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Reason - Purpose - Self Esteem



*November/December 2005*

**Topic Primer**

Resolved:

Judicial activism is necessary to protect the rights of American citizens.

*Mahesha Subbaraman*

# Trinity Briefs

## *November/December 2005 – Topic Primer*

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**Resolved:**

Judicial activism is necessary to protect the rights of American citizens.

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## II. TOPIC PRIMER (1/52)

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### I. Introduction

For an NFL LD topic, the November/December 2005 resolution is surprisingly terse: it simply asks us whether or not “judicial activism” is *necessary* to protect the rights of American citizens. And yet, despite its laconic and seemingly self-explanatory nature, this resolution abounds with meaning much like an iceberg whose massive bulk lies hidden beneath the surface of the water. In order to access this hidden substance, however, we must first be willing to see beyond the politics of our day (i.e., the “surface” of the iceberg)—a politics which uses the term “judicial activism” copiously to slur any judge who renders legal decisions with which one disagrees. Indeed, as former New Jersey Superior Court judge Andrew Napolitano explains, “*There is no such thing as an activist judge...An activist judge is one whose ruling you disagree with. And if you agree with what the judge has done, you call them heroic and intelligent and honest. If you disagree with them, you call them activists.*”<sup>1</sup> The ultimate effect of defining “judicial activism” in this way—through the subjective lens of one’s own political convictions—is that it renders the term meaningless. Think about it this way: remember the old fable of the boy who cried “wolf”? Let’s imagine that the boy in the fable hadn’t merely lied repeatedly about there being a wolf, but rather decided to declare *anything* that got near his herd of sheep which he didn’t like a “wolf.” Now, given these facts, would you come running if you heard this boy crying “wolf” one morning? Probably not. After all, this cry could be about anything from a dragonfly to an earthworm (i.e., almost everything but a real wolf). And that’s why when it comes to this LD topic, debaters must avoid simply screaming “judicial activism” when describing specific court decisions or justices. Rather, LD rounds on this topic should be about restoring objective meaning to this term so that all of us can know without a doubt what is and what isn’t a “wolf.”

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<sup>1</sup> Napolitano quoted in: Liza Porteus (News Reporter). “*Activist Judges Under Siege.*” Fox News Online. 23 May 2005. Available Online @ <http://www.foxnews.com/story/0,2933,157313,00.html>

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So, how exactly does one go about restoring a sense of objectivity when it comes to debating this topic? A good place to start is by appreciating the two major dimensions of this topic which allow for objective arguments to be made about it: history and philosophy. In terms of history, debaters should recognize that this topic is about more than just the hot-button issues of the day which often compel modern politicians and judges alike to cry “judicial activism” (e.g., abortion, privacy, gay marriage, affirmative action, etc). Indeed, a brief glance at the long history of the U.S. Supreme Court reveals “rights”-related rulings on a broad array of issues including lawyer-client confidentiality, the use of the word “God” in the Pledge of Allegiance, the death penalty, eminent domain, police wiretapping, school desegregation, executive privilege, minimum wage laws, Japanese internment, the “Miranda”-warning, and even slavery. Respecting the historical dimension of this topic also means recognizing the important role that “precedent” plays in how American judges makes decisions, especially when it comes to judicial respect for the legal doctrine of *stare decisis*, or “let the decision stand.” And the importance of this latter point can’t be understated insofar as it offers one potential objective definition of judicial activism—namely, the willingness of judges to overturn prior, well-established court decisions (i.e., legal precedent). Hence, in the end, by sifting through the extensive legal history which underlies this month’s LD topic, one gains a fuller view of all the real world problems that judges, politicians, and ordinary Americans have had to face since the Revolutionary War in figuring out what the relationship between law, jurisprudence, and individual rights ought to be. And with this view comes the ability to debate the topic in a way which doesn’t hinge on one’s own political views, but rather on one’s ability to unify the legal cases of the death row inmate, the Japanese American internee, and the owner of state-condemned property into a coherent narrative about what “judicial activism” really means, for better or for worse.

Besides history, philosophy is the other important dimension of this topic which debaters cannot afford to ignore. This is because when it comes to how courts and judges

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deal with the real world problems covered by this topic, they must inevitably consult certain ideas that tell them how to properly define individual rights, justice, and the proper limits of government power. In other words, when the Supreme Court hears a case, it has to consider what the Constitution and the Bill of Rights mean in principled terms, referring not just to the case-at-hand but to all such cases (i.e., past, present, and future). So, does First Amendment’s protection of “freedom of speech” protect only the use of one’s own voice to communicate, or can it be read in more philosophical terms which include any means of personal expression (e.g., handwritten letters, burning an American flag, wearing a black armband to school to protest the Vietnam War, etc.)? Does the Eighth Amendment’s prohibition on “cruel and unusual punishment” mean only those punishments that were considered cruel and unusual in 1791 (i.e., when the Bill of Rights was ratified), or does it repudiate the idea of “cruel and unusual punishment” itself, compelling judges to strike down any form of punishment—even the death penalty—they consider to be “cruel and unusual” (i.e., even if public opinion doesn’t). And does the Constitution’s Interstate Commerce Clause give Congress the power to override a democratic referendum in California which legalizes the use of marijuana for medicinal purposes? Hence, philosophy affects not only how American judges interpret the Constitution, but also how they view the proper role of the judiciary in the American political system. Debaters must therefore avoid thinking about this topic in purely empirical terms (i.e., in terms of specific cases or individual plaintiffs) and instead recognize that American judges are required to render justice both for the unique litigants appearing in front of them and for the Constitutional principles that they swore an oath to defend—principles like separation of powers, checks and balances, representative democracy, individual rights, civic equality, and limited government.

