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It's Time to Fight 'Judicial Imperialism'

By Carlos Muñiz

Why is the public so intensely focused on the role of judges in our system of government? The best explanation that I've seen came from Justice Antonin Scalia: "The American people love democracy, and the American people are not fools."

His point is that the American people are onto the courts. They know that under the guise of constitutional "interpretation," judges are imposing their own policy preferences. Issues that should be debated and decided through the democratic process are being taken off the table. However, because Americans are unwilling to surrender their right to self-government, they have begun to subject the courts to the same scrutiny that they apply to other lawmaking bodies.

Observing what the courts are doing, many Americans don't like what they see. They sense that court decisions too often reflect the judges' personal philosophies, rather than principled, text-based legal analysis. The courts strike down laws protecting children from Internet pornography, but uphold campaign finance laws that restrict basic political speech. The courts invalidate restrictions on even the most grotesque forms of abortion, but they turn a blind eye to violations of property rights that are explicitly protected in the constitutional text. And most controversially, the courts pursue a

secularist agenda at odds with our nation's religious heritage.

Beyond particular cases, many Americans find it galling that the courts have the final say on every important issue. Judicial activism and a hyper-litigious society have combined to turn every policy dispute into a constitutional case. Even casual observers of politics know that the arduous process culminating in the enactment of a law is merely a warm-up for the inevitable—and conclusive—litigation to follow. Floridians need only consider the experience of Gov. Jeb Bush, who has seen far too many of his key initiatives—from promoting school choice and ending state universities' use of racial preferences, to speeding up death-penalty appeals and changing the way public employees are hired and fired—subjected to time-consuming and costly litigation, often on contrived grounds.

Winning the fight against judicial imperialism requires engagement in the battle of ideas. Those of us who favor a more limited role for the judiciary must argue for the continuing validity of principles first articulated by our Founding Fathers. Most fundamental is the notion that the power of the people is superior to both the judiciary and the legislature. This means that the role of judges, when interpreting the Constitution, is to discern the will of the people as expressed in that

document. This requires judges to be grounded in the text of the Constitution and in our nation's history and traditions. No judicial decision is legitimate unless it can be justified by reference to those sources of authority.

Instead of blithely accepting the rhetoric of "judicial independence," we must hold the judiciary to the same principle of accountability that we apply to other branches of government. No reasonable person wants politicians or newspaper editorial boards dictating the outcome of court cases. But judges were never intended to be independent of the people. Here in Florida, our appellate judges are subject to periodic retention elections. It is unclear whether this process acts a check on the judiciary, because not a single appellate judge has been voted out of office in the 30 years the system has been in place. Nonetheless, if pursued with intellectual honesty and respect for the honor of the courts, the retention process offers an opportunity for healthy debate about the judiciary's performance.

Finally, we must acknowledge that the judiciary is not solely at fault for our diseased legal culture. Our society is addicted to litigation. While judicial activism creates a temptation to re-fight lost political battles in the courts, no judge has ever forced anyone to file a lawsuit.

Instead of reflexively running to court after every setback, groups on all points of the political spectrum must commit to the value of the democratic process.

In this regard, the words of the late Justice Felix Frankfurter, a historic advocate of judicial restraint, are worth pondering: "There is not under our Constitution a judicial remedy for every political mischief. In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives." Amen.

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