably rubber stamp anything he does. He would therefore have done a complete end-run around the Constitution and be well on his way to becoming the Hugo Chavez of North America.

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