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The Supreme Court Often Saves its Toughest Criticism for Itself

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June 19, 2023

In a recent New York Times op-ed, Georgetown Law Professor Josh Chafetz accuses the Supreme Court's justices of seizing for themselves "more and more of the national governing agenda, overriding other decision makers with startling frequency." And Chafetz argues that the justices "have done so in language that drips with contempt for other governing institutions and in a way that elevates the judicial role above all others."

Whether the Supreme Court has overstepped its rightful bounds in a particular case is a frequently recurring debate, and a legitimate one. But focusing on the justices' *rhetoric* is relatively novel. Is it true, as Chafetz claims, that the justices "have repeatedly described other political institutions in overwhelmingly derogatory terms while either describing the judiciary in flattering terms or not describing it at all"? Is their purpose really to deny the judiciary's "status as an institution" and instead position it "as simply a conduit of disembodied law"?

I do not see the same strategy of across-the-board denigration of the political branches that Chafetz sees. Rather, the rhetorical examples that Chafetz and other scholars have recently identified strike me as typical stylistic techniques employed by the justices to persuade readers that certain institutions are ill-fitted for the powers at issue in particular cases. Instances of sharp rhetorical critique aimed at the other branches should not be mistaken for a long-term stealth campaign of judicial self-aggrandizement.

Contra Chafetz's narrative, many justices (including those in the current six-justice conservative majority) regularly train these same stylistic techniques on their *own* institution when they conclude that the judiciary should defer to the political branches. In other words, language describing the relative shortcomings of government institutions is part of every justice's writing toolkit, and they know how to aim that language both outward and inward. The justices are not blind to their own fallibility or to the institutional limitations of their own branch. Nor are they afraid to acknowledge those limitations.

When the justices oppose overruling the political branches, their opinions routinely stress the judiciary's lack of policymaking expertise. One example came just this term in *National Pork Pork Producers v. Ross* (2023), in which Justice Gorsuch authored an opinion upholding a California pork regulation against a constitutional challenge. To support the Court's deference to the California legislature, Gorsuch wrote that "policy choices like these usually belong to the people and their elected representatives" and that judges "cannot displace the cost-benefit analyses embodied in democratically adopted legislation."

Justice Gorsuch also joined the opinion of Chief Justice John Roberts in *Trump v. Hawaii* (2018), which upheld President Donald Trump's "travel ban." That opinion favorably quoted earlier precedents holding that immigration exclusion decisions should be exercised by the "political departments largely immune from judicial control" and that "it is not the judicial role … to probe and test the justifications" of immigration policies. In language emphasizing the relative shortcomings of the judicial branch, the opinion held that judges "cannot substitute our own assessment for the Executive's predictive judgments" in national security matters because those judgments "are delicate, complex, and involve large elements of prophecy."

And perhaps the most famous recent example of an opinion urging judicial deference is the dissent of Chief Justice Roberts in *Obergefell v. Hodges* (2015). Roberts argued that the decision whether to legalize same-sex marriage "should rest with the people acting through their elected representatives" rather than "five lawyers who happen to hold commissions authorizing them to

resolve legal disputes according to law." Summing up his view that the Court had overstepped its proper role, Roberts asked rhetorically "Just who do we think we are?"

To be clear, I do not view all these opinions urging judicial deference to be correct (in fact, I believe the judiciary on the whole remains far *too* deferential to the political branches). But these examples show that the justices' sharp rhetoric is sometimes pointed toward the bench as well as away from it. Calling a bare majority of the Court "five lawyers" is inconsistent with a long-term plan to elevate "the judicial role above all others."

It is a serious charge to claim, as Chafetz does, that the judiciary has recently "shown little but contempt for other governing institutions." The merits and wisdom of the Supreme Court's decisions can and should be debated. But we need not jump to the conclusion that opinions urging more formalistic, judicially enforced limits on the political branches are merely "the ideological foundation for the Roberts-era judicial power grab."

In reading the Court's opinions, I see nine justices grappling in good faith with questions concerning the boundaries of their own power as well as the power of the other two branches. Their conclusions may earn strong criticism, but the judiciary has not "earned a little contempt."

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