Balls, Strikes, and Syllogisms:
A Critical Perspective on Jurisprudence and Judicial Activism

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Abstract:
The rise to prominence of the term “judicial activism” has been accompanied by a decline in its meaningfulness. As a political buzzword, the term is useless. As an honest critique of judges’ actions, it doesn't hold up much better, but instead points to a deeply rooted misunderstanding of the role of judges in American law. It is an indicator of the realization that the ideal of “a government of laws and not of men”º has not been achieved and may never be, but has instead been feigned and exploited by political leaders to achieve their personal agendas.

Jurisprudence in recent years has fallen into several categories. Traditional views about the source of political authority as coming from God or nature is known as natural law. Many of the Founders of the United States as well as the consent theorists who stoked the fires of revolution in France belonged to this school of thought. The later separation of natural law from its metaphysical claims created legal formalism, or legal positivism. This view is the primary one advanced by both conservative and liberal senators who rebuke judges who have made claims that judges are affected by their life experiences. Legal formalists would be likely to claim that cases have uniquely determined outcomes, and that a judge who makes a decision other than this perceived appropriate outcome is being an activist. American Legal Realism began in the early twentieth century as a critique of the idea that judges only made decisions based on the facts and law. Obviously, the Realists claimed, extra-legal factors work their way into legal decision-making. Deciding a case takes more than a deduction of the logical outcome of a syllogism. This way of thinking was inspired by behaviorism, the social science that attempted to find systematic ways of predicting judges' decisions.

Is there a correctly obtained, deductive outcome to every legal case? One recent Supreme Court nominee described the adjudicatory process as one similar to an umpire’s task of calling balls and strikes. Such an ideal may never be realized because the theoretical goals of such a legal system are undermined by the behaviorist critiques of legal realism, the underdetermination problem from philosophy of science, and the non-existence of a neutral point of view. I will frame the history of legal philosophy as one of increasing skepticism about the justification and origin of law, and review more recent critical views of the accuracy and trustworthiness of the judicial process.

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º John Adams, Constitution of the Commonwealth of Massachusetts, 1780.