Judicial Reform | Role of Judges

Overview

Policy organizations, elected officials, and citizens have watched with growing concern as state and federal judges enact public policy from the bench to the exclusion of the legislative and executive branches of government.

The most recent example of judicial activism can be seen in the U.S. Supreme Court’s decision to invalidate a section of the federal Defense of Marriage Act (“DOMA”). In spite of the fact that this law was overwhelmingly passed by the U.S. Senate, the U.S. House of Representatives, and signed into law by President Bill Clinton, five unelected justices took it upon themselves to invalidate part of that law and essentially legislate from the bench.

A case closer to home involving public funding of abortion illustrates another example of judicial activism in Arizona. A coalition of pro-abortion family planning entities filed a lawsuit in superior court challenging an Arizona law that prohibited public funding of abortions except in cases of rape, incest, or danger to the mother’s life. They alleged that this “discriminatory funding scheme jeopardizes the health and lives of AHCCCS-eligible women seeking medically necessary abortions” and was unconstitutional.

The United States Supreme Court, interpreting the federal Constitution, rejected a similar argument in 1977. Nonetheless, when the case was appealed to the Arizona Supreme Court, a majority of the Court held that Arizona’s Constitution requires funding of all “medically necessary” abortions. “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 decisions.”

A 2005 Goldwater Institute study analyzed Arizona Supreme Court decisions and came to the conclusion that “the justices have performed admirably in preserving constitutional rights, but have too often usurped legislative powers and superseded the constitutional powers granted the supreme court.”

Issue Analysis

The American system is different from other legal systems because it recognizes that the only source for the power of judicial review is the will of the people. The authority behind judicial review is not the authority of judges; it is the authority of the Constitution. Judges are not empowered to invalidate laws simply because
they consider them annoying, unwise, or even unjust. Only laws that are clearly inconsistent with the Constitution should be struck down.

American jurisprudence also 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 would approach his responsibilities.6

- **Respect for Constitution as Written and Originally Interpreted.** Coupled with a respect for tradition, history, and separation of powers, non-activist judges respect the intent of the Founding Fathers, who set up a national government with limited powers and a procedure to expand those powers as society changed. Non-activist judges believe that if the Constitution must be changed to reflect societal change, the proper way to do it is not by an “edict” issued by five members of a Supreme Court unaccountable to the people, but by a supermajority of Congress and then ratification by the supermajority of state legislatures, all of whom are accountable to the people. The Founders wanted a near consensus from both state and federal elected officials before the Constitution could be changed, not a 5-4 decision by judges unaccountable to the people.

- **Respect for Separation of Powers.** The Founding Fathers made Congress by far the most powerful branch of government and intended the Supreme Court to be weak in comparison. Members of Congress, of course, are elected by the people, and are directly accountable to them. Federal judges, by contrast, are given lifetime appointments, are very rarely removed from office, and therefore are not directly accountable to the people. When Congress makes laws we do not like, we can remove the objectionable members at the next election; we cannot do so to renegade Supreme Court justices who legislate from the bench. Similarly at the state level in Arizona, the three branches of government are intended to be separate with the legislature providing the cumulative voice for the state and the public at-large. However, also similar to the federal level, judges at the appellate level and largest county levels are hardly accountable to the people because they are unelected, and the presence of retention elections is more symbolic than anything else. A non-activist judge does not impose his will over the will of a popularly elected official.

- **Respect for Community vs. Rights.** We live in a community called the United States, and our laws reflect how we should live in this community. A focus on rights divides the community into separate individuals. Although rights (like the due process rights of criminals) must be respected, they must also be balanced against the needs of the community in general.

- **Respect for Tradition.** Non-activists generally respect history and tradition, the unique elements of our past that set us Americans apart as a people. Non-activist judges, similarly, respect the rule of law and the traditions of the American people.

- **Respect for Federalism.** Non-activists prefer state and local government over the national government on the premise that different communities have different problems (roads in one community and crime in another, for example). Similarly, non-activist judges are more deferential to state legislators and more willing to rule federal legislation as unconstitutional when it imposes additional restrictions on the states.
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- **Respect for National vs. International Law.** Consistent with a respect for community and tradition, non-activists have greater respect for the precedents of the United States than of foreign lands, since foreign nations have different perspectives and traditions than we do.

- **Respect for Ordered Liberty vs. Equality.** Non-activists recognize that individuals have different talents and ambitions, and that the greatest engine for a successful nation is liberty. Non-activists also recognize that to achieve equality, force of some kind is necessary (typically, government redistributing wealth). Equality is achieved, in part, through a loss of liberty. Non-activists, however, do not value liberty which permits licentiousness, but rather an ordered liberty which permits freedom in the context of community values. Non-activist judges respect these values founded on tradition and history and will respect them when challenged by claims of individual rights.

**Talking Points**

- **The role of the judiciary is to interpret the Constitution, not enact public policy.** Too often, however, judges legislate from the bench, and opponents of foundational values use the courts to usurp the power of the people.

- **An unaccountable judiciary should not be the ultimate authority in America.** Our Founding Fathers originally created a government that establishes checks and balances, respects separation of powers, and protects the voice of the individual.

**Conclusion**

Contrary to the intent of our Founding Fathers, the American judiciary has become the supreme power in our country. While not every judge is an activist today, there are many that base their decisions on personal preference rather than the respect for the Constitution as originally written and the separation of powers.

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4 Id.