The Supreme Court Is Helping Republicans Rig Elections

Adding more justices to the bench might be the only way to stop them.

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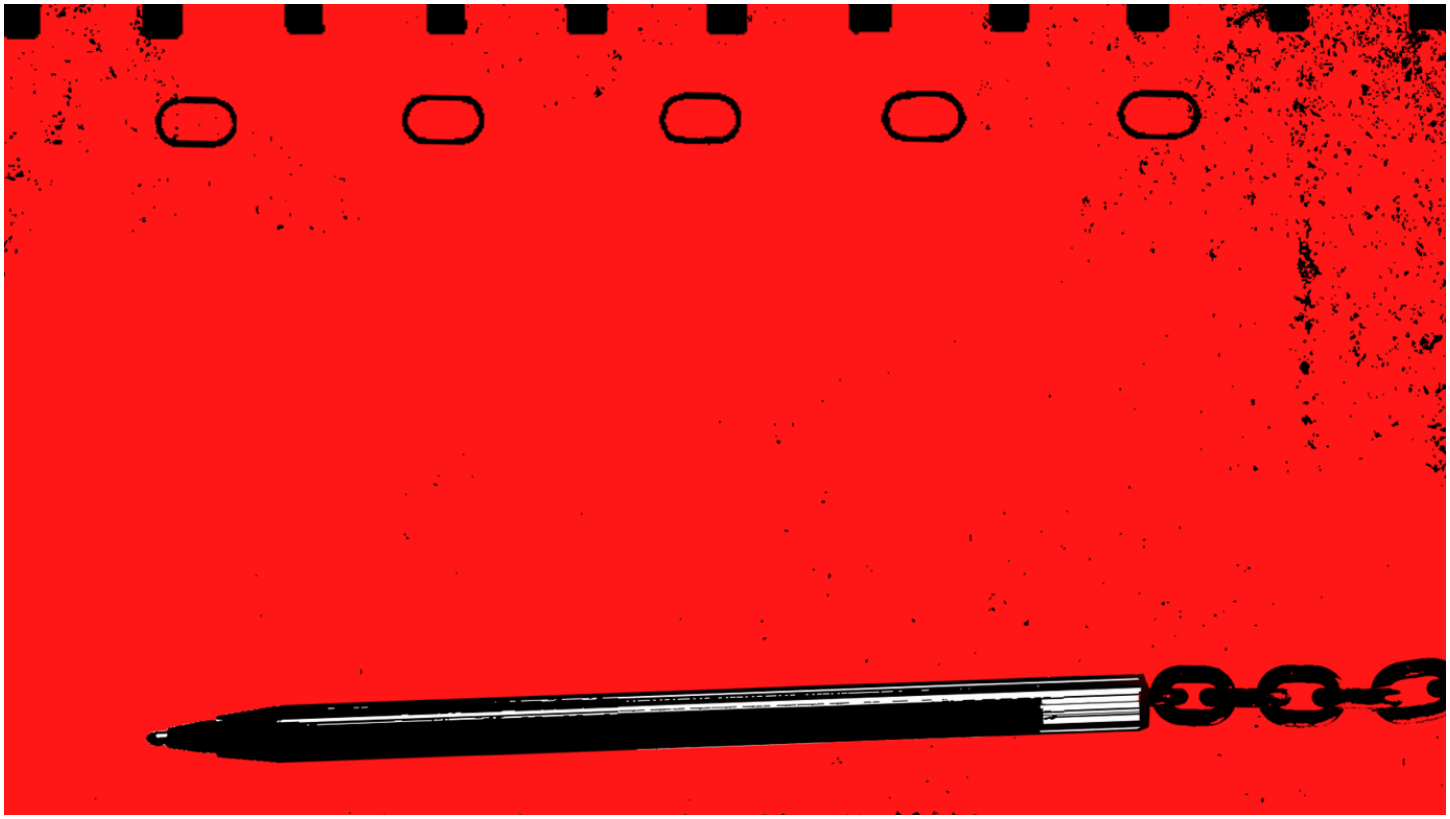

The Atlantic

For a judge with a brilliant legal mind, Amy Coney Barrett seemed oddly at a loss for words.

