

Judicial Activism: When Warranted?

Is “judicial activism” good or bad? Let us first ask, what is a proper role for judges?

To hear some folks speak, the only proper role of a judge is to act as a rubber stamp for Congress and/or the current Tyrant-in-Chief. One wonders if they have ever heard of the concept of checks and balances?

Now, there are some cases where I believe judges do over-reach. Any agency which deprives people of life, liberty or property, except as a justifiable consequence of *malum in se* crime, over-reaches what libertarians consider to be the proper bounds of government.

(*Malum in se* refers to things which are criminal in and of themselves, such as rape, murder, theft, fraud; *malum prohibitum* to things which are deemed crimes because some legislature made up some arbitrary statute.)

But lay aside the distinction between *malum in se* and *malum prohibitum*. The kinds of rulings which evince much screeching about “judicial activism” are almost invariably those rulings where the court has found that the government, having deprived people of life, liberty, or property, has over-reached.

This sort of “activism,” I would argue, should be the primary duty of the courts if, as has been averred, governments actually do exist to protect our life, liberty, and property. If you find such protection of life, liberty, and property to be abhorrent, one wonders whether you in fact prefer a government which acts, as Bastiat described it, as an agent of plunder. If so, you are no friend of liberty, but an enemy thereof.