

POLICY PAGES

Role of Judges

September 2023

OVERVIEW

Over the past century, many of the most important decisions of American public policy have been made not by legislative enactment, but by unelected state and federal judges.

The most famous example of this judicial activism is the United States Supreme Court’s 1973 decision in *Roe v. Wade*. The Court invented a “right to privacy” that included a right to abortion, effectively eviscerating state laws that then prohibited abortion in all 50 states. More than forty years later, despite an overwhelming majority of states voting on ballot measures to define marriage as the union of one man and one woman, unelected justices again took it upon themselves to invalidate these laws and mandate same-sex marriage throughout the country with their ruling in *Obergefell v. Hodges*. Most recently, that same Supreme Court ignored the ordinary usage of the word “sex” at the time that Title VII of the Civil Rights Act of 1964 was passed to refer to a person’s biological sex, and instead decided in *Harris Funeral Homes v. EEOC* it included sexual orientation and gender identity.

Arizona courts have issued similarly activist decisions. The Arizona Supreme Court held that Arizona’s Constitution requires public funding of all “medically necessary” abortions of welfare recipients. “Medically necessary” is a nebulous term that can be construed to encompass nearly all abortions. In her dissent, Justice Berch contended that the court misconstrued constitutional requirements and usurped the role of the legislature by literally rewriting the statute. She stated, “If the public disagrees with the choice of its elected representatives, its recourse is to turn those representatives out of office. It is not for the court to make such policy decision.”¹

The concern over judicial activism has led to courts and appointment of judges becoming central election issues in both federal and state elections. In 2016, for example, voters cited “Supreme Court appointments”² as a top issue and President Donald Trump followed through by placing conservative justices on the U.S. Supreme Court. Those justices helped form a majority who issued the *Dobbs* decision in 2022, overturning court-ordered abortion nearly fifty years after *Roe* and returning the issue to the states.

Analysis



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Judicial review is the authority granted to the judiciary to invalidate unconstitutional actions by the legislature or judicial branch. This power, when misused, creates a condition of judicial supremacy. Judges are not empowered to invalidate validly enacted laws simply because they consider them annoying, unwise, or even unjust; they should only strike down laws that are clearly inconsistent with the Constitution.

American jurisprudence requires a unique set of attitudes toward the role of government and the specific role that judges play within government. The following list outlines how the ideal judge should approach the job.

- **Respect for the Constitution as Written and Originally Understood.** The ideal judge understands the Constitution is a text that means what it meant when it was enacted and thus respects the traditions and history surrounding its framing. If the Constitution needs to be changed, the proper way to do so according to the text of the Constitution is by a supermajority of Congress and then ratification by the supermajority of state legislatures, all of whom are accountable to the people.
- **Respect for Separation of Powers.** The ideal judge understands the constitutional order. A judge is not a legislature. A judge is not a partisan politician elected to ensure certain policies triumph. Instead, a judge's job is to objectively adjudicate disputes between parties in specific cases as guided by the rule of law. The Framers of the Constitution made Congress by far the most powerful branch of government and intended the federal courts to be weak in comparison. Members of Congress are elected by the people in partisan elections and are thus directly accountable to them. Federal judges, by contrast, are given lifetime appointments and very rarely removed from office, and, therefore, are not directly accountable to the people. Contested policies should be decided in the more accountable branch. At the state level in Arizona, the three branches of government have an analogous relationship.
- **Respect for Federalism.** The ideal judge respects federalism. Federalism, as originally conceived by the Framers, meant the federal government had limited power over states and localities. States retained general policy making authority and could serve as "little laboratories" of experimentation in public policy (for example, one state might practice capital punishment, and another might forbid it in an effort to deter crime). Unfortunately, the federal government legislates in almost all areas now, often squeezing out local decision making or coercing it. The ideal judge looks for ways to restore the original vision of federalism where decisions can still be made at more localized levels. The ideal judge is also more willing to rule federal legislation as unconstitutional when it imposes additional restrictions on the states.
- **Rejection of International Law.** The ideal judge rejects the invitation to incorporate international law (not enacted by Americans) as rules for making or influencing decisions. The judge respects the constitutional order and respects the precedents of the United States over those of foreign nations.



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- **Respect for Ordered Liberty not Equality.** The ideal judge is impartial and does not favor the rich or the poor (Lev. 19:15). The activist judge is partial and “fixes” problems in front of them regardless of the law or constitution. The ideal judge respects the rule of law and follows the laws of the jurisdiction, obeying his role as an adjudicator not considering politics or outcomes. So, for example, this could mean a Republican judge might rule against a Republican candidate who disputes the outcome of her election because the law does not favor the politician’s arguments. Or a pro-life judge could rule that a pro-life law is unconstitutional under a pro-abortion state constitution, even though he wishes the state constitution protected unborn life instead of harming it.
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TALKING POINTS

- **The role of the judiciary is to apply and interpret law, not to write or re-write it.** Too often, judges legislate from the bench, and opponents of foundational values use the courts to usurp the will of the people.
 - **An unaccountable judiciary should not be the ultimate authority in America.** Our Founding Fathers originally created a government of separated powers and federalism to allow the states to flourish and individuals to live free.
 - **The ideal judge provides the impartial, nonpartisan implementation of laws passed by elected representatives of the people.** Judges are one important part of the delicate checks and balances needed to secure ordered liberty.
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CONCLUSION

Contrary to the intent of the Constitutional Framers, the American judiciary often claims the supreme power in the country. While not every judge is an activist today, there are many judges who base their decisions on personal preference rather than the respect for the Constitution and the separation of powers. However, there is a growing movement toward the appointment of judges who respect their role within the Constitutional structure and refuse the invitation to activism. This change is welcome and signals a return to ordered liberty.

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¹ Casetext (2002, Oct 23). Simat Corp. v. Arizona Health Care Cost Containment, Casetext Oct 23, 2002 <https://casetext.com/case/simat-corp-v-arizona-health-care-cost-containment>



² Pew Research Center (2016, July 7) Top voting issues in 2016 election,
<https://www.pewresearch.org/politics/2016/07/07/4-top-voting-issues-in-2016-election/>



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