Does a president have the power to postpone an election? Senator Dianne Feinstein of California asked. Barrett said she would have to approach that question—about a power the Constitution explicitly grants to Congress—"with an open mind."

Is voter intimidation illegal? Senator Amy Klobuchar of Minnesota asked. "I can't apply the law to a hypothetical set of facts," Barrett replied. Klobuchar responded by reading the statute outlawing voter intimidation, which exists and is, therefore, not hypothetical.

Should the president commit to a peaceful transfer of power? Senator Cory Booker of New Jersey asked. Barrett replied that, "to the extent this is a political controversy right now, as a judge I want to stay out of it."

Jane Chong: The Amy Coney Barrett hearings were a failure

Taken together, these three questions ask whether the president is, in essence, an elected monarch who, once in office, can determine the time and circumstances of his relinquishing power. Federal law stipulates that states must report their election results by the fourth Wednesday in December; the Constitution mandates that a president's term ends at noon on January 20. Voter intimidation is outlawed by statute rather than by the Constitution, but the law is unambiguous. Yet Barrett could not commit herself to affirm the bedrock principle of American democracy: the ability of voters to choose their leaders in free and fair elections.

More by this writer

The idea that a potential justice would be unable to address these questions is risible. Barrett seemed perfectly comfortable affirming her support for the *Brown v. Board* decision—a precedent safe to endorse, perhaps, because it has already been neutered. The most charitable explanation of her reluctance to do the same for the basic elements of election law is that Barrett is trying to avoid antagonizing President Donald Trump, who has said he needs her on the bench to decide the election in his favor. That explanation itself would be disqualifying.

Barrett's evasions are all the more alarming in light of the Republican Party's decades-long campaign to ensure victory by targeting Democratic constituencies with voting restrictions and other measures designed to limit their political representation, while disproportionately enhancing the influence

of conservative white voters. Barrett's successful confirmation would move the Supreme Court, dominated by conservative appointees since the 1970s, even further to the right on such matters as civil rights, environmental protections, and business regulations. But the more urgent threat is how a 6–3 conservative court might work to entrench the Republican Party's ability to wield power without the consent of the governed.

In the past few weeks alone, conservative judges have amply displayed their contempt for Democratic constituencies' right to the franchise. On October 12, Trump appointees to the federal bench in Texas upheld Governor Greg Abbott's decision to permit counties to designate only a single drop-off point for absentee ballots—a choice that will cause few problems in rural counties, where Republicans typically dominate, but has already created chaos in more populous counties, where Democrats are likely to draw a significant number of votes. In Harris County, which covers nearly 2,000 square miles, 5 million voters are now left with a single drop box. "One strains to see how it burdens voting at all," the court concluded.

In September, Trump appointees upheld the Jim Crow logic of a Florida poll tax that disenfranchises the formerly incarcerated by forcing them to pay restitution before having their voting rights restored, even though the state has provided them with no means of finding out what they owe. This week, Governor Ron DeSantis ordered that they be purged from the rolls outright, which would complete the nullification of the 2018 referendum restoring voting rights to the formerly incarcerated, one voters approved by an overwhelming margin.

Last Tuesday afternoon, while Barrett was testifying that she did not know whether voter intimidation was illegal, the Supreme Court allowed the Trump administration to shut down the census early, effectively collaborating in an attempt to diminish the political influence of minority communities by undercounting them, a scheme hatched by a Republican operative as part of what he described as a plan to enhance the power of "Republicans and Non-

Hispanic Whites."

Read: What the rush to confirm Amy Coney Barrett is really about

Barrett's future ascension to the high court portends tremendous headwinds for progressive priorities and legislation. But this is not sufficient reason for Democrats to consider drastic measures such as expanding the Supreme Court. What does justify such measures is that the Republican political project has gone beyond shaping policy to rigging the electorate. In politics, sometimes you lose—and the Court's rightward tilt for the past half century has reflected the left's losses. The conservative justices, though, have now concluded that their role is to help the Republican Party continue to wield political power, by inhibiting voters' ability to make a different choice.

James K. Vardaman, later a Democratic governor and senator from Mississippi, wanted to be very clear about the purpose of the state's 1890 constitution. "Mississippi's constitutional convention of 1890 was held for no other purpose than to eliminate the nigger from politics," Vardaman declared. "Not the 'ignorant and vicious,' as some of the apologists would have you believe, but the nigger."

