The Atlantic

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The Supreme Court Is Not Supposed to Have This Much Power

NIKOLAS BOWIE AND DAPHNA RENAN 2022-06-08T07:00:00-04:00

It's June again—that time of year when Americans wake up each morning and wait for the Supreme Court to resolve our deepest political disagreements. To decide what the Constitution says about our bodily autonomy, our power to avert climate change, and our ability to protect children from guns, the nation turns not to members of Congress—elected by us—but to five oracles in robes.

This annual observance of *judicial supremacy*—the idea that the Supreme Court has the final say about what our Constitution allows—is an odd affliction for a nation that will close the month ready to celebrate our independence from an unelected monarch. From one perspective, our acceptance of this supremacy reflects a sense that our political system is simply too broken to address the most urgent questions that we confront. But it would be a mistake to see judicial supremacy as a mere symptom of our politics and not a cause.

Contrary to what many people have come to believe, judicial supremacy is not in the Constitution, and does not date from the founding era. It took hold of American politics only after the Civil War, when the Court overruled Congress's judgment that the Constitution demanded civil-rights and voting laws. The Court has spent the 150 years since sapping our national representatives of the power to issue national rules. These judicial decisions have destroyed guardrails that national majorities deemed vital to a functional, multiracial democracy—including protecting the right to vote and curbing the

influence of money in politics. Even worse, the Court's assertion of the power to invalidate federal laws has stripped Americans of the expectation, once widely shared, that the most important interpretations of the Constitution are expressed not by judicial decree but by the participation of "We, the People," in enacting national legislation.

In the decades before the Civil War, when national parties violently contested the constitutionality of slavery west of the Mississippi, the center of gravity was Congress. As the historian James Oakes recounts, when a border-state senator proposed asking the Supreme Court to decide the issue in 1848, other senators ridiculed his idea as implausible. "The Constitution was interpreted as variously as the Bible," Senator John P. Hale of New Hampshire responded. White southerners believed "the Constitution carries slavery with it," while northerners construed the Constitution "to secure freedom." As Hale and his contemporaries appreciated, resolving such a fundamental national disagreement could never turn on a court's answer to which interpretation was more correct. Rather, the winning interpretation would depend on whether adherents could build sufficient political majorities to control the national government.

[Ryan D. Doerfler and Samuel Moyn: Reform the Court but don't pack it]

The Supreme Court did attempt to decide the question in its infamous 1857 *Dred Scott* decision—interpreting the Constitution to hold that the federal government lacked the power to abolish slavery anywhere in the United States. But rather than accept this novel assertion of judicial supremacy over Congress, the Republican Party responded with defiance. Indeed, Abraham Lincoln successfully ran for president on a platform of repudiating the Court with national legislation. In his inaugural address, he remarked that "the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court," then "the people will have ceased to be their own rulers, having to that

extent practically resigned their Government into the hands of that eminent tribunal."

Through the Civil War and the Reconstruction era that followed, the politically dominant Republicans in Congress enacted legislation to build a multiracial democracy in the United States for the first time. Some of these laws boldly overruled the Court, including statutes in 1862 and 1866 that began the abolition of slavery and recognized the citizenship of Black people. Others prevented the Court from retaliating against Congress's interpretation of the Constitution, such as legislation stripping the Court of jurisdiction over certain matters. Still others enlisted the Court in the project of enforcing Congress's constitutional judgments. Acts in 1870 and 1871 instructed federal courts to enforce the Thirteenth, Fourteenth, and Fifteenth Amendments against recalcitrant state officials, while acts in 1870 and 1875 tasked judges with banning voting restrictions, lynch mobs, and racial discrimination.

Only after Republicans lost control of Congress in 1875 was the Court able to enforce its contrary interpretations of the Constitution—to devastating effect. In the *Civil Rights Cases* of 1883 and related cases, the Court refused to enforce federal civil-rights laws on the theory that the newly enacted Thirteenth and Fourteenth Amendments gave Congress no power against private racial violence or discrimination in public accommodations. For the next half century—as part of what the historian W. E. B. Du Bois called the "counter-revolution of property"—the Court condemned the Reconstruction Congress as a group of unprincipled fanatics. And it invented new doctrines that authorized the Court to invalidate federal legislation that it thought went too far toward interfering with white business interests. It was during this period that judicial supremacy took hold as a dominant ideology in the United States.

This bears repeating: Judicial supremacy is an institutional arrangement brought to cultural ascendancy by white people who wanted to undo Reconstruction and the rise of organized labor that had followed. And that makes sense, as judicial supremacy can harness the power of an entrenched

minority and use that power to undermine the more democratic legislative branch. Decades after the Court in *Marbury v. Madison* first anticipated that it might disagree with Congress about a federal law's constitutionality, the justices finally convinced skeptics of the need for this authority by disempowering Congress and unraveling its legislative efforts to establish political equality.

