UNDERSTANDING AMERICA

What Is the Proper Role of the Courts?

Robert Alt

The *Understanding America* series is founded on the belief that **America is an exceptional nation.** America is exceptional, not for what it has achieved or accomplished, but because, unlike any other nation, it is dedicated to the principles of human liberty, grounded in the truths expressed in the Declaration of Independence that all men are created equal and endowed with equal rights. As Abraham Lincoln once said, these permanent truths are "applicable to all men and all times." The series explores these principles and explains how they must govern America's policies, at home and abroad.

About This Cover

According to the Founders, the job of the courts is to rule whether a law violates the Constitution—not whether it constitutes good policy. In recent decades, some judges have become activists, deciding cases by applying their own policy preferences rather than by impartially applying the law. In these cases, justice is no longer blind: it picks the outcome it prefers.

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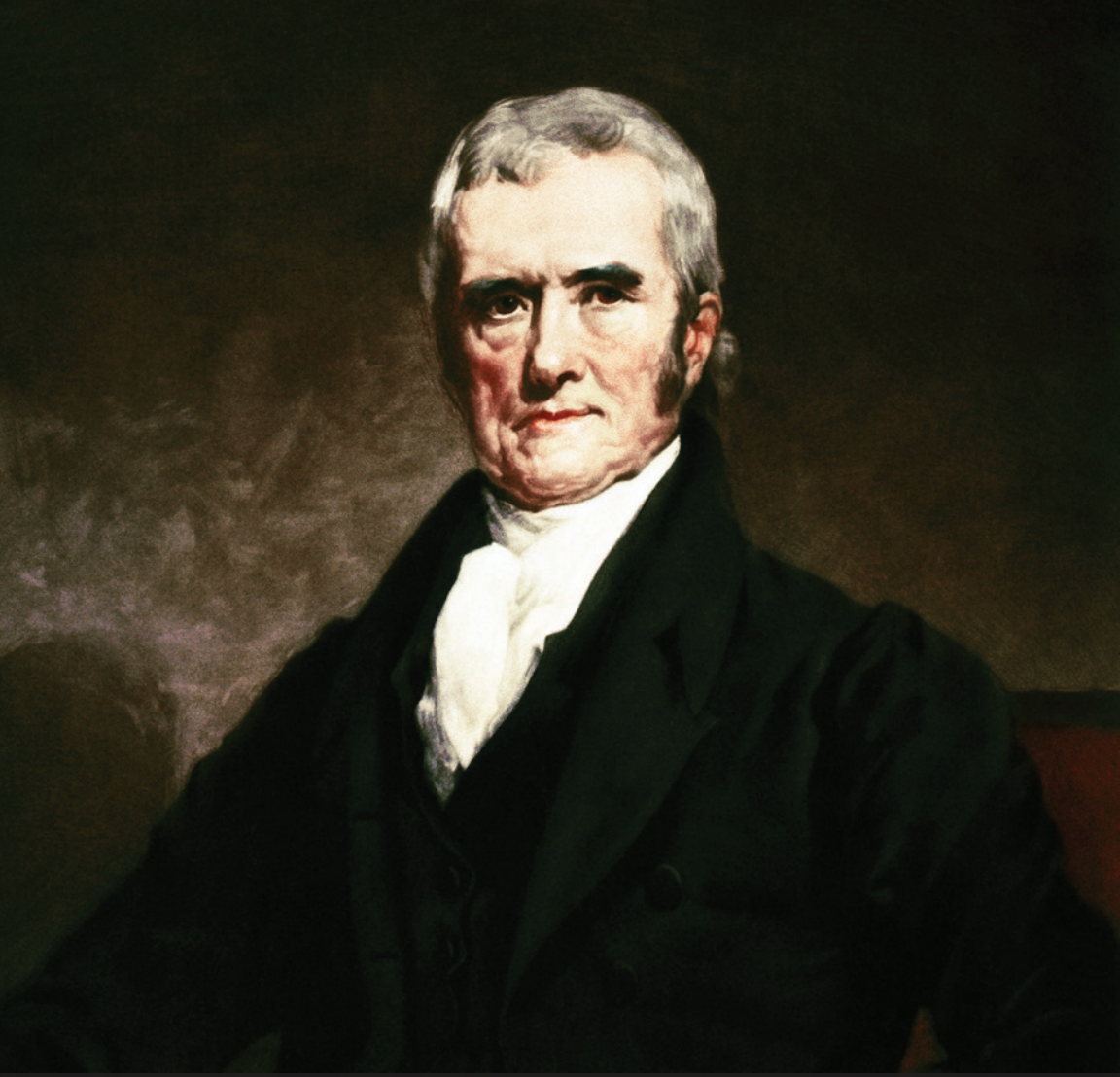
What Is the Proper Role of the Courts?

