Drastic Liberal Schemes to Undermine the US Supreme Court Will Enable an Authoritarian Presidency

Despite some controversial rulings, conservative jurists held the line against illicit power grabs by their own side

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In recent years, it has become commonplace to claim that the U.S. Supreme Court is deeply politicized. The court's current 6-3 conservative majority is often seen as pursuing a partisan or ideological agenda, and views on the Court's rulings often break down along partisan and ideological lines. For some on the left, this perceived politicization justifies drastic measures like court-packing or executive defiance of judicial decisions.

In some ways, the judiciary is indeed politicized. But there are many occasions where conservative judges have prioritized jurisprudential values over any partisan or ideological goals, showing that the court is much more than a merely political body. Moreover, resorting to steps like court-packing in response to real or imagined judicial excesses risks destroying or gravely weakening judicial review—a cure far worse than the disease, one that would leave the country more vulnerable to aspiring authoritarians.

Some Politicization Is Real

While accusations of judicial politicization are often overblown, the court's critics aren't completely wrong. In recent decades, political conflict over judicial appointments has increased, largely as a result of the increased polarization of U.S. politics. In the 1950s and 1960s, Supreme Court justices were often confirmed with little or no objection. When John F. Kennedy appointed Byron White to the court in 1962, there was only a brief, perfunctory confirmation hearing, much of it devoted to White's time as a professional football player. Today, the vast majority of senators routinely oppose nearly all Supreme Court nominees proposed by the other party's president. Last year, only three of 50 Republican senators voted for President Joe Biden's nominee, Justice Ketanji Brown Jackson—an unremarkable result by present standards. Conflict over lower-court nominations has also grown, though not quite to the same extent.

Both Democrats and Republicans have resorted to increasingly aggressive tactics to block opposing-party judicial nominations and push through their own. Democrats understandably highlight the GOP-controlled Senate's refusal to grant a hearing to Barack Obama's Supreme Court nominee Merrick Garland, arguing the public should have a chance to weigh in on the nomination in the November 2016 election. A GOP-controlled Senate then held hypocritically swift confirmation hearings for President Donald Trump's nominee Justice Amy Coney Barrett in 2020, even though her nomination occurred closer to the time of the election than Garland's had in 2016.

The tactic of denying hearings to judicial nominees was also employed by Democrats during the George W. Bush administration, when they used it to block prominent GOP nominees to the District of Columbia Circuit Court (usually considered the second-most powerful federal court). Leading Democrats, including then-Sen. Joe Biden, also threatened to block GOP Supreme Court nominees in the election years of 1992 and 2008, though no vacancies ultimately occurred on the court in those years.

In effect, there has been a gradual escalation on both sides in the judicial confirmation wars. Even if one side is more to blame than the other, the difference is a matter of degree, rather than kind.

This conflict has arisen and intensified because Republican and Democratic-appointed justices predictably take divergent positions on a variety of hot-button issues that come before the courts. Notable examples include gun rights, affirmative action, abortion, property rights and religious liberties. Presidents of both parties select nominees in large part based on their views on such issues. While professional qualifications also matter greatly, not even the most qualified jurist is likely to be nominated if he or she fails an administration's litmus tests.

The combination of litmus tests for appointees, growing partisan conflict over the judicial confirmation process, and predictable ideological divisions on key issues make it difficult to claim that the federal courts are completely insulated from politics. Some of this politicization is a built-in structural feature of the Constitution, which gives partisan politicians—the president and the Senate—the power to appoint and confirm federal judges. But much is the product of an era of intense political polarization, in which judges appointed by the two major parties diverge more than in many previous eras. This polarization may diminish over time, but it seems unlikely to do so anytime soon.

But Some Claims of Politicization Are Overblown

There is, therefore, some basis for claims that the judiciary has become politicized. Indeed, it has never been completely free of politics.

But claims of politicization are also dangerously overstated. They overlook or minimize a wide range of important issues on which conservative judges have elevated legal and constitutional principles over partisanship and thereby curbed dangerous right-wing initiatives and abuses of power.

Such cases are not hard to find. Perhaps the most obvious and important example is that conservative judges serving on both lower courts and the Supreme Court rejected Trump's and other GOP efforts to overturn the result of the 2020 election.

More recently, in *Moore v. Harper*, the Supreme Court decisively repudiated the "independent state legislature" theory that Trumpists had advanced as a tool to enable Republican state legislatures to reverse election results they oppose. Similarly, conservative judges, including those on the Supreme Court, have mostly been skeptical of new state laws trying to force social media providers to platform right-wing speakers they would prefer to exclude.

The Supreme Court has twice turned back red-state efforts to force Biden to crack down more harshly on undocumented immigration. In 2018, all five conservative justices then on the Court were in the majority in *Murphy v. NCAA,* a key federalism decision whose predictable (and predicted) main effect has been to protect immigration sanctuary jurisdictions. The author of *Murphy v. NCAA* was Justice Samuel Alito, one of the Court's two most conservative justices, best known for writing the majority opinion in *Dobbs v. Jackson Women's Health Organization*, the 2022 case overturning the right to abortion. *Murphy v. NCAA* is probably Alito's second-most impactful majority opinion, and its biggest effect was to help sanctuary cities.

