

# Who Determines Constitutional Authority?

*by John A. F. Smith*

The U. S. House of Representatives is operating under a curious new rule: Each bill in Congress must include language citing the constitutional authority upon which it's based. Why do they bother?

In the hyper-partisan environment of recent years, use of the word "Constitution" has dramatically increased; some would say ad nauseum. Use it in a political argument, and you'll frequently elicit responses of rolled eyes, references to tri-corner hats, or perhaps a debate on the hypocrisy of the authors.

Pursued further, such conversations frequently turn to citations of Supreme Court cases to prove or disprove a point; virtually every politically aware citizen can quickly unholster his favorite and most repugnant opinions: Citizens United, Snyder v. Phelps, Kelo, Roe v. Wade.

But as we argue about past Court decisions, and worry about decisions to come, it's clear they matter a great deal to us. In our era, they are the final word on what is or isn't "constitutional," and therefore the law we must obey.

So, the formula for winning policy arguments seems to be: Win elections at all costs; make sure OUR team places OUR judges on the Supreme Court, and works to keep THEIR judges off.

Yet, whether we're winners or losers in this process, there's something that feels wrong about it. We are uneasy with the amount of power that's at stake, that we give to our judicial branch.

Perhaps it's because we know, albeit vaguely, that our system is based on something more than majority rule in elections, or judges' fiat. Something that establishes an independent, reasoned rule of law, without which government is mere whim. A referee that, while respecting the will of the majority, protects the minority from oppression.

What is that thing? We can be forgiven for mistakenly believing it's the Supreme Court's decisions, rather than the Constitution itself; since the 1950s the Court has explicitly said so, and little has happened since to suggest otherwise. Our other branches of government have increasingly deferred to the Court on issues of constitutionality--notably President George W. Bush in signing McCain-Feingold--or ignored them altogether.

And it's understandable why the doctrine of "judicial supremacy" prevails. After all, popularly elected representatives have little incentive to anger constituents by taking on the messiest public policy issues, and the Court has given them permission to avoid them since, some would argue, Marbury v. Madison in 1803.

So we've come to this: Politicians punt hard choices to the courts. Voters defer to politicians. Law students learn the law is what the Court says it is. And the Court makes policy, often badly; its history is full of examples of questionable decisions motivated by partisan politics.

But this is not how we began. The Constitution was a gift given to us by America's founders who envisioned good government by "reflection and choice." They knew we would not always have "enlightened statesmen," and that factions could rise to "carry into effect schemes of oppression." Their answer was to create branches of government with very limited powers, restricted by checks and balances on each other. The Court wasn't intended to be exempt from this. We have abdicated our responsibility for self-governance. We have rejected the founders' gift.

We must reclaim that gift, by insisting that ALL branches of government carry out their proper constitutional roles.

There is historical precedent. Before the modern era of judicial supremacy, other branches of government--particularly the executive--have refused to grant the Court exclusive authority to interpret the meaning of the Constitution, most vehemently Presidents Lincoln, Jackson, and Jefferson.

Let us join them. As a responsible citizen, conduct your own investigation. You'll discover, in studying the Declaration, the Constitution, and the Federalist Papers, the most brilliant system of government ever devised, to defend the "unalienable Rights" set forth in the Declaration of Independence. For all of us.

You'll find that underlying our government is the will of the people, expressed through election of "a chosen body of citizens, whose wisdom may best discern the true interest of their country." Those representatives are bound by oath to support the Constitution by deferring to its limitation of their power, which should imply, at a minimum, that they have and express an opinion on the constitutionality of their decisions and actions.

We are endangering our liberty if our "reflection and choice" doesn't include understanding the documents on which our government is based, and choosing--and supporting--representatives who adhere to the principles these documents established.

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