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Whither the Judicial Wars Under President Joe Biden?

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Liberal Democrats were shocked when President Donald Trump appointed conservatives to the federal bench. True, there were vacancies. He was the duly elected president. The Senate had the constitutional authority to approve nominees. But whatever were Republicans thinking?

This was outrageous misconduct, screamed people who had welcomed the activist liberal court of the 1960s and 1970s. They lionized jurists who ignored the text in the search for penumbras and emanations upon which to reach progressive policy results. New "rights" were discovered, almost daily it sometimes seemed, highlighted by the 1973 abortion case *Roe v. Wade*.

But liberal judges could not ignore the text entirely: too many average folks still venerated the Constitution and believed that it had some relationship to the operation of the U.S. government. So pretense was maintained. Experienced progressive lawyers would at least mention a legal document before joyously making up their preferred result. Then a vote was duly held, like in any other legislative body, and the Constitution was magically amended.

Author Michael Rips contended, "The choice of any interpretative scheme is inherently arbitrary." But that is flagrantly untrue. There are two broad jurisprudential approaches: put into effect to the best of your ability the law as written or make up what you want the law to be. That all answers will not be obvious doesn't change the fact that, for judges, only the first objective is valid.

Republicans spent the 1960s railing against activist judges. But the GOP had no effective strategy to transform the judiciary. Richard Nixon made four high court appointments. Harry Blackmun trended left. Chief Justice Warren Burger was an ineffective moderate conservative. Lewis Powell and William Rehnquist possessed more serious judicial philosophies but were desperately outnumbered.

President Jerry Ford paid little attention to the issue, naming John Paul Stevens, a statist especially hostile to religious liberty, who enthusiastically joined the Supreme Court's liberal wing. Reagan's record was mixed. He anointed the moderate Sandra Day O'Connor to be the court's first female member. Antonin Scalia was next, joining the body before Democrats awoke to the danger posed by originalist thinkers. For the next vacancy Reagan nominated Robert Bork, a noted scholarly advocate of judicial restraint.

The Left understood the stakes better than Reagan did. Sen. Ted Kennedy launched an effective, though viciously untrue, attack:

Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, and schoolchildren could not be taught about evolution, writers and artists could be censored at the whim of the Government, and the doors of the Federal courts would be shut on the fingers of millions of citizens.

Bork was defeated, resulting in the appointment of Anthony Kennedy, who infamously became the court's swing vote. George H. W. Bush first chose David Souter, another leftie in conservative disguise. Then came Clarence Thomas, a genuine hit. George W. Bush offered John Roberts, a disappointingly "institutionalist" chief justice, and Samuel Alito.

President Donald Trump did better. The ruthless but effective Mitch McConnell refused to hold hearings on Barack Obama's nominee to fill Antonin Scalia's seat, creating an immediate vacancy for Trump to fill with Neil Gorsuch. Next up was Brett Kavanaugh. And then, most recently, Amy Coney Barrett.

Although predicting a justice's future course is dangerous, Barrett appears to be a solid conservative with a concern for civil liberties. She cited Scalia, a leading proponent of "originalism," for whom she clerked, as her judicial model. "Judges are not policymakers, she observed. "A judge must apply the law as written." She ensures a general conservative/libertarian majority.

Her personal life also adds to the court's diversity. A devout Catholic, she adopted two children from Haiti. One of her more inspiring advocates was a blind student who testified about how Barrett assisted her; the latter later clerked for Barrett.

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Only forty-eight years old, the newest justice could have a long tenure on the Supreme Court. (Thomas was forty-three when he was confirmed and so far has served twenty-nine years.) She combines a reputation for well-crafted opinions with a winsome personality. With great understatement, Circuit Court Judge Laurence Silberman observed, "Her rhetoric would be much less combustible." She might persuade colleagues and assemble majorities in a way that Scalia was never able to do. No wonder her selection traumatized the gentle spirits of the Left.

