

JURISPRUDENCE

How Liberals Could Declare War on Brett Kavanaugh's Supreme Court

His confirmation might pave the way for a full-blown constitutional crisis.

By MARK JOSEPH STERN
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Judge Brett Kavanaugh testifies to the Senate Judiciary Committee during his hearing in the Dirksen Senate Office Building on Capitol Hill on Sept. 27 in Washington.

Photo by Win McNamee/Getty Images

By all indications, Brett Kavanaugh is about to be confirmed to the Supreme Court, where he will become part of a five-justice conservative bloc that will swiftly roll back decades of progressive jurisprudence. His confirmation will be a major victory for the Republican Party and its leader, Donald Trump, who will soon succeed in entrenching GOP control over the court for at least a generation. But as soon as Kavanaugh takes the oath, he will plunge the Supreme Court into a legitimacy crisis that could weaken its power over the long term. This crisis will become particularly acute if Democrats retake Congress and the presidency but find their reforms stymied by a reactionary judiciary. The broad consensus over the court's authority to interpret the Constitution will crumble. If that all comes to pass, Kavanaugh's appointment may come to be seen as a Pyrrhic victory not just for Trump but for the entire conservative movement.

The Supreme Court has always needed buy-in from the political branches to enforce its rulings. As my colleague Dahlia Lithwick wrote in 2016, the court "relies on us to believe that it's magic. The power and legitimacy of the whole institution depend upon the idea that regardless of the political maelstrom surrounding it, the court is doing just fine and always will be." Remarkably, throughout most of American history, this magic trick has worked. It came closest to collapse after 2000's Bush v. Gore, when five Republican appointees justices indefensibly elevated their preferred candidate to the presidency. At that point, liberals could have declared war on the court, challenging the central role it had assumed in American politics.

They didn't, for two reasons: Sandra Day O'Connor and Anthony Kennedy. The two swing justices handed the left a stream of victories following Bush v. Gore, upholding affirmative action, affirming campaign finance restrictions, strengthening Roe v. Wade, striking down sodomy bans, and securing the rights of Guantanamo detainees. After the hard-line conservative Justice Samuel Alito replaced O'Connor, the court lurched rightward, weakening Roe, gutting campaign finance laws, and undermining

voting rights. But because Kennedy still delivered the occasional progressive victory—most notably, his marriage-equality rulings—Democrats still tended to see the court as moderate and equitable.

Democratic approval of the court plummeted after the GOP blockaded Merrick Garland, Barack Obama's final SCOTUS nominee, and instead allowed Trump to appoint the far-right Neil Gorsuch. But while plenty of progressive advocates and politicians insisted that Gorsuch was an "illegitimate" justice in a "stolen" seat, few seriously contested the validity of his votes. That's probably because Gorsuch didn't alter the balance of the court and wasn't a flagrant partisan (despite some ethical lapses). During his confirmation hearing and on the bench, Gorsuch behaved more or less like a judge, not a GOP operative out to do his party's bidding.

Kavanaugh is different in all respects. He will drag the court far to the right, eroding Roe, marriage equality, campaign finance restrictions, voting rights, affirmative action, and the separation of church and state. Democrats' respect for the court, already diminished, will plunge to new lows each time Kavanaugh casts the fifth vote in a controversial 5-4 ruling.

But most important is Kavanaugh's image as both a partisan pugilist and an alleged sexual abuser. Democrats overwhelmingly believe Christine Blasey Ford's accusation that Kavanaugh sexually assaulted her. They're disgusted by the extensive reports of his allegedly boorish conduct throughout high school and college, including lewd sexual jokes, heavy drinking, and alleged indecent exposure. And they're convinced that Kavanaugh lied about this behavior under oath in his testimony last week—when, in an unprecedented display of partisanship, Kavanaugh lashed out against Democrats and the broader American left.

No matter how courteously Kavanaugh behaves on the court, many Democrats will always see him as the man who blamed "friends of the Clintons" for trying to thwart his confirmation. They will dismiss his votes as the product of political bias. It might not matter much at first: So long as Republicans maintain their grasp on power, they can enforce the court's decisions through legislation, executive orders, and, if necessary, the

National Guard.

But what happens when Democrats take back the legislative and executive branches? What if Democrats pass Medicare for All, and the Supreme Court strikes it down, with Kavanaugh casting the decisive fifth vote? It's not hard to envision Democrats marching in the streets, demanding that the president and Congress ignore the ruling. And what if they do? What happens if the Department of Health and Human Services just ... implements the law anyway? It's easy to envision the presidential statement: *As the chief executive, it is my duty to enact this legislation, passed through the democratic process, and to reject the illegitimate ruling of Donald Trump's Supreme Court.* The federal government, acting on orders of the president, opens enrollment, and Congress appropriates the funds as planned. What can the Supreme Court do? Send its tiny police force to storm the White House?

Or imagine if the court abolishes affirmative action, and some state—say, New Jersey—refuses to comply. Or what if the court strikes down California's independent redistricting commission, granting state legislators untrammeled ability to gerrymander congressional districts, and the governor insists on preserving it? The same goes for all manner of progressive reforms that could be on Kavanaugh's chopping block, such as minimum wage laws and public financing of elections. Blue states may be pressured to disregard his decisions. And the president could decline to compel them to follow the high court's rulings.

In 2003, Justice Stephen Breyer referred to the “miracle” of national compliance with the court's edicts, even in the wake of “controversial decisions” like *Bush v. Gore*. There is nothing inevitable or self-sustaining about this “miracle.” Courts do have some tools to mandate adherence to their orders—namely, their ability to hold individuals in contempt of court. But judges will surely hesitate to hold governors, legislators, and Cabinet secretaries in contempt. The truth is that we haven't seen massive resistance to the Supreme Court since the segregation battles of the 1950s and '60s. And despite two presidents' celebrated efforts to integrate schools with the help of the National Guard, the South's resistance succeeded in slowing the pace of desegregation.

This precedent is appalling. But it demonstrates that the playbook can work. Progressives should recognize the danger in adopting the tactics of segregationists. Getting to the point of massive liberal resistance to the court would require a significant psychological shift, since the left has long viewed the Supreme Court as a saving grace. Kavanaugh's confirmation alone won't bring Democrats all the way there. But if he leads the court into a frenzy of reactionary jurisprudence, progressives may feel they have no other alternative.

No matter the end result of liberal defiance, it will likely transform the Supreme Court's legitimacy crisis into a full-blown constitutional crisis. Kavanaugh's confirmation will have poisoned the foundation of the judiciary's authority. The Supreme Court derives its power from the belief that it sits above the political fray. Brett Kavanaugh is poised to shatter that illusion. 📌
