How To Pick Judges

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The delays and wrangles about President George W. Bush's scores of unconfirmed judicial nominees highlight the underlying issues between the two political parties. The Republicans want constitutionalists and the Democrats want judicial activists.
The term judicial activism came into the popular lexicon because of the much-criticized decisions of the Earl Warren Court. Conservatives don't want judges who write their own social and political opinions into the law, while liberals praise what they call a "living" Constitution that is constantly updated by liberal justices.

Two federal district court decisions on July 18 in different states offer a good teaching lesson in the differences between the two approaches.

The activist judge, U.S. District Judge Melinda Harmon, ruled that a Texas state law banning the direct importation of out-of-state wine to individual consumers is unconstitutional. The constitutionalist judge, U.S. District Judge James Lawrence King, dismissed a challenge by felons who were demanding the invalidation of a Florida state law barring felons from voting.

America's famous 15-year flirtation with Prohibition ended in 1933 with ratification of the 21st Amendment to the U.S. Constitution. Section 1 repealed national prohibition, and Section 2 permitted state option: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Texas law bans the direct importation of out-of-state wine to individual consumers. Three Houston wine collectors filed suit in federal court against the Texas Alcoholic Beverage Commission.

Relying on the Commerce clause, the wine collectors argued that the Constitution exists to prevent states from discriminating in favor of in-state and against out-of-state businesses. They said, "There is no reason that kind of discrimination should be allowed for wine; it's not allowed for every other product."

But that's exactly what the 21st Amendment does, namely, give special state-option treatment to "intoxicating beverages." The 21st Amendment, ratified 144 years after the Commerce Clause, carved out this special exception.

Ignoring the plain language of the Constitution, Judge Harmon ruled not on the way the Constitution is, but on the way she thinks it ought to be. That's what we call judicial activism.

The Florida case produced the opposite result. Florida has a law that prohibits felons from voting, with the exception that the Governor and his Cabinet, serving as the state's Clemency Board, have the discretion to restore voting rights to felons who apply after finishing their prison time and parole.

The Florida law has been in effect for a century and a half. But now that elections are so close, the liberals are pushing to corral the votes of felons, and 37 states allow felons to vote after they complete their sentences.

The attorneys representing eight Florida felons played the race card, arguing that the law disproportionately hurts blacks. Although the original law was passed in 1868, Florida re-enacted felon disenfranchisement in 1968 when there was no evidence of discriminatory intent.

Judge King dismissed the lawsuit because the U.S. Constitution does not prohibit Florida from passing and enforcing this law. He wrote, "It is clear that the First Amendment does not guarantee felons the right to vote."

Furthermore, the conduct of elections is one of the powers the Constitution reserves to the states. The only exceptions to state power to govern elections are the Amendments pertaining to race, sex, age, and a poll tax.

The bottom-line question that ought to be asked of all judicial nominees is, Do you believe in ruling on the basis of the Constitution as it is written, or do you plan to substitute your own social and political opinions?

Justice William J. Brennan in a 1982 speech revealed the mindset of liberal activist judges who have convinced themselves that once they are appointed, they are divinely anointed to rule over lesser mortals. He praised "the evolution of constitutional doctrine."

Brennan said that in previous times, "the function of law was to formalize and preserve (accumulated) wisdom," but "over the past 40 years Law has come alive as a living process responsive to changing human needs." He bragged that the law has become "a moving consensus," and that "our constitutional guarantees and the Bill of Rights are tissue paper bastions if they fail to transcend the printed page."

In June the U.S. Supreme Court gave us a striking current example of the "evolution" of the so-called "living" Constitution in the pen of judicial activists. Referring to "polling data," Justice John Paul Stevens rewrote the Eighth Amendment to outlaw capital punishment for those with low I.Q. scores based on what he called a "national consensus."

Justice Antonin Scalia, in dissent, retorted that the decision really was based on "nothing but the personal views" of the Justices. The reason the Democratic Senate is holding up President Bush's nominees is that Tom Daschle and Patrick Leahy want more judges who believe in constitutional "evolution."