

April Edition: The Truth About Judicial Activism



"We are under a constitution, but the constitution is what the judges say it is."

Former Chief Justice Charles Evans Hughes

Today, confusion regarding the U.S. Constitution continues to spread alongside myths about the branches of government. Through this month's edition, we are excited to share clarity and appreciation for our country and our founders' original intent.

Our Constitution created our government to consist of three branches: legislative, executive, and judicial. By creating three branches of government, our Founding Fathers established checks and balances. The goal of checks and balances is to prevent the abuse of power among the branches.

For starters, here is a synopsis of the purpose of each branch:

Legislative Branch: The legislative branch was established by Article I of the Constitution. It consists of the House of Representatives and the Senate, which together form Congress.

Congress has the authority to enact legislation, declare war, confirm or reject presidential appointments, and it has investigative powers.

Executive Branch The executive branch is essentially the President of the United States. The President's role also acts as head of state and Commander-in-Chief of the Armed Forces. The President is responsible for implementing and applying the laws written by Congress. He also appoints the heads of the federal agencies.

Judicial Branch The judicial branch was created by Article III of the Constitution. While the executive and legislative branches are elected by the people, members of the judicial branch are appointed by the President and confirmed by the Senate. The judicial branch's purpose is to make rulings based on Constitution.

America's Corrosive Internal Enemy: Judicial Activism

And now we arrive at the main point of this edition of Unite the USA: judicial activism. Judicial activism occurs when the judicial branch misuses its power. **When judicial rulings are made based on personal opinion (erroneous interpretation based upon current pressures) rather than on Constitutional law, judges essentially rebel and rule the land.** American voters must exercise their power through voting and holding elected officials accountable thereby ending this abuse of power.

Activists strategically use judicial activism to push through their agendas which would never make it past the ballot box. One of the most infamous examples of judicial activism is Roe vs. Wade. That was when the Supreme Court determined that a Texas law that criminalized abortion was unconstitutional. As a result, abortion was made legal in the United States and millions of babies have been killed. This ruling changed the law and bypassed the legislative and executive branches.

A current developing case of judicial activism is happening right now in Mississippi. Recently, Governor Phil Bryant signed the most pro-life law in the country; it bans abortion after 15 weeks' gestation. In response to a suit from a liberal anti-life group, a judge quickly moved to temporarily block Mississippi's 15-week abortion ban. The law is utterly unconstitutional. The law was passed by the state legislature and signed by the governor (all of whom were elected by the people). Once again, judicial activism has invaded and threatened citizens. We all will certainly be keeping an eye on this case.

Meanwhile, the concept of judicial activism is nothing new. **Alexander Hamilton** addressed it in the Federalist Papers: "*Law is about the exercise of judgment and not will. Judicial activism is best understood as substituting judicial opinion for the command of law.*"

Avid historian and expert David Barton offered a historical example of judicial activism: "*In 1875, Congress - by majority vote banned racial segregation, but in 1882, the unelected Supreme Court struck down that anti-segregation law; in 1896, the Supreme Court reaffirmed its pro-segregation position; but in 1954 [Brown v. Board of Education], the Court finally reversed itself and struck down segregation - eighty years after 'We the People' had abolished segregation.*"

In conclusion, let's end the confusion and intrusion of corrosive judicial activism. May we all continue to pray and share a better understanding of the Constitution and the scenario we face regarding judicial activism. One way to learn more and share it is through our feature article by

David Barton: "A Tale of Two Constitutions."

Truly, all of our involvement is so important because "We the People" must ensure a healthy government process. Pray, work hard, educate yourself and others about the Constitution, and vote for candidates who support the Constitution. (Remember, those we elect ultimately choose our judges. Keep in mind that **November 6 is Election Day.**) So let's get involved and do all we can for the good of our country and future. It is our right. It is our privilege. And it is our God-given duty. Literal lives do depend on it.

God bless you,
Carrie Stoelting and Stacie Stoelting
Sisters and Founders of [Unite the USA](#)

David Barton On the 3 Branches of Government



David Barton explains the role of the U.S. Supreme Court and the three branches of government.

Featured Quote

"As long as a judge tinkers with the Constitution to 'do what the people want,' instead of what the document actually commands, politicians who actually pick and confirm new federal judges will naturally want only those who agree with them politically."

