

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

To: Interested Persons
Date: July 2026
From: A. Eric Johnston
RE: 250 years of Constitutional Protection

To commemorate our 250th birthday as a constitutional democracy, there will be many perspectives given. We make our comments in this month's Educational Update as lawyers working on constitutional issues.

250 years is a long time. Many changes have occurred, from horses and wagons to cars to spaceships, from the single printing press to the internet and AI. We declared our independence in 1776 with the Declaration of Independence and then the adoption of the U.S. Constitution in 1789 and our first Bill of Rights in 1791, we expanded to 50 states with separate governance for each, fought one internal war and several external ones. Yet, we have remained a nation of laws and not men. We still cope with issues like racism, largely encouraged by politicians, but regardless, we have, for most, a high standard of living, good healthcare, and safety. What is the reason for this? More than anything, it is our Constitution and how it protects us from ourselves. In recent years, we are seeing an upheaval, i.e. riots, homelessness, drug use, fomented by liberals (including progressives) who do not like the tradition and laws of America. They actually want to change America. What keeps them from succeeding?

We believe continuing to adhere to our founding documents and the original meaning intended by our Founding Fathers gives us protection. About 70 years ago, beginning more or less with the Earl Warren Supreme Court, there significantly expanded into American jurisprudence the idea that courts could make laws. As a result, we saw many non-existent "rights" being found by SCOTUS, i.e. abortion, protected homosexuality, same-sex marriage, and other manifestations by judges "who know what we need," though legislatures do not usually agree. In their minds, there are still unresolved issues of the death penalty, and there are the continuing issue of the diminution of religious freedom and protected free speech. These are "rights" issues. The Bill of Rights states what is protected in the first 10 Amendments. These are constitutional stated and protected rights voted on by the people by constitutional convention not judge made. Judges must only determine what the original meaning of the constitutional provisions were, not make up what they think should be added. There are two lines of thinking on judicial authority, i.e. the original meaning versus evolutionary or living constitution interpretation.

Our founders laid down the legal and political foundation of America and our Constitution. While we are a democracy, we have limited government. If we permit evolution of the Constitution through what judges think it ought to mean, that is, to modernize it, we permit those unelected judges, principally SCOTUS, to tell us our rights, rather than we the people through our elected representatives. If we do that, we will erode our constitutional foundations and after 250 years as a nation, we will no longer be who we once were.

With the appointment by President Donald Trump of Justices Gorsuch, Kavanaugh, and Barrett, by 2020, SCOTUS became, with Justices Thomas and Alito, and sometimes Chief Justice Roberts, a five- or six-member court whose members are committed, in varying degrees, to original meaning. Liberals are very upset that they cannot depend on SCOTUS to establish rights that they cannot pass legislatively. Representative Jamie Raskin (D-MD) is already proposing with a new democrat administration after Trump to add five new justices to SCOTUS. That would give a 13-member court to overrule the five or six conservative justices now in control of the court. There are also proposals by several democrat candidates for the senate to limit SCOTUS justice terms.

The first appearance of an "unenumerated" right was in *Dred Scott v. Sandford* (1857) when SCOTUS found a black person was not a citizen protected by the constitution. The Fifth Amendment provides protection of rights by "due process of law." This is for court "procedures" to protect citizens from civil and criminal claims. However, SCOTUS created the first case of "substantive due process", by declaring slave owners had a "right to possess slaves." Certainly, nothing in the Constitution gave this right.

There have been several areas of most abuse by SCOTUS over the last several decades. Abortion, assisted suicide, sodomy, same-sex marriage, free-speech, religious freedom, parental rights, *etcetera*, have all been legal issues undemocratically and unconstitutionally addressed by lower federal courts, then SCOTUS, in their usurpation of the proper legal process. The issues with which SLI are mainly concerned are these individual rights and protections.

Perhaps, the most egregious ruling was the legalization of abortion by *Roe v Wade*. This 1973 case was one of the first to use evolutionary constitutional thinking to establish a right that did not previously exist. It is the worst (best?) example of SCOTUS creating a right not found in the Constitution. A reading of the case by any intelligent legal mind shows the absolute error in the reasoning. Unless, of course, that perditious mind believes the Constitution can be read to include unknown rights. The *Dobbs* decision (2022) which reversed *Roe*, pointed out the fallacy of *Roe*'s unfounded reasoning. The *Dobbs* court pointed out that at the time *Roe* was decided, all but four states and the District of Columbia, criminally prohibited abortion. Those were historically democratically based laws. SCOTUS totally abused the democratic process.

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Assisted suicide deals with life issues at the other end of the spectrum. The Constitution does not address assisted suicide and gives no right to assisted suicide. To this point, the court has properly interpreted the Constitution to avoid creating a federal constitutional right. However, beginning in about 2015, advocates of “death with dignity” have begun to test again trying to establish assisted suicide. Whether they succeed should depend on the vote of the people and not a vote of nine lawyers sitting on SCOTUS. The Alabama Legislature prohibited assisted suicide in 2017, a proper democratic procedure.