[Paul Finkelman: America's 'Great Chief Justice' was an unrepentant slaveholder]

In the nearly 150 years since Reconstruction, the thrust of judicial supremacy has continued to be revanchist. Through the 21st century, the justices overwhelmingly have exercised their claim of supremacy over Congress to insulate the wealthy and powerful from federal labor laws, federal voting laws, federal civil-rights laws, federal campaign-finance laws, and federal health-care laws. Decisions such as *Citizens United* and *Shelby County* are typical examples of how the Court has overruled Congress to make it harder for ordinary people to participate in American democracy on equal terms. But their damage goes beyond even that: Because the limits of our constitutional imagination can extend no further than the opinions of those who happen to sit on the Court, judicial supremacy has also impoverished what we think is possible *through* democratic politics—and through organizing for political change at the national level.

Rather than look to the Court to glimpse some fundamental truth from scant constitutional text, Americans ought to demand that their elected representatives engage in the hard work of national lawmaking. Congress must act, even if it means overriding the interpretations of the Court and reshaping its jurisdiction.

Encouragingly, members of the House have recently passed bills to enforce their understanding of what federal laws our nation demands and our Constitution permits—including reproductive freedom and voting rights. But the bills have all stalled in the Senate for two reasons that remain within its control. One, the filibuster, will be abolished as soon as 50 senators recognize

that a permanently incapacitated Senate is far more destructive than an active Senate that might one day be controlled by an opposing party.

But the other obstacle may be more pernicious: a fear among legislators that there is no point to legislating if the Court will simply invalidate anything Congress achieves.

Yet as the Reconstruction Congress recognized, everything the Court has the power to do comes from federal statutes passed by Congress—statutes that a majority of Congress always has the power to amend. Conflicts over constitutional interpretation are not really over who has the best understanding of words inscribed in an old document. They are about who—or which actors in our system of national government—can deliver on a particular, and inherently contested, meaning in the context of our current times. It is a question of political leadership, not legalism.

There is nothing unconstitutional about Congress reasserting its authority to define the nation's highest law. The experience of Reconstruction brings into view this firmly grounded practice. In fact, a surviving remnant of the Reconstruction Congress's work—today codified in 42 U.S.C. § 1983—has underwritten some of the most famous cases in modern constitutional law. In Section 1983, Congress instructed federal courts to stop state or local officials from depriving anyone of their "rights, privileges, or immunities secured by the Constitution." Section 1983 is what Oliver Brown invoked when he challenged Kansas's segregation laws in *Brown v. Board of Education of Topeka*, what "Jane Roe" invoked to challenge Texas's abortion law in *Roe v. Wade*, and what James Obergefell invoked when he challenged Ohio's same-sex-marriage ban in *Obergefell v. Hodges*. While these landmark cases invalidated *state* laws, the justices were following, not undermining, Congress's orders. The decisions overruling state interpretations of the Constitution don't represent judicial supremacy, but rather *Congress's* ability to make and enforce national constitutional commitments.

Congressional checks on the Supreme Court are also very different from the calls for "nullification" by slaveholders before the Civil War, their descendants during the civil-rights movement, and Texas legislators today. The Civil War itself resolved that the representatives of states must enforce their constitutional interpretations not by defying the government created by the Constitution but by participating in it. For the past two centuries, Congress has been the branch of the federal government where our democracy's pursuit of equal justice under law has most often been realized. The question is not whether some commitments—abolition, reproductive freedom, racial equality—are worth making supreme and constitutive of a national American identity. Rather, the question is who gets to decide the content of those commitments for all Americans: the 50 states, a five-justice majority, or our national legislature.

If the Court is today eviscerating those very constitutional commitments through its case law, Congress should enact or amend federal statutes to advance a different understanding of a nation built on democratic justice. It should reshape the Court's ability to intervene in these disputes, including by restricting the Court's authority to set aside federal legislation. And it should conscript the Court in enforcing federal commitments when resistant state officials brazenly declare that the national government has no jurisdiction to protect Americans from their parochial rule.

The thing stopping Congress from reversing each wrongheaded decision the Court issues this month therefore isn't the Constitution. It's our failure to demand more from our elected representatives.

The promise of a genuinely multiracial democracy will fade if Americans are unwilling to embrace structural reforms that can make our policies and our politics more responsive to majority rule. How Congress allocates the power to interpret the Constitution should be at the heart of those reforms. We simply cannot build a better politics if we don't reclaim the authority of Congress to resolve our most fundamental disagreements. Rather than allow a handful of us

to define the Constitution's meaning in a mystical ritual each June, the rest of us should define it with the hard, messy work of American politics year-round.