In the *Federalist Papers*, Alexander Hamilton referred to the judiciary as the least dangerous branch of government, stating that judges under the Constitution would possess "neither force nor will, but merely judgment." Yet recently, the courts have wielded great power, directing the President on questions as monumental as how to conduct war, and micromanaging the states concerning even the most minute details of local school and prison operations. What is the proper role of the courts?



As the longest serving Chief Justice of the United States, John Marshall played an important role in the development of our legal system. In Marbury v. Madison *(1803), he famously established judicial review, which is the judicial power to determine whether laws and activities of the branches of the state and federal governments are unconstitutional.*

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"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." —James Madison, Federalist 47

The Founders studied political philosophy and the rise and fall of nations throughout history. When confronted with tyranny on their own shores, they rebelled against the dangerous consolidation of power in the British monarchy. Through reason and experience, they recognized that government can threaten liberty by abusing its powers, and they sought to avoid this by separating powers in the U.S. federal government. They believed that this separation of powers, coupled with a system of checks and balances, would make "ambition … counteract ambition." Rather than depending on officeholders to restrain themselves (which given the power of ambition is unsafe), or on rules set down on paper (which are too easily ignored), the Founders gave each branch authority to exercise, and an interest in defending its own prerogatives, and thereby limited the ability of any one branch to usurp power.

Accordingly, the Founders vested the legislative power (the power to make the laws) in Congress, the executive power (the power to enforce the laws) in the President, and the judicial power (the power to interpret the laws and decide concrete factual cases) with the courts. But even these powers were not unfettered. Federal courts, for example, can hear only "cases or controversies": they cannot issue advisory opinions. The courts cannot expound on a law of their choosing or at the request of even the President himself, but must wait for a genuine case between actual aggrieved parties to be properly presented to the court.

In explaining judicial power under the Constitution, Hamilton noted that the courts would have the authority to determine whether laws passed by the legislature were consistent with the fundamental and superior law of the Constitution. If a law was contrary to the Constitution, then it was void. Not surprisingly, the Supreme Court agreed, famously announcing its authority to rule on the validity of laws—known as judicial review—in the case of *Marbury v. Madison*. In weighing the validity of a provision of the Judiciary Act of 1789, Chief Justice John Marshall declared that "It is emphatically the province and duty of the judicial department to say what the law is."

"Those who framed the Constitution chose their words carefully; they debated at great length the most minute points. The language they chose meant something. It is incumbent upon the Court to determine what that meaning was."

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—Attorney General Edwin Meese

July 9, 1985

Everyone who holds an office in the United States takes an oath to uphold the United States Constitution. As the Supreme Court must dutifully and faithfully interpret the Constitution when determining the validity of the laws in the cases before it, so too must the Members of Congress and the President when they craft and sign legislation into law.

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But the *Marbury* Court did not claim that the courts possessed the exclusive or supreme authority to interpret the constitutionality of laws. The other branches of government are also legitimately responsible for interpreting the Constitution. The President, for example, takes an oath to support the Constitution, and carries out this oath by determining which laws to sign. While the President may sign or veto legislation for political or policy reasons, the President faithfully discharges his oath by vetoing legislation if he believes that it would violate the Constitution. If the law was signed by one of his predecessors, a President may engage in constitutional interpretation by choosing not to enforce it if he believes it to be unconstitutional.

Thus, President Thomas Jefferson ordered his Attorney General *not* to enforce the Alien and Sedition Acts because he believed that they violated the First Amendment. Jefferson did this even though some courts had held that the Acts were constitutional. Jefferson's action is an early practical example of the President using his independent role and judgment to interpret the Constitution.

Members of Congress also take an oath to support the Constitution. Congress interprets the Constitution by deciding which laws to enact. Congress may (and does) choose to enact or reject

legislation for political or policy reasons, but when its Members reject legislation that would violate the Constitution, they are acting in accordance with their oaths.

That is how our system is supposed to work. But over time, the Supreme Court has grabbed power by declaring that "the federal judiciary is supreme in the exposition of the law of the Constitution." The Supreme Court has even gone so far as to declare that its decisions that interpret the Constitution are the supreme law of the land.

Unfortunately, the political branches have largely acceded to these bloated claims. For example, when Congress was considering the Bipartisan Campaign Reform Act—popularly known as McCain-Feingold—which imposed numerous restrictions on election-related speech, its Members delivered speeches acknowledging that provisions of the Act were likely unconstitutional. That should have ended the debate.

