

**LAW & JUSTICE**

Resisting the Juristocracy

OCTOBER 5, 2018

SAMUEL MOYN

Image: Justice Anthony Kennedy swore in Brett Kavanaugh to the U.S. Court of Appeals on June 1, 2006, in the Rose Garden. [White House photo by Eric Draper.](#)

That Democrats fought the nomination of Brett Kavanaugh to the Supreme Court tooth and nail was entirely understandable, especially after Christine Blasey Ford's allegations of sexual assault. With yesterday's events making Kavanaugh's confirmation a near certainty today, everything now depends on how liberals and progressives decide to respond to the hard fact of right-wing control of the imperial judiciary. The answer is obvious: the United States is supposed to be a democracy, not an empire.

Because of the cult of the higher judiciary, Democrats find themselves facing an all-powerful institution set to impose its will on a majority of Americans who would decide things differently.

Affirmative action will be the first to go, with Justice Kavanaugh's vote. A federal abortion right is also on the chopping block, with the main question remaining whether it will die in a single blow or a succession of smaller ones. The First Amendment will continue to be "**weaponized**" in the service of economic power, as Justice Elena Kagan put it last term. And the rest of constitutional law will turn into a defense of business interests and corporate might the likes of which the country has not seen **in a century**.

Which brings us back to Franklin Roosevelt's mistake and our opportunity. The last time the court was converted into a tool of the rich and powerful against political majorities, Roosevelt tried to pack the court. Once the Democrats had finally gathered enough political will to stand the Court down, Roosevelt **told the American people** in March of 1937 that it was time to "save the Constitution from the Court and the Court from itself."

But the Constitution is what got us here, along with longstanding interpretations of it such as **Marbury v. Madison** that transform popular rule into elite rule and democracy into juristocracy. Only because of the constitution do Democrats have to battle in a political system in which minorities take the presidency—twice in our lifetime. Only because of a cult of the higher judiciary do Democrats find themselves facing an all-powerful institution set to impose its will on a majority of Americans who would decide things differently.

The mythology of constitutional law dies hard.

And only because everyone knows that our system empowers constitutional judges to an extraordinary extent to make enormous policy decisions did Americans have to live through this latest national drama. Ironically, in this recent circus, the topic of the law itself disappeared as the lens focused successively on whether an assault occurred, what kind of investigation was proper, and if judicial "**temperament**" mattered. But then, prior confirmation battles had already pushed the actual legal views of nominees for the Supreme Court out of view.

The United States, Roberto Unger **once wrote**, is distinguished by "the single-minded

focus upon the higher judges and their selection as the most important part of democratic politics.” This syndrome is reflected in the left as well as the right, and their choice over the decades “to obtain from judges, under the cover of improving interpretation, the advances popular politics fail to deliver.” Yet, in democracies, it is the people who are supposed to write their own laws. The limits of this longstanding judicial strategy were clear long before the left failed to block Kavanaugh, which means the only progressive move now is to reclaim democracy.

Consider the alternatives. In the face of a solid conservative majority for years to come, there is no doubt that many (both inside and outside the court) will look hopefully to Chief Justice John Roberts as the new swing vote and treat him, as they did Anthony Kennedy, as the new “centrist” to lure. But Roberts will defect far less regularly than Kennedy. For the more radical, it will seem tempting to complain—as Roosevelt did—of the betrayal of the Constitution. Yet the last constitutional revolution in the name of democracy, at the height of the New Deal, ended up setting the stage for fifty years of illicit judicial empowerment, in part because it merely pushed judges into **promising to exercise restraint**.

Progressives must embrace democracy and its risks if they want to avoid the stigma of judicial activism that still haunts them from the past.

In the face of an enemy Supreme Court, the only option is for progressives to begin work on a long-term plan to recast the role of fundamental law in our society for the sake of majority rule—disempowering the courts and angling, when they can, to redo **our undemocratic constitution** itself. This will require taking a few pages from the conservative playbook of the last generation. It is conservatives who stole the originally progressive talking point that we are experiencing “**government by judiciary**.” It is conservatives who convinced wide swathes of the American people that it is the left, not the right, that too routinely uses constitutional law to enact its policy preferences, no matter what the text says. The truth is the reverse, and progressives need to take back the

charge they lost. To do so, they need to abandon their routine temptation to collude with the higher judiciary opportunistically. Progressives must embrace democracy and its risks if they want to avoid the stigma of judicial activism that still haunts them from the past.

Even though the right turned to judicial fiat far more frequently, liberals have taken a long time to give up on black-robed power to enact their preferences. This was most notable in decisions around the **right to privacy** and so-called “substantive due process.” In making such choices in cases ranging from **Roe v. Wade** (which secured abortion rights) to **Obergefell v. Hodges** (which legalized same-sex marriage), liberals entered an unholy alliance with Kennedy, Kavanaugh’s predecessor, to advance gay and women’s rights on a libertarian rationale—defending the free choice of individuals independent of state control—even though that rationale mostly serves business interests in most areas of law. The endangerment or even loss of precedents that the left cares about (such as Roe) is going to be a grievous blow, and no one should celebrate that outcome. But if it is going to happen anyway, then it is time to pivot to a democratic strategy to protect what we care about.

In the face of an enemy Supreme Court, progressives must recast the role of fundamental law in our society for the sake of majority rule.

Instead of terrorizing the court into moving through various court-packing schemes, it is a much better and bolder choice for the left to stand up for reforms that will take the last word from it. Jurisdiction-stripping statutes, tools to bar the judiciary from considering cases on certain topics such as abortion or affirmative action, are not clearly unconstitutional even under current legal doctrine. Indeed, the right has used such statutes for years to limit access to courts for immigrants and prisoners. Other changes in customs and precedent could also weaken judicial supremacy. For example, by choice under pressure or compulsion through law, the Supreme Court could evolve into an advisory body, especially when the justices disagree. Such steps would force progressives to take their case to the people to win majorities for their policies, including in places across the

country they have given up for lost.

The United States still looks to the higher judiciary to act on behalf of the country's principles and values, even when basic study proves that judges are partisan and that partisanship only increases when they are given the power to decide the highest stakes questions. The mythology of constitutional law dies hard. The notion that empowering judges would serve progressive outcomes is a flickering star that collapsed long ago, and it is long since time to accept the dying of the light. A legal culture less oriented to the judiciary and more to public service in obtaining and using democratic power in legislatures at all levels is the sole path to progress now. In fact, it always has been.

BOSTON REVIEW

Printing Note: For best printing results try turning on any options your web browser's print dialog makes available for printing backgrounds and background graphics.