But when the case of *Williams v. Mississippi* came before the Supreme Court in 1898, challenging the state's constitution and its laws for discriminating against Black voters, the Court upheld the rules. Justice Joseph McKenna wrote that even though the state's poll tax, grandfather clause, and literacy tests had reduced the registration rate of one of the largest African American populations in the country to almost nothing, the measures themselves did not mention race and therefore did not violate the Constitution's prohibitions on racial discrimination.

"It has been uniformly held that the constitution of the United States, as amended, forbids, so far as civil and political rights are concerned, discriminations by the general government or by the states against any citizen

because of his race," McKenna wrote. "The operation of the constitution and laws is not limited by their language or effects to one race. They reach weak and vicious white men as well as weak and vicious black men, and whatever is sinister in their intention, if anything, can be prevented by both races by the exertion of that duty which voluntarily pays taxes and refrains from crime."

As the legal historian Lawrence Goldstone wrote in *Inherently Unequal: The Betrayal of Equal Rights by the Supreme Court*, the justices had "chosen a paper-thin, even tortured, interpretation of the Fourteenth Amendment and turned a blind eye to the obvious." When it came to Black rights, the Supreme Court was both ignorant and vicious.

The *Williams* case capped a decades-long process of disenfranchisement. Although the Reconstruction governments guaranteeing equal rights for Black Americans had been overthrown by 1876, and Republicans had retreated from their advocacy of racial equality, southern politics remained in flux for some years after. The long night of Jim Crow did not fall all at once.

"Blacks continued to endure abuse and risk bodily harm in order to try to cast ballots. White southerners were also all too aware that just because the Supreme Court had drifted away from freedmen's rights, this was no guarantee that they might not one day drift back again," Goldstone wrote. "For white society to permanently breathe easy, they would need to find a way to imbed in law what was practiced in the community."

Lawrence Goldstone: Judiciary reform is not revenge

As the historian C. Vann Woodward wrote in 1955 in *The Strange Career of Jim Crow*, Democrats embraced a violent politics of white identity in order to splinter any potential class alliances between poor whites and Blacks.

"The leaders of the movement resorted to an intensive propaganda of white supremacy, Negrophobia, and race chauvinism," Woodward wrote. "Such a campaign preceded and accompanied disenfranchisement in each state. In

some of them it had been thirty years or more since the reign of the carpetbagger, but the legend of Reconstruction was revived, refurbished, and relived by the propagandists as if it were an immediate background of the current crisis."

States, the laboratories of democracy—or, in this case, its suppression—experimented with different methods that would disenfranchise Black voters while being superficially race-neutral enough to pass under the blind eye of the justices on the Supreme Court, who were willing to countenance the most blatant forms of discrimination so long as they did not announce their obvious purpose.

There were grandfather clauses, which exempted those who had been able to vote prior to the Civil War and their descendants from the new, onerous voting requirements. There were poll taxes and property requirements, which dispossessed Black men could not afford. There were literacy tests, which could take the form of unanswerable questions in the event that a prospective Black voter knew how to read. All of these provisions were aimed at disenfranchising Black voters, but technically such measures didn't mention race at all. After *Williams*, southern states were free to employ all of these methods: The Constitution was no obstacle to white supremacy in the South.

There were also explicitly racist methods of disenfranchisement, such as the exclusion of nonwhite voters from Democratic primaries in much of the one-party South. The white primary would pass constitutional muster well into the 20th century, under the rationale that the Fourteenth Amendment applied only to state actions, not private actors. But "race neutral" methods worked well enough to disenfranchise Black Americans even without white primaries.

These methods were swept away by the 1965 Voting Rights Act, which not only enforced the Fifteenth Amendment's protections against racial discrimination in voting but also placed jurisdictions with a history of such measures under federal supervision to keep them from being reimposed.

That worked. That is, it worked until Chief Justice John Roberts decided that such protections were no longer needed. "Our country has changed," Roberts announced in his 2013 opinion in *Shelby County v. Holder*, which rendered useless the provision allowing the federal government to preempt discriminatory voting changes in jurisdictions with a history of discrimination. "The question is whether the Act's extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements," Roberts wrote. In effect, the chief justice held that the real prejudice was not the disenfranchisement of Black Americans—no longer a serious risk—but the Voting Rights Act's treatment of states with a history of disenfranchising Black Americans.