But some Members surprisingly went on to state that questions of constitutionality were for the Supreme Court, not Congress, to

decide, and that Congress should pass the legislation because it was too important not to enact. This was a flagrant abdication of Congress's role in determining the constitutionality of legislation.

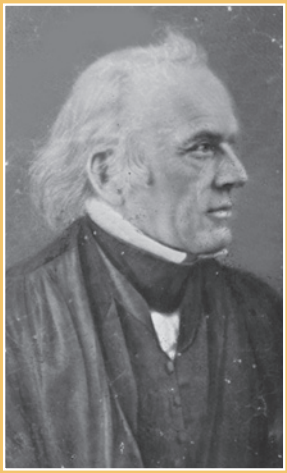
Similarly, when President George W. Bush signed the legislation, he issued a statement asserting that he expected the courts to resolve his "reservations about the constitutionality" of provisions of the Act. This once again left the courts to answer constitutional questions that the President could have and should have decided himself. Thus, by the acquiescence of Congress and the President, the weakest branch has largely succeeded in its self-anointed claim of supremacy.

The federal courts have not only grabbed power. They have also changed how judges carry out one of the core function of the judiciary: interpreting laws. The proper role of a judge in a constitutional republic is a modest one. Ours is a government of laws and not men. This basic truth requires that disputes be adjudicated based on what the law actually says, rather than the whims of judges.

In determining whether a contested law is consistent with the Constitution, judges act within their proper judicial power when they give effect to the original public meaning of the words of the law and the Constitution. This necessarily means that judges acting in accordance with their constitutional duties will at times uphold laws that may be bad policy, and strike down laws that may be good policy. This is because judicial review requires the judge to determine not whether the law leads to good or bad results, but whether the law violates the Constitution.

In recent decades, judges have engaged in judicial activism, deciding cases according to their own policy preferences rather than by applying the law impartially according to its original public meaning. They have become enamored of ideas like "living constitutionalism," the theory that the Constitution evolves and changes not through the amendment process set out in the Constitution itself, but as a result of the decisions of judges who supposedly serve as the supreme social arbiters. They have drawn on external sources like

“The danger is not, that the judges will be too firm in resisting public opinion … but, that they will be ready to yield themselves to the passions, and politics, and prejudices of the day.”



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—Joseph Story
1833

When judges or justices inject their policy preferences into the Constitution, they act against the will of the people and reduce the possibility for true democratic debate within state and federal legislatures. It is not surprising, then, that the public increasingly brings their petitions and protests directly to the court, rather than to their elected representatives.

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foreign laws when the outcome they desired did not comport with the original public meaning of the law under review.

Liberal activist Justice William Brennan famously said that "With five votes you can do anything around here"—five votes being a majority of the Supreme Court. Living up to Brennan's boast, the federal courts have awarded the federal government power to regulate matters well beyond its constitutional authority. The courts themselves have taken over school systems and prisons for decades at a time, created new rights found nowhere in the Constitution, whittled away at constitutional rights (like property rights) that they apparently dislike, and asserted that they have the authority to decide questions concerning how to conduct the War on Terror that are constitutionally reserved to Congress and the President.

The courts have increasingly intervened on what are properly political questions. They have thereby undermined the ability of the American people to decide important issues through their elected representatives. Not surprisingly, the courts have become increasingly politicized institutions, and the nomination and confirmation of judges has also been politicized.

The Constitution is resilient, and it provides its own mechanism for renewal. The President nominates, and the Senate confirms, federal judges to serve during good behavior. If America is to be again a country of laws, and not of men, the people must demand that their President nominate and Senators confirm only judges who will conform to the proper role of a judge, and rule based upon the words and the original public meaning of the Constitution.

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Enduring Truths

For links to these titles, go to heritage.org/UnderstandingAmerica.

- **Alexander Hamilton, *The Federalist Papers*, No. 78, "The Judiciary Department," and No. 81, "The Judiciary Continued, and the Distribution of the Judicial Authority."**
  Hamilton explains the importance of an independent judicial branch and discusses the meaning of judicial review. Thought by Hamilton to be "the least dangerous branch," the judiciary has neither the ability nor the resources to create and enforce laws. It remains the "proper and peculiar province" of the courts to interpret statutes and determine whether they comport with the Constitution.

- **Joseph Story, *Commentaries on the Constitution of the United States*, Book 3, Chapter IV, "Who Is the Final Judge or Interpreter in Constitutional Controversies."**
  One of the cornerstones of American jurisprudential interpretation, *Commentaries* provides a deep and methodical examination of the Constitution and reveals how the Constitution was viewed and interpreted after its adoption. In Chapter IV, Justice Story

explains the nature of judicial review and sets forth a philosophy of judicial restraint.