-Supreme Court Justice

Antonin Scalia

Remarks before the Philadelphia Bar Association, April 29, 2004

This Month's Bible Verse

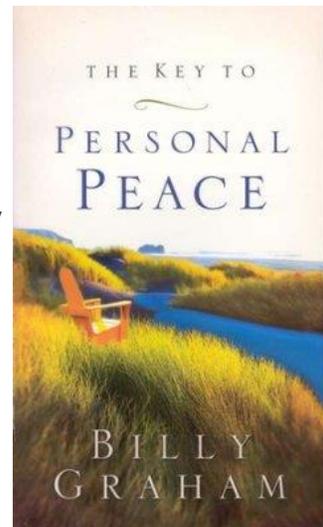
"But those who hope in the LORD will renew their strength. They will soar on wings like eagles; they will run and not grow weary, they will walk and not be faint." **Isaiah 40:31**

Request a Free Copy of *The Key to Personal Peace* by Billy Graham

Update: *We're amazed and touched by the great response to our give-away of "The Key To Personal Peace". It's been exciting to how this has been used to share about Jesus, encourage others in their faith, and remember Billy Graham as well. Please be sure to request your free copy, too!*

[Click here](#) to request a free copy of *The Key to Personal Peace* by Billy Graham. In honor of Billy Graham, Unite the USA is excited to have the opportunity to give away copies of one of his books. It's a short book yet filled with truth and hope. We are so happy to have the blessing of giving you a copy as a gift.

God bless you,
Carrie and Stacie



The Key to Personal Peace by Billy Graham

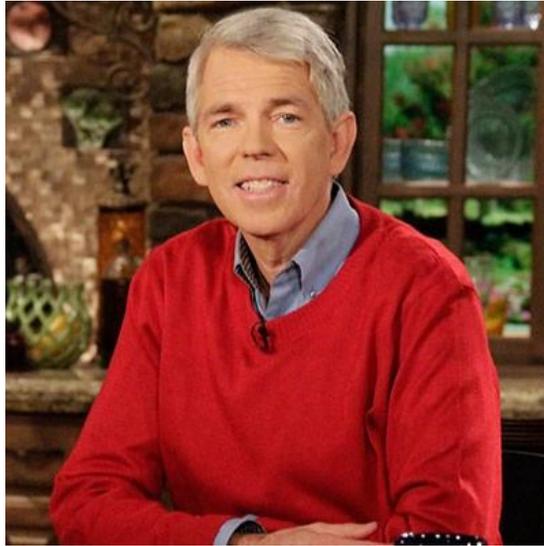
We live in unsettling times colored by terrorism, political unrest, natural calamities (including devastating earthquakes, hurricanes, and tsunamis), and moral decline. Where can we find comfort? Graham offers hope and a road map to peace---not just in this world, but in the world to come. An excellent "outreach" book for personal evangelism. (57 pages, softcover)

Featured Founding Father



Carter Braxton (September 10, 1736 - October 10, 1797) is most famous for the fact that he was a signer of the Declaration of Independence. He was also a merchant and planter. Carter Braxton was active in the Virginia legislature for more than 25 years. In addition, he served in the Continental Congress. The Continental Congress was a convention of delegates called together from the 13 colonies. It became the governing body of the United States during the American Revolution.

About the Author



David Barton is the Founder and President of WallBuilders, a national pro-family organization that presents America's forgotten history and heroes, with an emphasis on our moral, religious and constitutional heritage.

WallBuilders is a name taken from the Old Testament writings of

Nehemiah, who led a grassroots movement to rebuild the walls of Jerusalem and restore its strength and honor. In the same way, WallBuilders seeks to energize the grassroots today to become involved in strengthening their communities, states, and nation.

David is the author of numerous best-selling books, with the subjects being drawn largely from his massive library of tens of thousands of original writings from the Founding Era. He also addresses well over 400 groups each year.

His exhaustive research has rendered him an expert in historical and constitutional issues and he serves as a consultant to state and federal legislators, has participated in several cases at the Supreme Court, was involved in the development of the History/Social Studies standards for states such as Texas and California, and has helped produce history textbooks now used in schools across the nation.

