

# Criticism of the Supreme Court

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## Federal versus state power

There has been debate throughout American history about the boundary between federal and state power.

- ↪ While James Madison and Alexander Hamilton argued in the Federalist Papers that their then-proposed Constitution would not infringe on the power of state governments, others argue that expansive federal power is good and consistent with the Framers' wishes.
- ↪ The Supreme Court has been criticized for giving the federal government too much power to interfere with state authority.
- ↪ One criticism is that it has allowed the federal government to misuse the Commerce Clause by upholding regulations and legislation which have little to do with interstate commerce, but that were enacted under the guise of regulating interstate commerce; and by voiding state legislation for allegedly interfering with interstate commerce.
- ↪ For instance, the Commerce Clause was used to protect non-commercial cave bugs (yes, an insect species) within a state. Chief Justice John Marshall asserted Congress's power over interstate commerce was "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution."
- ↪ Justice Alito said congressional authority under the Commerce Clause is "quite broad."
- ↪ Constitutional scholar Kevin Gutzman have also criticized the Court, saying it has misused the Fourteenth Amendment to undermine state authority.
- ↪ Justice Brandeis, in arguing for allowing the states to operate without federal interference, suggested that "states should be free to serve as laboratories of democracy."
- ↪ One critic wrote "the great majority of Court rulings of unconstitutionality involve state, not federal, law."
- ↪ However, others see the Fourteenth Amendment as a positive force that extends "protection of those rights and guarantees to the state level."

## Courts are poor check on executive power

British constitutional scholar Adam Tomkins sees flaws in the American system of having courts (and specifically the Supreme Court) act as checks on the Executive and Legislative branches.

- ↪ He argues that because the courts must wait, sometimes for years, for cases to wend their way through the system, their ability to restrain the other two branches is severely weakened.

## Judicial interference in political disputes

Some Court decisions have been criticized for injecting the Court into the political arena, and deciding questions that are the purview of the other two branches of government.

- ↪ The Bush v. Gore decision, in which the Supreme Court intervened in the 2000 presidential election, ending an in-process recount in Florida (effectively choosing Bush Jr over Gore for president) has been criticized extensively, particularly by liberals.
- ↪ Court decisions on apportionment and re-districting are also cited as evidence of this criticism.
- ↪ In Baker v. Carr, the court decided it could rule on apportionment questions.
- ↪ Justice Frankfurter in a "scathing dissent" argued against the court wading into so-called "political questions."

## Failing to protect individual rights

Court decisions have been criticized for failing to protect individual rights

- ↪ The Dred Scott (1857) decision upheld slavery.
- ↪ Plessy v Ferguson (1896) upheld segregation under the doctrine of separate but equal.
- ↪ Kelo v. City of New London (2005) was criticized by prominent politicians, including New Jersey governor Jon Corzine, as undermining property rights.
- ↪ A student criticized a 1988 ruling that allowed school officials "to block publication of a student article in the high school newspaper."
- ↪ Some critics suggest the 2009 bench with a conservative majority has "become increasingly hostile to voters" by siding with Indiana's voter identification laws which tend to "disenfranchise large numbers of people without driver's licenses, especially poor and minority voters," according to one report.
- ↪ Senator Al Franken criticized the Court for "eroding individual rights."

However, others argue that the Court is too protective of some individual rights, particularly those of people accused of crimes or in detention.

- ↪ For example, Chief Justice Warren Burger was an outspoken critic of the exclusionary rule, and Justice Scalia criticized the Court's decision in Boumediene v. Bush for being too protective of the rights of Guantanamo detainees, on the grounds that habeas corpus was "limited" to sovereign territory.

## Not choosing enough cases to review

Senator Arlen Specter said the Court should "decide more cases."

- ↪ On the other hand, although Justice Scalia acknowledged in a 2009 interview that the number of cases that the Court hears now is smaller today than when he first joined the Supreme Court, he also stated that he has not changed his standards for deciding whether to review a case, nor does he believe his colleagues have changed their standards.
- ↪ He attributed the high volume of cases in the late 1980s, at least in part, to an earlier flurry of new federal legislation that was making its way through the courts.

## Secret proceedings

The Court has been criticized for keeping its deliberations hidden from public view. Its inner workings are difficult for reporters to cover, only revealing itself through public events and printed releases, with nothing about its inner workings.

- ↪ Few dig deeply into court affairs. It all works very neatly; the only ones hurt are the American people, who know little about nine individuals with enormous power over their lives.
- ↪ Larry Sabato complains about the Court's "insularity."
- ↪ A Fairleigh Dickinson University poll conducted in 2010 found that 61% of American voters agreed that televising Court hearings would "be good for democracy," and 50% of voters stated they would watch Court proceedings if they were televised.

However, some dispute this point . . .

- ↪ In recent years, many justices have appeared on television, written books, and made public statements to journalists.
- ↪ In a 2009 interview on C-SPAN, journalists Joan Biskupic (of USA Today) and Lyle Denniston (of SCOTUSblog) argued that the Court is a "very open" institution, with only the justices' private conferences being inaccessible to others.

# Criticism of the Supreme Court

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## Creating a culture of legal intimidation

Critic Philip Howard in 'The Death of Common Sense and Life Without Lawyers' criticized the Court for promoting a culture in which "law is wielded as a weapon of intimidation rather than as an instrument of protection."