Moreover, in a 7-2 decision issued in 2021, the Court rejected a challenge to the Affordable Care Act brought by 20 red state governments—a lawsuit that many liberals feared would result in the overturning of the legislation. Conservative lower-court judges have issued numerous rulings supporting sanctuary cities against the Trump administration and have more recently struck down red state laws banning "drag shows," ruling that they violate freedom of speech.

During the recently ended Supreme Court term, the court also issued important rulings with major liberal effects on minority voting rights and Indian law. Experts estimate that the former decision will net the Democratic Party multiple additional seats in the House of Representatives—an outcome that may enable them to end the GOP's current majority in that chamber. It's not remotely the ruling one would expect from a merely "political" court.

Imperfect But Judicious

In almost all of these major Supreme Court cases with liberal outcomes, two or more conservative justices joined with the three liberals. *Murphy v. NCAA* actually featured all of the conservatives backing a result highly favorable to sanctuary cities, while two liberal justices dissented.

Admittedly, in some of these cases, the right-wing legal position was very weak, most obviously in the challenges to the 2020 election results, where the plaintiffs often made laughably bad or downright fraudulent claims. Some of the key arguments in the 2021 "Obamacare" challenge were also deeply flawed.

But even in these situations involving weak right-wing legal arguments, it's significant that the courts ruled against them. Politicians and activists routinely embrace terrible arguments for political advantage. Many GOP officials endorsed Trump's bogus claim to have won the 2020 election. Conservative judges' refusal to do likewise shows they are not just "politicians in robes."

Moreover, aside from the 2020 election litigation and some elements of the Obamacare case, the rejected conservative arguments were reasonably plausible in the cases discussed above. In the litigation involving the "independent state legislature" doctrine, for example, the Constitution's elections clause states that, "The Times, Places and Manner of holding Elections

for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." Article II of the Constitution also gives state legislators the power to determine the method of allocating the state's electoral votes in presidential races.

Conservatives advanced the plausible textual argument that "Legislature thereof" means the state legislature narrowly defined, thereby blocking judicial review by state courts. The Supreme Court held—correctly, in my view—that the text refers to legislative processes more broadly, which are subject to state constitutional constraints and review by the state courts. But had conservatives on the Supreme Court been looking for a plausible argument to advance partisan Republican interests, they could easily have done so. There were similarly plausible reasons to rule in favor of right-wing litigants in many other cases where the Court ultimately rejected their positions.

None of this proves that the Court is not conservative overall. The Court has obviously issued major conservative decisions expanding protection for gun rights and religious liberties, reversing precedent protecting a right to abortion, and limiting the powers of administrative agencies.

But like the Court's more liberal rulings, these decisions had at least reasonably plausible justifications. For example, in the Second Amendment decision in *NYSPA v. Bruen* (2022), the Court struck down a New York law that gave state officials broad presumptive discretion to reject gun license applications. It would have been implausible to hold that a constitutional right can be so completely at the mercy of the very government whose power the right is supposed to limit.

And while I would not have overturned abortion precedent to the extent the Supreme Court majority did in *Dobbs*, the Court's earlier abortion decisions have long been a focus of legal controversy. Even some defenders of the results in these cases have at times conceded they had flaws in their reasoning. Overturning *Roe v. Wade* may have been a mistake. But it was one with a solid basis in mainstream legal thought.

Nor can it be said that overturning longstanding precedent is in itself extreme and anathema. The Court has done that in many cases, including some that progressives rightly approve of, such as the 2015 reversal of a 1972 precedent upholding laws banning same-sex marriage. It is also not accurate to claim that *Dobbs* was the first time the Court reversed a precedent expanding, rather than restricting, constitutional rights. The Court has done that on several prior occasions, some of them much-praised by progressives.

The fact that the Court's conservative decisions are rooted in plausible legal reasoning doesn't mean they are necessarily right. I myself object to some of them, most notably the conservative justices' excessive deference to immigration restrictions that violate constitutional rights, such as in their 2018 ruling upholding Trump's anti-Muslim "travel ban." The point here is not that the Court's jurisprudence is ideal—it isn't—but that its reasoning cannot be dismissed as mere politics, untethered from legal constraints.

Against Undermining Judicial Review

Anger at the Supreme Court's more conservative rulings and the GOP Senate's political maneuvers in 2016 and 2020 have led many progressives to advocate radical responses that would undermine judicial review. The most notable is a court-packing or "court expansion"

law—that is, having Congress increase the size of the Supreme Court so that Democratic President Joe Biden and a Democratic-controlled Senate can appoint new justices who will alter the court's ideological balance. Another prominent suggestion is executive branch defiance of judicial decisions that progressives vehemently oppose.