A national news organization has described him as "America's historian," and *Time Magazine* called him "a hero to millions - including some powerful politicians. In fact, *Time Magazine* named him as one of America's 25 most influential evangelicals.

David has received numerous national and international awards, including Who's Who in Education, DAR's Medal of Honor, and the George Washington Honor Medal from the Freedoms Foundation at Valley Forge. His work in media has merited several Angel Awards, Telly Awards, and the Dove Foundation Seal of Approval.

David and his wife Cheryl reside in Aledo, Texas, they have three grown, married children (Damaris, Timothy, and Stephen), and three grandchildren. Learn more about David Barton at www.wallbuilders.com.

A Tale of Two Constitutions

By David Barton

The subject of constitutional interpretation may seem like a topic best fitted for an ivory-tower debate, but it actually has a very real and dramatic impact on daily life (as will be demonstrated shortly). In recent years, two competing viewpoints have emerged.

Probably the first exposure most citizens had to the two views came during the 2000 presidential debates. When asked what type of judges should be placed on the bench, candidate Bush responded: "I believe that the judges ought not to take the place of the legislative branch of government . . . and that they ought to look at the Constitution as sacred. . . . I don't believe in liberal, activist judges; I believe in strict constructionists." Candidate Gore countered, "The Constitution ought to be interpreted as a document that grows." Gore later stated, "I believe the Constitution is a living and breathing document. . . . We have interpreted our founding charter over the years, and found deeper meanings in it in light of the subsequent experience in American life." So, the two choices are . . . follow original intent, or construct a living constitution.

Proponents of a living constitution believe that we should not be bound by what dead white guys wrote two centuries ago when slavery was legal, women could not vote, and horses were the fastest means of transportation. Instead, we should live under a constitution that is alive and vibrant, reflecting today's values and beliefs.

Such rhetoric makes a living constitution sound appealing, but it is actually a complete misportrayal of the difference between the two philosophies. In reality, both accommodate an evolving society; in fact, under the strict construction (or originalist) viewpoint, Article V of the Constitution **requires** that the Constitution be a living document. The real difference between the two approaches is not **whether** the Constitution should evolve, but rather **how** those changes should occur - and **who** should make them.

Under the living constitution approach, history and precedent are largely irrelevant; instead, unelected judges create policy to reflect modern needs through the Constitution they themselves write. As explained by Chief Justice Charles Evans Hughes:

"We are under a constitution, but the constitution is what the judges say it is."

Ironically, under this modern approach, judicial policy-makers are regularly out of step with modern society. For example, although 80 percent of the nation currently opposes flag desecration, living constitution judges have ruled that the people are wrong on this issue and that the flag cannot be protected. Similarly, 90 percent of citizens in the federal Ninth Circuit supported keeping "under God" in the Pledge of Allegiance, but their living constitution judges pronounced them wrong.



Equally striking is the number of recent occasions in which living constitution judges have overturned statewide votes wherein the People clearly expressed their will (e.g., striking down votes in New York and Washington that banned physician-assisted suicides; in Arkansas and Washington that enacted term limits; in Missouri that rejected a tax increase; etc.).

Each of these popular votes would be valid under original intent because in that approach, the People - not unelected judges - determine their policies and values. And whenever the People want a change, they do not rely on a judge to make it; instead, they update their Constitution to reflect their views - as they have done on over two-dozen occasions. Samuel Adams pointed out the strength of this approach:

"[T]he people alone have an incontestable, unalienable, and indefeasible right to institute government and to reform, alter, or totally change the same when their protection, safety, prosperity, and happiness require it. And the federal Constitution - according to the mode prescribed therein [Article V] - has already undergone such amendments in several parts of it as from experience has been judged necessary." (emphasis added)

This unique American guiding principle made its appearance in the Declaration of Independence as "the consent of the governed." The State constitutions penned after the Declaration reiterated this precept - as, for example, in Massachusetts in 1780:

"All power residing originally in the people and being derived from them, the several magistrates and officers of government vested with authority -whether Legislative, Executive, or Judicial - are their substitutes and agents and are at all times accountable to them."

The same axiom was then established in the Constitution through the three-word phrase that begins its text: "We The People."

