

The Breakfast Club

Constitutional Minute for 8 March 2022

The Least Dangerous Branch?

Joe Biden has nominated federal [Judge Ketanji Brown Jackson](#) to the Supreme Court seat being vacated by the retiring Justice Stephen Breyer, who was hounded into retiring earlier than he had initially planned by a Left-wing organization ironically named Demand Justice. Judge Brown-Jackson would be the first Black woman to sit on the Court if confirmed by the Senate, but she brings little experience to the job, as is pointed out in [this article](#) by Court expert Jonathan Turley.

Biden had reportedly promised Rep. Jim Clyburn, D-S.C to nominate a black woman, in exchange for Clyburn delivering South Carolina for Biden in the 2020 election¹. But Judge Brown-Jackson's confirmation is no sure thing. She was confirmed just last year to a seat on the US Court of Appeals for the District of Columbia. Before that, the Senate confirmed her for a federal District Court seat, but since arriving at the Court of Appeals she has written opinions that were strongly reversed and seems to have been picked more for where she sits on the political (and racial) spectrum than for her judicial experience.

The nomination provides proof that Biden is controlled by the radical progressive wing of the Democratic Party. Most troubling is Biden's previously announced "litmus test" that any nominee must have [a "living constitution" approach](#) to even be considered for the job.

How did this country get to the point where Supreme Court nominations dominate the news cycle when they occur and become, as did that of Brett Kavanaugh, high theater?

"The Legislature of Last Resort" is the answer.

While Alexander Hamilton might have thought that a bare reading of Article Three of the Constitution led to the conclusion that the Judiciary would be the "least dangerous branch" since it had "no influence over either the sword or the purse," it is obvious today that neither power over the sword (The Executive) nor the purse (Congress) are necessary to cause great damage to the American political system.

As I tell my seminar students, nothing in the Constitution requires that we treat a Supreme Court opinion as law, but we do. The day after the *Obergefell v. Hodges* decision striking down state laws and even state constitutional provisions against homosexual marriage, a homosexual couple could walk into any Clerk's office in the country and obtain a marriage license. Why? Because we the people, through our silence and acquiescence, give Supreme Court opinions the status of law. A County Clerk who refuses to issue a marriage license because "the Bible says marriage is between a man and woman" will lose their job, as did [County Clerk Kim Davis](#).

There was a time in this country where the Supreme Court actually tried to "discover the law" as it applied to the case before them; today, the Court is free to render opinions that "have nothing to do with the Constitution," as [Chief Justice John Roberts complained](#) was the case in *Obergefell*.

The political Left learned at least 50 years ago that by placing liberal justices on the high court, they could enact controversial social policies into "law" which would otherwise have no chance of

finding a majority in Congress.

Because of this, choosing Supreme Court justices has become perhaps the most lasting thing a President can do in his four to eight years in office. Having the opportunity of nominating 2-3 young judges to the court can influence the direction of the country for 40 years or more.

But this idea of the court as a “legislature of last resort” is a fairly new phenomenon. It certainly was not intended by the Framers nor foreseen by those who ratified the Constitution.

[Early justice nominations](#) were so non-controversial they were often ratified the same day they were made, usually by a simple voice vote in the Senate.

Professor Ilya Shapiro, who unfortunately is today being “cancelled” by Leftists at colleges across the country when he is invited to speak on constitutional issues, wrote a great book two years ago entitled: [“Supreme Disorder: Judicial Nominations and the Politics of America’s Highest Court.”](#) In it, Shapiro lays out the entire history of Supreme Court nominations across the years. [Molly Hemingway’s book](#) focuses only on the Brett Kavanaugh nomination, but the nominations of others, such as those of [Clarence Thomas](#) and [Judge Robert Bork](#), have been equally contentious. While Republicans have been charged with “playing politics” with court nominations (remember [Merrick Garland?](#)), Democrats alone have turned the judicial hearing process into a veritable circus, even allowing [woke protestors into the hearing rooms](#).

As I make clear in my seminars, the Supreme Court has made a mess of the Constitution; they are singularly to blame for the massive power wielded by today’s Congress, power characterized by former Congressman Peter Stark of California as being able to *“do most anything in this country.”*

Those of us who long for the days of true constitutional government in this country, days when our elected officials were actually bound by the “chains of the Constitution,”ⁱⁱ realize those days are gone and not coming back any time soon. The Progressive Left will fight like a rabid dog to keep constitutional conservatives off the Supreme Court; they will lie, cheat and steal if necessary. They realize that a strong conservative majority could and probably would, with a few well-chosen reversals like the one I expect we are about to witness regarding *Roe v. Wade*, begin to roll back decades of progressive “progress” towards creating their socialist utopia.

“The least dangerous branch” was a poorly chosen descriptor for an institution which we the people have given the power to make law, to create it through arbitrary and clearly political decisions. Granted, some of the Court’s most errant decisions (*Dred Scott v. Sanford*, *Plessy v. Ferguson*, etc.) have been ultimately reversed by either the court itself (Plessy) or constitutional amendment (Dred Scott). But even if *Roe v. Wade* is reversed this June, the nearly 50 years it has taken the Court to come to that reversal has cost millions upon millions of unborn babies their right to life and cost incalculable harm to the moral fiber of this country.

Least dangerous branch? My foot!

What would you like to see discussed next week? Send me an email.

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ⁱ Clyburn failed to “deliver” South Carolina; Trump/Pence won the state 55% to Biden/Harris’ 43%.

ⁱⁱ *“In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution.”* Thomas Jefferson, fair copy of the drafts of the Kentucky Resolutions of 1798.