Sexual sin and deviancy has been a sensitive and regulated area of law. Even from ancient times, sodomy and deviant sexual practices have been prohibited. Most civilized cultures have prohibited those activities. However, in recent decades, the LGBTQ+ agenda has pushed those borders, and SCOTUS has been happy to accommodate. In 2003, in *Lawrence v. Texas*, SCOTUS struck down as unconstitutional a law that prohibited sodomy. Based on that thinking, SCOTUS in *Obergefell v. Hodges* in 2015, struck down all marriage laws, including Alabama’s, permitting the legalization of same-sex marriage. The court declared these perversions to be “rights.” Following that, we had further developments concerning transgender and related issues which affected us in Alabama when we passed the Vulnerable Child Compassion and Protection Act (“VCAP”), prohibiting attempted sex change procedures on minors. That resulted in significant litigation, but the present supreme court declared these type laws constitutional. In the *Dobbs* opinion, Justice Thomas suggested that it may be proper to go back and visit some of these sex issues and restore to the states the ability to democratically determine proper moral laws.

Courts should not use foreign laws to determine our rights in America. In *Lawrence v. Texas*, mentioned above, SCOTUS visited foreign laws to determine whether sodomy should be recognized. Similarly, we are facing issues today over Sharia Law and whether it should be applied to protect the rights of Muslims, notwithstanding the constitutional protections given to individuals under the constitution. This is particularly true concerning women’s rights in divorce and in other legal proceedings where Muslims contend Sharia Law should be applied. Fortunately, in 2014, Alabama passed the American and Alabama Laws for Alabama Courts Act which prohibits the application of foreign laws to the detriment of citizens’ rights protected by the United States and Alabama Constitutions.

Alabama was again in the news recently in a capital murder case. A federal court declared our nitrogen method of execution “cruel and unusual punishment.” By a 6-3 opinion, SCOTUS upheld this finding, without explanation. There is mention in the Constitution of “cruel and unusual punishment,” but no definition. That is a question more accurately addressed by legislatures, then reviewed by SCOTUS.

Liberals have been incensed by SCOTUS finally deciding racial gerrymandering for election of U.S. Representatives is wrong. A three-judge federal panel disregarded SCOTUS and decided the Alabama legislature was “racially motivated” when it redrew congressional districts in 2023. Those judges, among other things, reviewed the private and extra-legislative comments of legislators leading up to the 2023 vote. This is a favored method of judges substituting their beliefs for the meaning of the law, rather than simply interpreting the law. They search through legislative history, rather than reading the law itself. They are usurping constitutional authority.

In the *VCAP* litigation, mentioned above, LGBTQ+ plaintiffs and the Biden Department of Justice lawyers, tried to introduce concepts of bias of individual legislators hoping to have that law found unconstitutional. They hoped to prove legislators discriminated against persons because they had opposition privately to these sexual issues. The Alabama legislature moved to protect children from surgical and chemical efforts to change their sex. The Constitution does not give parents or children the “right” and a legislature can act to regulate healthcare. That is within the constitutional given “police power” of state regulation in the 10th Amendment to the Constitution, which SCOTUS upheld.

It makes no difference what individual legislators believe or say in the process of making a law. Working in the Alabama legislature, we see the ridiculous process of committee and legislative debate. Committee witness testimony is usually limited to 2-3 minutes and often limiting the number of witnesses that can testify. Floor debate is almost always self-serving comments with little or no merit. I once attended a U.S. Senate committee hearing. At one point, Senator Ted Kennedy spoke, the media cameras rolled, and he made unhelpful, self-serving comments. The committee adjourned and as he walked by me Senator Orrin Hatch was saying “I hate it when he does that.” Such legislative history would be no help at all in determining what the law was actually meant to be once it was passed.

There is constant and continuing litigation over protecting our other rights related to speech, religion, parenting, *etcetera*. The basis of these things is protected in the Bill of Rights, yet liberal states are continuously pushing the borders on trying to restrict or prohibit them, e.g., Colorado’s continued prosecution (persecution) of the wedding cake baker. A living constitutional approach would diminish those rights, and it is important that we protect the original meaning of the Constitution and its application even in modern times.

The point is, it is only when a statute is democratically passed that the public is served. Courts should only interpret and enforce it, not expand or diminish it. Courts should not create rights that have not historically existed. Otherwise, this is judges overruling the democratic process. The lesson from this is there are those who want to change America. They want to create rights through undemocratic process and ignore the grand design of the Founding Fathers. SLI will continue the fight to pursue our freedoms, but with those limits that have “preserved us a nation.”

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