These measures would have dangerous consequences. Even if they were depicted as a justifiable retaliation for the GOP's recent political skullduggery on appointments to the Supreme Court, a successful court-packing effort is likely to lead to the destruction of judicial review of congressional and presidential actions. If the Democrats pulled off such a measure, the Republicans would surely retaliate in kind the next time they had control of both the White House and Congress (recall that such reversals in political power can happen regularly in our era of close elections). Justices would hesitate to rule against measures favored by the party in power, for fear of further court-packing. If they nonetheless occasionally issued such rulings, they would likely be reversed after an additional round of packing.

The end result would be a court unable or unwilling to challenge policies supported by the dominant party in government. As President Biden once put it, "We add three justices. Next time around, we lose control, they add three justices. We begin to lose any credibility the court has at all." He is right to have resisted left-wing pressure to push this idea.

Successful large-scale executive defiance of court decisions would lead to the same result. In the aftermath of a president's successful refusal to honor a ruling by the court, courts would hesitate to rule against the executive again on major issues or any such rulings would have little effect, since those in power would feel free to largely ignore them. Indeed, executive defiance is an even slipperier slope than court-packing because it can be undertaken by the president alone, without the need, as with court-packing, for new legislation to be enacted by both houses of Congress and signed by the president. This makes executive defiance an even more attractive tool for a would-be strongman.

Undermining judicial review through tools like court-packing is a standard tactic of incipient illiberal authoritarians like Hungary's Viktor Orban and Venezuela's Hugo Chavez as they seek to concentrate power in the executive; it's especially useful in the early stages of authoritarian consolidation. American progressives readily see this when it comes to countries like Russia, Turkey, Hungary and—most recently—Israel, where the right-wing government has been trying to eviscerate the power of that country's judiciary.

The Danger of Delegating Legislative Powers

The point applies here at home, too. If you think Trump and other Republicans pose a grave danger to liberal democracy, you should be wary of dismantling one of the major institutions standing in their way. Imagine, for example, if Trump had been able to successfully resist judicial rulings against his efforts to overturn the 2020 election.

Even some controversial U.S. Supreme Court decisions opposed by the left bolster safeguards against authoritarianism. For example, the court's "major questions doctrine" requires Congress to "speak clearly when authorizing an [executive branch] agency to exercise powers of vast 'economic and political significance.'" Under this doctrine, if such a broad delegation of power isn't clear, courts must rule against the executive branch's claims that it has the authority in question. Over the last two years, it has been used by the Supreme Court to invalidate a

Centers for Disease Control and Prevention eviction moratorium, strike down the Occupational Safety and Health Administration's large-employer vaccine mandate, limit the Environmental Protection Agency's authority to regulate carbon dioxide emissions, and, most recently, invalidate President Biden's plan to forgive over $400 billion in student loan debt. The doctrine has been much-criticized, especially by progressives.

In my view, the major questions doctrine is defensible on both textualist and structural grounds. Still, I admit the doctrine's validity is debatable as are at least some of the Court's applications of it to specific cases.

But if you fear concentration of power in a potentially authoritarian and illiberal executive, this doctrine is just the sort of approach you should support, since it prevents the president from using vaguely worded statutes to engage in massive power grabs. Even if you trust President Biden to wield such authority, you probably do not have similar faith in the next Republican president, who could well be Donald Trump, Ron DeSantis, or someone with a similar mindset. In his book *Principles Matter: The Constitution, Progressives, and the Trump Era*, legal scholar Carlos Ball urges his fellow progressives to support tighter judicial enforcement of constitutional limits on delegating power to the executive for precisely this reason. They—and the rest of us—would do well to heed his call.

And recall that judicial review also protects a variety of individual rights that can check illiberal and authoritarian tendencies in government. These rights include a wide range of freedom speech, basic civil liberties like protections against arbitrary detention, and ensuring a modicum of separation of powers, among other principles that mainstream liberal and conservative jurists, for all their differences, still agree on. History shows that these are the sorts of restraints on government power that the executive is likely to violate during times of crisis or severe partisan conflict. Such actions are especially likely if the president is a populist demagogue with authoritarian impulses. Trump probably will not be the last such person to occupy the White House.

None of this proves that efforts to reduce judicial power and prerogatives can never be justified. For example, I think there is good reason to end life tenure for Supreme Court justices and replace it with term limits. There is also a plausible case for Congress' imposing an ethics code on Supreme Court justices—for example by limiting the gifts they are allowed to accept from private citizens. But we should be wary of proposals that are likely to destroy or severely undermine the institution of judicial review.

The courts are far from perfect, and there is indeed a degree of politicization that impacts them. But conservative judges' willingness to rule against right-wing causes in a variety of important cases gives the lie to claims that Supreme Court justices are just politicians in robes. Even more importantly, destroying judicial review is likely to undermine liberal democratic values, rather than promote them, leaving us more vulnerable to authoritarian gambits in an era where authoritarianism is resurgent.

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