Indeed, the wailing and gnashing of teeth among the "make it up" school of judicial thought reached epic proportions. Imagine, she believes that the Constitution means something! Channeling Ted Kennedy, Sen. Ed Markey (D-Mass.), an attorney who knows better, denounced originalism, applying the law as written, as "racist," "sexist," "homophobic," and "a fancy word for discrimination." *Guardian* columnist Arwa Mahdawi suffered a similar intellectual breakdown, declaring, "Goodbye civil rights: Amy Coney Barrett's America is a terrifying place."

Even more threatening was the reaction of Democratic politicos who believe the Constitution imposes the latest Democratic Party platform. After years of using the judiciary to implement policies that were rejected by the public, the Left was shocked, shocked, to discover that it sometimes lost court cases. So liberals developed a strange new respect for democracy and the

will of the people. Upset at McConnell's hardball but unexceptional tactics — historically, presidents have had only middling success in filling election-year vacancies when the opposing party controls the Senate — Democrats decided that reconquest of the judicial branch was essential. The only judicial qualification required is an ideological commitment to the expansive state, progressive projects, and official coercion.

Senate Minority Leader Chuck Schumer suggested blocking all nominations by future GOP presidents "except in extraordinary circumstances." Other lefties took up past Republican proposals, such as limiting the Supreme Court's jurisdiction — that is, what cases it could hear — and impeaching current justices (one or all of Trump's appointees). Common in the 1960s, such measures were contemptuously dismissed by liberals who then believed in judicial review.

But as hope for a "blue wave" on November 3 grew, the progressive mind ran rampant. The most elaborate schemes involved killing the Senate filibuster and adding two, four, ten, or even more justices to the Supreme Court. To make the transformation permanent, Washington, D.C., and Puerto Rico would be turned into states, adding enough new lawmakers to ensure a permanent Democratic majority.

Alas, the Left's hope to engage in brutal political engineering went a-glimmering. Biden, a former Senate Judiciary Committee chairman, avoided committing himself on court-packing and proposed appointing a vacuous bipartisan commission to study the issue. On Election Day Democrats proved weaker than expected and immediately formed a circular firing squad over congressional losses.

Nevertheless, bipartisan judicial reform would be a worthy goal — and might be possible given present political divisions. Sen. Ted Cruz (R-Texas) introduced a constitutional amendment to prevent court-packing. A more far-reaching measure would be both more effective and likely to pass.

Here's what that could look like: Set nine as the number of high court justices, but allow Congress to add or subtract members by a two-thirds vote, thus requiring more than a transient majority. Set judicial terms, ensuring regular rotation in office. The main objective would be to ensure that nominations are regularly spread among presidents, with appointments no longer viewed as almost a once-in-a-lifetime opportunity to reshape the law. Another option, rather more complicated, would be to create a rotational model using Circuit Court judges.

Moreover, streamline the constitutional amendment process. Of course, the nation's governing document is meant to secure fundamental liberties and should not be easy to revise. But the extreme difficulty in changing the Constitution as popular sentiments and political balances evolve encourages frustrated activists to look for a workaround. Which means turning to judges to effectively amend the nation's basic law.

So, ease the process. For instance, drop the number of legislators or states proposing an amendment to 60 percent and the number of states required for ratification to two-thirds. Allow ratification if approved by 60 percent of voters in a national referendum. Encourage activists to see political, not judicial, action as the proper venue for updating the Constitution.

Most important, stop asking judges to act like legislators. Democrats have gained a new appreciation for the imperative to win political battles. When they fail, as they did in November

in many states, they should redouble their organizing efforts rather than turn judges into a second policy front. If you want to transform society, win people's support for doing so.

Both Democrats and Republicans are shameless hypocrites and opportunists. Schumer would have acted like McConnell in similar circumstances. But there is at least one critical difference among the contending political forces.

Progressives consider a judge to be another form of legislator, whose decisions are to be determined by results. Members of the judicial Right are more likely to view judges as judges, tasked with putting laws and constitutions created by others into effect. The latter philosophy is not guaranteed to yield the policy results personally desired. Today, Democratic proposals to further politicize the courts pose a far greater threat to American democracy than anything the GOP has done in filling court vacancies with judges who believe it is the law they are supposed to interpret.

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