One final note: it should go without saying that U.S. Supreme Court opinions offer an excellent way of gaining a more objective understanding of this month’s topic and how to debate it. Nevertheless, debaters need to be very careful in using these decisions

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to support their arguments on this topic. This is largely because Supreme Court opinions are like onions, consisting of many layers that each have to be peeled away before the entire opinion can be understood. These layers are as follows: First, there's the "Opinion of the Court," which is written by a justice belonging to the "majority" of the Court (i.e., those five or more justices which voted for the prevailing outcome in the case). In short, the "Opinion of the Court" lays out (1) the details of the case-at-hand, (2) the decision of the majority, (3) the reasoning behind this decision, and (4) those past Supreme Court decisions which support this reasoning. Next up are "Concurring Opinions" which are written by those Court justices in the majority who agree with the outcome of the case, but not with the legal reasoning used to reach that outcome. "Concurring opinions" have no legal force, however, because the not everyone in the majority agrees with what they have to say. Finally, there are the "Dissenting Opinions," which are written by those Supreme Court justices who ended up on the losing side (i.e., "the minority"). Through dissents, these "minority" justices are able to express not only why they believe the majority's decision is wrong, but also why future Court justices shouldn't feel bound to respect this decision. Dissents thus often play an important role when a majority of the Court decides to overturn a prior Court decision. For example, when a unanimous Court struck down public school segregation in *Brown v. Board of Education*, one of the major "precedents" it cited in its favor was Justice John Harlan's dissent in *Plessy v. Ferguson* (i.e., the majority in *Plessy* upheld the doctrine of "separate but equal"). With all of this in mind, debaters should aim to read through Supreme Court cases with a constant awareness of who's speaking (i.e., is it a member of the majority or a dissenter), what's being argued, and *why* something is being argued. Moreover, while not all Court decisions will have concurrences or dissents, when these do exist, debaters must ensure that when reading and/or quoting them, their true meaning is preserved (i.e., debaters shouldn't cite dissents in their cases as if they really were majority opinions).

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Charles Fried (Professor of Law, Harvard Law School). Saying What Law Is: The Constitution in the Supreme Court. Cambridge, MA: Harvard Univ. Press, 2004. [p. 3]

American constitutional doctrine has two principal sources: the text of the Constitution itself and prior court decisions, especially the decisions of the Supreme Court of the United States. That the Constitution's text is a source of constitutional law (constitutional doctrine) is not surprising, and needs explaining only in a work of legal philosophy—which often takes as its task explaining the obvious. It is enough to say that text *is* the Constitution, and it is that text that judges and other officials swear to support as the “supreme law of the land.” It is more problematic that court decisions should be as important as a source as they are—so important, indeed, that in many constitutional disputes the text receives only a passing, as it were polite nods, as courts go about their business of parsing not the text but the prior decisions of the Supreme Court, which are treated as controlling the outcome. It is a source of frustration to many that constitutional doctrine—and that means those hundreds of volumes of cases—stand between us and the Constitution itself. Like the Protestant cry, “Only Scripture,” there is a longing to refer to all decisions directly to the constitutional text. There must be judges, and citizens must accept their rulings in their particular cases, but the citizen should be able to plead his case person to person in terms of just the Constitution, unmediated by the distorting filter of doctrine. This is a fantasy, but it is worth pausing to see why.

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Charles Black, Jr. (Prof. of Constitutional Law, Columbia Law School). The People and the Court: Judicial Review in a Democracy. New York: The Macmillan Co., 1960. [p. 12]

The essence of judicial review, to recapitulate, is simply this: In the course of a judicial proceeding, it may happen that one of the litigants relies on a statute or other governmental pronouncement which the other litigant contends to be repugnant to some provision of the Constitution. It is the task of the court to determine what the law is. If the Constitution is a law of superior status, then the rule of the Constitution, and not the rule of the statute or other governmental pronouncement, is the correct rule of law for application to the case before the court. The court, under our system, therefore considers itself bound to follow the rule of the Constitution, and so to treat the other rule as a nullity... This simple line of reasoning has been so often repeated that it has come to have a flat taste. It is nonetheless the indispensable theoretical justification of the institution that has been the chief curiosity and pride and exasperation of the American system of government. It does not say all there is to say about judicial review, any more than the designation of the President as “Commander in Chief” says all there is to say about the relation of the Presidency to the military establishment. But it states the bedrock concept, to which all other concepts are qualifications.



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