- ↳ It leads to "a nation paralyzed by fear, unwilling to assume responsibility, both overly reliant on authority and distrustful of it." Howard deplores a legal culture in which the "rights" of "whoever might disagree" have trumped common sense.
- ↳ Specifically, Howard criticized the Earl Warren court for too much "sympathy for the little man."
- ↳ He criticized the *Conley v. Gibson* decision for opening "the floodgates to abusive litigation."

## Lifetime tenure

- ↳ Critic Larry Sabato wrote: "The insularity of lifetime tenure, combined with the appointments of relatively young attorneys who give long service on the bench, produces senior judges representing the views of past generations better than views of the current day."
- ↳ Sanford Levinson has been critical of justices who stayed in office despite medical deterioration based on longevity.
- ↳ James MacGregor Burns stated lifelong tenure has "produced a critical time lag, with the Supreme Court institutionally almost always behind the times."
- ↳ Proposals to solve these problems include term limits for justices, as proposed by Levinson and Sabato as well as a mandatory retirement age proposed by Richard Epstein.

Others support the existing tenure system . . .

- ↳ However, others suggest lifetime tenure brings substantial benefits, such as impartiality and freedom from political pressure.
- ↳ Alexander Hamilton in *Federalist 78* wrote "nothing can contribute so much to its firmness and independence as permanency in office."

## Supreme Court has too much power

This criticism is related to complaints about judicial activism.

- ↳ George Will wrote that the Court has an "increasingly central role in American governance."
- ↳ It was criticized for intervening in bankruptcy proceedings regarding ailing carmaker Chrysler Corporation in 2009.
- ↳ A reporter wrote that "Justice Ruth Bader Ginsburg's intervention in the Chrysler bankruptcy" left open the "possibility of further judicial review" but argued overall that the intervention was a proper use of Supreme Court power to check the executive branch.
- ↳ Warren E. Burger, before becoming Chief Justice, argued that since the Supreme Court has such "unreviewable power" it is likely to "self-indulge itself" and unlikely to "engage in dispassionate analysis".
- ↳ Larry Sabato wrote "excessive authority has accrued to the federal courts, especially the Supreme Court."
- ↳ The Court ruling any which way on a case is infinitely easier than the process of creating a Constitutional amendment necessary to change the Constitution and, subsequently, the Court's opinion.

## Objective criticism of individual Justices

- ↳ Decisions not offering detailed guidance to the lower courts.
- ↳ Justice Thomas has not remarked in oral argument in 5 years!

## Judicial activism

Describes judicial ruling suspected of being based on personal or political considerations rather than on existing law

The Supreme Court has been criticized for not keeping within Constitutional bounds by engaging in "judicial activism", rather than merely interpreting law and exercising "judicial restraint."

- ↳ Detractors of judicial activism charge that it usurps the power of the elected branches of government or appointed agencies, damaging the rule of law and democracy.
- ↳ Defenders of judicial activism say that in many cases it is a legitimate form of judicial review, and that the interpretation of the law must change with changing times.
- ↳ A third view is that so-called "objective" interpretation of the law does not exist.
- ↳ According to law professor Brian Z. Tamanaha, "Throughout the formalist age, it turns out, many prominent judges and jurists acknowledged that there were gaps and uncertainties in the law and that judges must sometimes make choices."
- ↳ Some proponents of a stronger judiciary argue that the judiciary helps provide checks and balances and should grant itself an expanded role to counterbalance the effects of transient majoritarianism
- ↳ ie, there should be an increase in the powers of a branch of government which is not directly subject to the electorate, so that the majority cannot dominate or oppress any particular minority through its elective powers.
- ↳ Moreover, they argue that the judiciary strikes down both elected and unelected official action, that in some instances acts of legislative bodies reflect the view the transient majority may have had at the moment of passage and not necessarily the view the same legislative body may have at the time the legislation is struck down, that the judges that are appointed are usually appointed by previously elected executive officials so that their philosophy should reflect that of those who nominated them, that an independent judiciary is a great asset to civil society since special interests are unable to dictate their version of constitutional interpretation with threat of stopping political donations.

Claims of judicial activism are not confined to any particular ideology.

- ↳ Claims by liberals of evidence of conservative judicial activism:
  - ↳ *Lochner v. New York* (1905)
    - ↳ Invalidating progressive federal and state statutes that sought to regulate working conditions during the Progressive Era and the Great Depression.
  - ↳ *Bush v. Gore* (2000)
    - ↳ The judges voted along ideological lines, 5-4, to halt the recount of ballots in Florida and, in effect, elect Bush President; three Justices have complained publically that their colleagues minds were made up and discussion on the Constitutional merits of getting involved in a state recount were superficial.
  - ↳ *Citizens United v. Federal Election Commission* (2010)
    - ↳ Ruled that corporations, unions and nonprofits can spend more freely in federal elections;
- ↳ Claims by conservatives as evidence of liberal judicial activism:
  - ↳ *Brown v. Board of Education* (1954)
    - ↳ declared state laws establishing separate public schools for black and white students unconstitutional; overturned *Plessy v. Ferguson*
  - ↳ *Roe v. Wade* (1973)
    - ↳ Decriminalized abortion in part on the basis of the "right to privacy" expressed in the Fourteenth Amendment

The question of judicial activism is closely related to constitutional interpretation, statutory construction, and separation of powers.