- **Edwin Meese, "Before the American Bar Association." July 9, 1985, Washington D.C.**
  In the first in a series of historic speeches, Attorney General Edwin Meese discussed the proper role of the Supreme Court and the singular importance of enforcing the Constitution's original meaning. The proper way to interpret the Constitution is for judges to discern the original meaning of the constitutional text as it was written and publicly understood at the time of ratification. Because of this speech and the vigorous debate that followed, many judges have returned to a jurisprudence of originalism.

- **Ronald Reagan, "The Investiture of Chief Justice William H. Rehnquist and Associate Justice Antonin Scalia at the White House," September 26, 1986, Washington D.C.**
  In a speech before the investiture of Chief Justice Rehnquist and Associate Justice Scalia to the Supreme Court, President Reagan outlines the importance of judicial restraint in order to ensure that our government remains one that is governed by the people.

The role of the judicial branch is to interpret the law, while the ability to enact and enforce those laws is left to the legislative and executive branches. President Reagan understood that freedom is not preserved by one branch alone. Rather, our freedom is secure only when the entirety of our constitutional system works together and no branch is given the upper hand.

Current Issues

For links to these reports, go to heritage.org/UnderstandingAmerica.

- **EXPANSION OF POWER. Todd Gaziano, Randy Barnett, and Nathaniel Stewart, "Why the Personal Mandate to Buy Health Insurance Is Unprecedented and Unconstitutional," December 9, 2009.**
  The Patient Protection and Affordable Care Act, popularly known as "Obamacare," includes a mandate that all private citizens enter into a contract with a private company to purchase a good or service, or be punished by a fine labeled a "tax," which is unprecedented in American history. For this reason, there are

no Supreme Court decisions authorizing this exercise of federal power. Although it is always difficult for the Supreme Court to thwart what is perceived to be the popular will, the majority of the justices who are inclined to preserve the system of enumerated powers and adhere to the original meaning of the text of the Constitution will have little inclination or incentive to stretch the Commerce Clause to uphold the unconstitutional scheme presented in Obamacare.

- **JUDICIAL ACTIVISM. Robert Alt and Hans von Spakovsky, "The Liberal Mythology of an 'Activist' Court: *Citizens United* and *Ledbetter*," June 15, 2010.**
  Liberals are currently engaged in a concerted effort to redefine judicial activism. Rather than accepting the true definition of judicial activism—when a judge applies his or her own policy preferences to uphold a statute or other government action that is clearly forbidden by the Constitution—liberals now apply the term any time a statute is struck down or a court delivers an unfavorable decision. This new tactic is on display in the Left's response to two major Supreme Court cases: *Citizens United v. FEC* and *Ledbetter v. Goodyear Tire & Rubber Co.* These cynical and

derisive attacks are unfair to the justices who participated in these decisions and injure the public's faith and confidence in the judicial system.

- **ELECTED JUDICIARY. Deborah O'Malley, "A Defense of the Elected Judiciary," September 9, 2010.**
  Activist judges and activist judicial rulings have led to the increasing politicization of judicial selection. A well-funded movement advocates "merit" selection in which unelected, unaccountable experts and special interests recommend the appointment—and in some cases actually select—judges as a way to combat politicization. This process simply moves the politics behind closed doors. Judicial elections are subject to potential flaws, but there are also due-process checks in that system. Judicial elections better meet the goals of promoting judicial independence and assuring public accountability than does so-called merit selection.

About *Understanding America*

AMERICANS HAVE ALWAYS BELIEVED that this nation, founded on the idea of freedom, has a vital responsibility to the rest of the world. As George Washington first recognized, the "preservation of the sacred fire of liberty" depended on the American people. These words remain true today.

Understanding America explores how the United States' commitment to the universal truths of human equality and the right to self-government—as proclaimed in the Declaration of Independence—requires a vigilant defense of the cause of liberty, both at home and abroad.

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What Is the Proper Role of the Courts?

"Judicial review requires the judge to determine not whether the law leads to good or bad results, but whether the law violates the Constitution."

According to the Framers, all three branches of government have a duty to uphold the Constitution. The courts are a co-equal branch of government and the decisions of judges must be guided by the Constitution. Over time, the courts have started claiming the exclusive power to interpret the Constitution, and to interpret it in light of their personal preferences. This volume in the *Understanding America* series examines the proper role of the courts in determining the constitutionality of our laws.

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