Today's living document proponents decry this approach as majoritarianism -the so-called "tyranny of the majority." Perhaps, but what is the alternative? Minoritarianism? That a small group should be able to annul the will of the People and enforce its own desires upon the masses? Such an option is unacceptable under original intent. As explained by George Washington:

"The fundamental principle of our Constitution . . . enjoins [requires] that the will of the majority shall prevail."

Thomas Jefferson agreed:

"The will of the majority [is] the natural law of every society [and] is the only sure guardian of the rights of man. Perhaps even this may sometimes err. But its errors are honest, solitary and short-lived."

Does this original principle therefore mean that minorities are to be disregarded or trodden upon? Of course not. As Jefferson further explained:

"Though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable - the minority possess their equal rights which equal law must protect."

While the minority is not to prevail, with its constitutional guarantee of "free speech," it does have the "equal right" to attempt to persuade the majority to its point of view. The minority does have

equal rights, but equal right is not the same as equal power; the minority is never the equivalent of the majority and should never exercise control over it.

Living constitution judges, however, view the majority as inherently wicked and depraved - always seeking deliberately to violate the rights of the minority with only judges standing between the minority and total annihilation. Therefore, under this anti-majoritarian view, the greater the public support for a position, the more likely a living constitution judge is to strike it down.

Yet American history has proven that the best protector of minority rights is not the courts but rather the People. For example, former slaves received their constitutional rights not from the courts but by the majority consent of non-slaves; women were similarly accorded the constitutional right to vote not by the courts but by the majority approval of men; the constitutional rights accorded to the poor by the abolition of the poll tax came at the majority approval of those who were not poor; and the constitutional right allowing eighteen-year-olds to vote was given by the majority approval of voters not eighteen-years-old.

Additionally, all of the constitutional protections for individuals and minorities established in the original Bill of Rights (e.g., speech, religion, petition, assembly, bearing of arms, etc.) were also enacted by majority consent. In other words, all minority rights in the Constitution have in all cases been established by majority consent.

In fact, the courts have a very poor record of protecting minority rights. Although living constitution proponents love to point to the 1954 *Brown v. Board of Education* decision that ended segregation as proof that the courts protects minority rights, they conveniently forget to tell the rest of the story. In 1875, Congress - by majority vote - banned racial segregation, but in 1882, the unelected Supreme Court struck down that anti-segregation law; in 1896, the Supreme Court reaffirmed its pro-segregation position; but in 1954, the Court finally reversed itself and struck down segregation - eighty years after "We The People" had abolished segregation.

It is not surprising that judges are fallible, for as Jefferson pointed out:

"Our judges are as honest as other men, and not more so. They have - with others - the same passions for party, for power, and the privilege of their corps. . . . And their power the more dangerous as they are in office for life and not responsible - as the other functionaries are - to the elective control."

Certainly, the majority will sometimes err, but as Jefferson observed, "its errors are honest, solitary, and short-lived" and can be remedied by "elective control." However, the errors created by judicial decisions are more severe and long-lasting.

While living document enthusiasts disparage strict constructionists as being narrow or restrictive, Justice Antonin Scalia counters:

"Don't think the originalist interpretation constrains you. To the contrary, my [originalist] Constitution is a very flexible Constitution. You want a right to abortion? Create it the way all rights are created in a democracy: pass a law. The death penalty? Pass a law. That's flexibility."

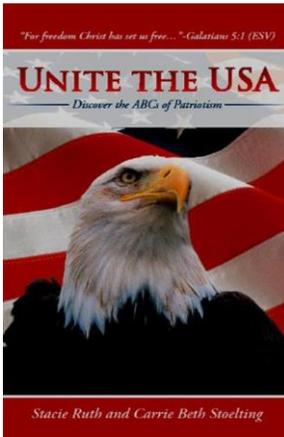
Scalia points out that it is just the opposite with living constitution judges:

"They want the whole country to do it their way, from coast to coast. They want to drive one issue after another off the stage of political debate."

In short, then, the living constitution approach empowers an unaccountable elite to make decisions on behalf of the People; original intent empowers the People themselves.

[For more information on this topic please see David Barton's book [Restraining Judicial Activism.](#)]

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