
THE REAL ROLES OF JUDGES

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In the 1960s, one of the standard texts in college government departments was a work by a Cornell political scientist, Clinton Rossiter, called *The American Presidency*.¹ Professor Rossiter departed from the civics lesson descriptions of the presidency, analyzing instead the President's actual functions.² For example, the President is not only Chief of State but also head of his political party – likely a role not contemplated by some of the Framers.³ As a point of departure, let me adapt Rossiter's approach to federal judges.

The first two functions performed by federal judges, commonly linked but worth distinguishing, are two of the traditional roles performed for centuries by English judges: the resolution of private disputes (e.g., who owns Blackacre?) and the imposition of criminal justice (e.g., hanging highwaymen). This is the mental picture of the courts at work that most of the public entertains.

These are still mainstream roles for federal judges, but both functions, although permanent, are somewhat in decline. When all felonies were capital, there was not much purpose in plea bargaining; but today most cases are resolved by deals between prosecutors and defense lawyers rather than by trials. Still, the courts set the rules, do the sentencing and, especially through the trials that remain, help to legitimize the criminal law.

On the civil side, the courts have become victims of their own success in making litigation so "fair" through discovery "reforms" as to be both expensive and slow; many lawyers now prefer arbitration or other alternative dispute resolution devices. Because of juries, there will always be litigants whose interests are better served by traditional trials; but what makes civil juries attractive to one side also spurs the other to foreclose the judicial regime, for example, through contractual clauses providing for arbitration.

A third, and also traditional, function of courts is that of lawmaking in miniature. During periods of our own history, the existence of this role has been denied; but, of course, judges have been making common law since the dawn of the writ system. Even in an age of legislation, every new statute has gaps to fill and ambiguities to decipher.

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¹ CLINTON ROSSITER, *THE AMERICAN PRESIDENCY* (2d ed. 1960).

² *Id.* at 16.

³ *See id.* at 30-31.

Mostly, lawmaking by judges has been incremental and interstitial, although a few figures have swept more broadly (e.g., Lord Mansfield, Chief Justice Marshall). This approach reflects a practical division of labor between legislatures and judges. The judicial element, if modestly performed and correctable by legislatures, is secure as far as the eye can see. Lawmaking under the Constitution, often far from interstitial, is a different kettle of fish.

Yet a fourth function – this one with roots in the past but far more elaborately developed in modern times – is the judge’s role in connecting the ever-growing bureaucratic state with private individuals or entities. The role blends those of protector of citizenry, ombudsman, and implementer of state administrative regulation. Two of its great charters, marking the range of the activities under this heading, are the Bill of Rights and the Administrative Procedure Act.⁴

English courts in the eighteenth century protected citizens against unlawful behavior by sheriffs and revenue agents through common law writs such as trespass. But the swelling regulation of an industrial age makes this intermediation central to modern governance. Conceivably, the function could be accomplished by other means, but in this country, with a million lawyers at the ready, we do it largely through the courts. Other countries probably use different techniques.

In contrast to the previous four judicial functions, the next role is comparatively new and peculiarly American. It is commonplace that American courts settle disputes over power between the President and Congress and (as Justice Holmes thought more important)⁵ between the states and the national government. Even Learned Hand, no enthusiast of judicial activism, thought these functions could be implied by the rule of necessity.⁶

This brings us to yet another related function, which is the role of courts as reformers. Grant Gilmore once said: “After 1900 the Supreme Court withdrew from the decision of private law questions and became a forum for the resolution of political controversies dressed up as issues of constitutional law.”⁷ Many reforms, such as *Brown v. Board of Education*,⁸ garner wide acceptance and have substantial roots in traditional constitutional sources.

But much of the fruit, whether sweet or not, falls further from the tree. Additionally, the decisions do not all come from one side of the spectrum.

⁴ Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

⁵ OLIVER WENDELL HOLMES, *Law and the Court*, in COLLECTED LEGAL PAPERS 291, 295-96 (1920).

⁶ LEARNED HAND, THE BILL OF RIGHTS 14-15 (1958) (contending that the federal government “would almost certainly have foundered” were it not “established practice for the Supreme Court to assume an authority to keep the states, Congress, and the President within their prescribed powers”).

⁷ GRANT GILMORE, THE AGES OF AMERICAN LAW 61 (1977).

⁸ 347 U.S. 483 (1954).

*Lochner v. New York*⁹ and more recent improvisations on Eleventh Amendment themes¹⁰ are to be set against one man, one vote,¹¹ and the dramatic downsizing of state defamation law beginning with *New York Times Co. v. Sullivan*.¹²

The origins and ramifications of the development of courts as reformers are a separate subject. Although there are early examples, this role has flourished most fully in the last hundred years, and the enthusiasm for the role has now spread to Europe. Certainly the line between ordinary parsing of constitutional language and dramatic innovation is a matter of degree. But the latter – my focus here – is volatile because it sets courts against the democratic process.

To the extent that judges get seriously out of step with what the public wants – the 1930s and the 1960s may both furnish examples – there are backlashes followed by temporary displays of judicial modesty. Yet where the ordinary political process is itself unresponsive to the public will and courts choose what is popular, the pendulum swings back in favor of judicial power. The one constant of most institutions is the drive to expand their authority. It is peculiarly the courts that set their own boundaries.

The question remains whether there are new judicial functions as yet in the womb of time. In the past, the Supreme Court has hesitated to intrude very far into foreign affairs¹³ and left treaty matters mostly to the other two branches. Given a globalized economy and burgeoning international arrangements, these are subjects of ever-increasing importance. And many other self-denying doctrines have given way.¹⁴

The United States is party to many treaties. Their language is often broad and ambiguous, and the line is often blurred between those that are precatory or not self-executing and those that have the force of domestic law.¹⁵ The number of new rights and obligations that could be “domesticated” through the construction of broadly worded treaties may be considerable, with some perhaps surprising to Congress. We will see where such litigation leads, and, in turn, into what new role it may lead the federal courts. Courts are creatures of evolution, and of evolution there is no end.

⁹ 198 U.S. 45, 64 (1905).

¹⁰ See, e.g., *Alden v. Maine*, 527 U.S. 706, 712 (1999).

¹¹ *Reynolds v. Sims*, 377 U.S. 533, 537 (1964).

¹² 376 U.S. 254, 279-80 (1964).

¹³ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 329 (1936).

¹⁴ See, e.g., *Baker v. Carr*, 369 U.S. 186, 237 (1962) (finding that the Equal Protection Clause allowed the Court to decide a reapportionment issue, thereby limiting the scope of the traditional doctrine of non-justiciability of political questions).

¹⁵ See, e.g., *Igartúa-de la Rosa v. United States*, 417 F.3d 145, 149-50 (1st Cir. 2005) (en banc), cert. denied, 126 S. Ct. 1569 (2006). In *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2677-78 (2006), the Supreme Court recently managed to avoid such a question; but the very question posed there, and others like it, will recur.