



Written by [Selwyn Duke](#) on February 5, 2017

How to Drain the Judicial Swamp

It's no surprise the Democrats plan to fight against the nomination of President Trump's Supreme Court pick, 10th Circuit Court of Appeals judge Neil Gorsuch. There are no confirmation battles like Supreme Court confirmation battles because, as we always hear, such a decision can "shape the country for a generation."



This doesn't sound like the role envisioned by the founders. As Alexander Hamilton [wrote](#) in *The Federalist*, No. 78, the judiciary is (theoretically) the "least dangerous" branch of government because it "has no influence over either the sword or the purse." So how have the courts been afforded so much power?

"Afforded" is the word. In reality, the judiciary has become the most dangerous branch due to ignorance and congressional abdication of responsibility.

Conservatives often complain that the courts thwart the people's will, act unconstitutionally and impose their own biases via judicial fiat. A good example is the 2015 *Obergefell v. Hodges* decision dictating that states must recognize faux ("same-sex") marriage. What most don't know is that Congress could long before have prevented the courts from weighing in.

Article III, Section 2 of the Constitution grants Congress the power to limit the jurisdiction of federal courts below the Supreme Court and the appellate jurisdiction of the latter. In other words, Congress could simply have prevented federal courts below the SCOTUS from ruling on marriage (and other issues) to begin with and the SCOTUS from reviewing lower-court decisions on those issues. This would, essentially, have left marriage where it belongs: in the states.

Why was this not done?

Cowardice.

Congress would've had to take a firm stand on a contentious issue and perhaps suffer electoral consequences. It's easier for politicians to just puff up their chests, complain of judicial overreach, then throw up their hands and say "The courts have ruled — there's nothing we can do." Few today understand the Constitution, so who will argue?

Congress also has the power under Article III to *eliminate* any and every federal court except the SCOTUS. For example, it could have sent the United States Court of Appeals for the Ninth Circuit — known for insane rulings and as the nation's "[most reversed](#)" court — packing long ago. It certainly would make judges mind their p's and q's, too, if they knew acting unconstitutionally could mean their jobs.

Again, though, this would require Congress to take a stand. Besides, if it actually did so and drained the



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judicial swamp, what could Congress blame for divisive political outcomes? The transgressing courts would be gone and the remaining ones chastened, and judges would more often leave issues (e.g., abortion, marriage) in the legislature's hands, putting politicians on the hot seat. Can't have that. Federal judges don't have to be reelected — congressmen do.

Yet this is why courts are going rogue. How can there be a balance of power in our system, as the founders intended, if one branch refuses to exercise its power?

The kicker is that accepting the courts' current role is not only misguided, but, [according](#) to Thomas Jefferson, makes our Constitution a "*felo de se*" — a suicide pact.

Jefferson was warning of judicial supremacy, the idea that courts have the power to determine what law means and thus constrain not only their own branch, but the other two as well. Why did this bother Jefferson?

The legislature's power to create law and the executive branch's power to enforce it are granted by the Constitution. But what of judicial supremacy?

It is *nowhere to be found in the Constitution*.

Rather, this "power" was declared by the courts themselves, most notably in the *Marbury v. Madison* [decision](#) in 1803. Talk about circular reasoning: The SCOTUS has trump card power....

Because the SCOTUS says so.

The result? The Supreme Court was only meant to be supreme among courts. Instead, in a government supposedly of, by and for the people, five lawyers can determine what law means for 320 million Americans.

With Trump poised to transform the SCOTUS, conservatives may say that now isn't the time to question its power. But Republican judicial nominees have often disappointed. Moreover, draining the swamp is fine, but if we want the right kind of governmental revolution, perhaps we should start by listening to the revolutionaries who created our government.

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