

# Judges should stick to the Constitution

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At a forum at the Hinckley Institute of Politics on Friday, Judge Thomas Griffith of the U.S. Court of Appeals for the D.C. Circuit told a standing-room-only crowd that the goal of a judge should be to follow the law rather than to “do justice.”



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Probably the biggest controversy today in jurisprudence, or the philosophy of judging, is to what extent a judge is obliged to follow the text of the law as opposed to doing what he or she believes is the right thing.

This is one of the main themes of the excellent Judicial Process class taught here at the U, both at the College of Law and in the political science department. There are scholars and judges on each side of the argument. Griffith came down unequivocally on the side of following the text.

This does not mean Griffith and others who follow the textualist approach do not have their own views as to what is right or just. Rather, they believe that the relevant values to be considered are those of the people expressed through their elected legislatures instead of those of appointed judges.

There are serious problems with having the judiciary making value judgements. U.S. Supreme Court Chief Justice William Rehnquist wrote in the *Texas Law Review* that such an approach was not only non-democratic but also contrary to the “nature of the Constitution, which was designed to enable the popularly elected branches of government, not the judicial branch, to keep the country abreast of the times.”

The U's Michael McConnell, a judge on the 10th U.S. Circuit Court of Appeals as well as a law professor, has argued that the Supreme Court does not have the time for serious deliberation on moral issues that legislatures do and the quality of the court's moral analysis is “low on intelligible principle.”

When speaking at Utah State University earlier this year, Justice Antonin Scalia said judges are no more qualified to make moral judgments than “Joe Six-Pack.” He also said judicial value judgments lack legitimacy.

Legitimacy in a democracy must ultimately come from the people. Many, if not most, judges are appointed. Federal judges are appointed for life, and Utah's judges are initially appointed. Even in states such as Idaho where the judges are supposed to be elected, the judiciary manipulates the system through strategic retirements so the vast majority of judges are initially appointed.

Without the mandate of a popular election, the judiciary's only claim to democratic legitimacy in deciding cases is to strictly adhere to the words of laws and the Constitution because they represent the will of the people.

This kind of debate is not just the jurisprudential equivalent of arguing about “how many angels can dance on the head of a pin,” it also involves the question of who will make some of the most momentous decisions in our society.

Griffith said it is a lot easier to convince a majority of nine justices than to pass a constitutional amendment. This approach is particularly attractive in places such as Utah and Idaho, where one party dominates the executive and legislative branches. Many on the other side see the judicial branch as their only hope.

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Fortunately, this does not appear to be a problem in Utah. We have a strong system of checks and balances and a judiciary that seems to recognize the limitations of its power.

Judge Griffith is absolutely correct—judges need to try as hard as they can to be neutral. The role of the judiciary in a democracy is to interpret, not make, laws.

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