

AN EDUCATIONAL UPDATE FROM THE SOUTHEAST LAW INSTITUTE™, INC.

To: Interested Persons
Date: September 2024
From: A. Eric Johnston
RE: What is Wrong with the United States Supreme Court?

From time to time we have mentioned the Democrats dissatisfaction with the current U.S. Supreme Court (“SCOTUS”) rulings. Their frustration is that the current majority of Justices have brought to the court its proper role in the execution of its functions of government.

There are three branches of government established by the U.S. Constitution, viz, the Executive (Article II), the Legislative (Article I) and the Judicial (Article III). The Executive is the President and agencies that are established to carry out many functions of government. The Legislative is the Congress which has the responsibility for acting upon the will of the people by passing statutes, that is, laws that regulate the many facets of our way of life. The Judicial are judges who have the responsibility of interpreting those executive actions and laws. The problem liberals are having now is they cannot use the judiciary to carry out executive or legislative functions.

The United States is a constitutional republic. It is democratic in the sense that we elect officials who in turn pass laws which we believe are reasonable and necessary. Occasionally, the people vote on constitutional amendments. The Bill of Rights, the first ten amendments to the U.S. Constitution, spell out many of our rights and privileges. Otherwise, the Constitution describes our form of government.

For about the last eighty years Democrats became accustomed to the judiciary “making laws” which the Democrats were otherwise unable to get passed in the Congress. The most egregious examples are the *Roe v. Wade* decision legalizing abortion and the *Obergefell* decision legalizing same sex marriage. There is also expansion of the bureaucratic state, sometimes called the deep state. These are the unelected officials who run the numerous federal bureaucracies that rule our lives.

With the nominations of Justices Gorsuch, Kavanaugh and Barrett, the complexion of SCOTUS changed. It began to undo many of the “legislative” things the prior activist SCOTUS had done. Because of this, the Democrats are wringing their hands about changing the court. With the leadership of Senators Sheldon Whitehouse and Chuck Shumer, numerous suggestions have been made about how to reign in this “undemocratic court.” Their suggestions include limiting the terms of Justices, creating an ethics code which would require them to recuse from cases for political reasons, packing the court with additional Justices, and other as of yet unarticulated ways to restrict the judiciary. President Biden recently said he would introduce legislation to amend the Constitution to regulate SCOTUS.

One of the important decisions in the recent term of SCOTUS was the decision on the “Chevron doctrine.” That doctrine was one by which SCOTUS had earlier directed that significant deference be given to the bureaucracies of government. Congress passes statutes which often times have “rule making” authority extended to the agency charged with carrying out the law. It is those bureaucracies that have become entrenched and occupy unconstitutional seats of authority. In *Loper Bright Enterprises v. Raimondo*, SCOTUS ruled the Chevron doctrine is unconstitutional. Judges cannot abdicate their responsibility to interpret the law by delegating decision making authority to unelected bureaucrats.

Conservatives believe in the original role of SCOTUS, that is merely interpreting the law, while liberals want to continue politicizing the court. It is the liberals who misunderstand the Constitution. The Federalist Papers were written to explain the U.S. Constitution when it was being considered. The Federalist No. 78, Alexander Hamilton spoke directly about the judicial branch:

“... the Judiciary... will always be the least dangerous to the political rights of the constitution The Executive... holds the sword of the community. The Legislature not only commands the purse, but prescribes the rules about which the duties and rights of every citizen are to be regulated. **The Judiciary, on the contrary, has no influence over either the sword or the purse... it may only be said to have neither FORCE nor WILL, but merely judgment....**” Emphasis added.

The democratic processes of government cannot work if SCOTUS also has executive and legislative powers. The separation of powers make it clear that SCOTUS has only judgment. It is important to the rule of law that elective officials observe these restrictions of government. If they do not, we will see abuses as we saw in past decades of SCOTUS jurisprudence. If Congress realizes it must act according to the will of the people and not rely on policy making Justices, then the greater good of citizens will be served. Pay careful attention to comments and debates during the election season on what candidates take what positions. The very future of the United States of America depends on that.

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