Read: How Shelby County v. Holder broke America

Roberts's opinion doesn't actually say what part of the Constitution the formula that Congress developed for enforcing the Voting Rights Act violated. Instead, he declares it a "dramatic departure from the principle that all States enjoy equal sovereignty." This principle does not appear in the text of the Constitution, but it was the basis for several infamous decisions, including the 1857 *Dred Scott* ruling, in which Chief Justice Roger Taney declared that Black Americans could not be U.S. citizens. For that reason, the legal scholars James Blacksher and Lani Guinier wrote in 2014 that Roberts's rationale in *Shelby County* was "based on the jurisprudence of slavery."

The chief justice's affection for "equal sovereignty" reflects not the overt racism of a McKenna or a Taney, but a nostalgia for an antebellum Constitution that was forever changed by the Reconstruction amendments, a revolution the right's jurists have been loath to accept. So instead of citing *Dred Scott*, Roberts chose a few minor cases and an opinion he had written in 2009, which had invoked the concept of equal sovereignty for the first time in decades. Roberts knew which knife he wanted to use to gut the Voting Rights Act, but he had to wipe Taney's fingerprints from the handle first.

Shelby County ushered in a new era of experimentation among Republican politicians in restricting the electorate, often along racial lines. The country, it turned out, hadn't changed as much as Roberts insisted. As subsequent decisions showed, the chief justice was far more interested in ensuring that a greater injustice—federal supervision of voting rights—would be rectified.

Roberts's decision *in Shelby County* surprised few legal observers. As a judge, he has frequently ruled that state measures addressing racism are worse than racism. This is a deeply held philosophical perspective, one he has advanced since he was a young attorney in the Reagan Justice Department. In that role, he argued against adding a "disparate impact" provision to the Voting Rights Act. He was unsuccessful, but the provision would have barred voting restrictions that have discriminatory effects, whether intended or not. Such a standard, Roberts argued, would "provide a basis for the most intrusive interference imaginable." The intrusive interference he feared was not with the ability of Americans to cast a ballot, but with the ability of states to prevent Americans from casting ballots.

That southern states employed facially race-neutral methods to disenfranchise their Black populations for the express purpose of evading the Constitution didn't matter to Roberts then, and it doesn't matter to him now. From the perspective of the Court's conservative wing, the avalanche of voting restrictions Republicans have adopted since *Shelby County* are no crisis; the real concern is the incivility of liberals pointing out when these restrictions are discriminatory.

Read: The lost promise of the Voting Rights Act

Under the logic of Roberts Court jurisprudence, not only would most Jim Crow voting restrictions pass constitutional muster, but even Vardaman's boasting would be meaningless. As Roberts wrote in his opinion upholding the Trump administration's travel ban targeting Muslim countries, Trump's explicit declarations of discriminatory intent did not matter, because the lawyers who

wrote the order didn't mention religion. "The text says nothing about religion," Roberts insisted, echoing McKenna's assertion that the voting restrictions in Mississippi's constitution were not "limited by their language or effects to one race."

McKenna believed in the inherent biological inferiority of Black men. Roberts does not, but his rulings offer no obstacle to those who want to act on such a belief. The chief justice may claim that only deliberate discrimination counts as racism, but in practice he rules even overt racism acceptable if sufficiently competent attorneys clean it up first.

And Roberts is the most sympathetic conservative justice when it comes to voting rights.

Indeed, the conservative wing of the Court has yet to find a Republican effort to rig the electorate that it does not love. In 2018, it blessed a flimsy Republican rationale for voter purges that, as Justice Sonia Sotomayor put it, "appears to further the very disenfranchisement of minority and low-income voters that Congress set out to eradicate." Her colleague Samuel Alito sniffed that Sotomayor could not "point to any evidence in the record that Ohio instituted or has carried out its program with discriminatory intent." The conservative wing said there was no problem with voter-ID laws that disproportionately affect minority and low-income voters, even though Republicans openly acknowledged that those laws were passed with the intent to swing elections. The conservatives threw up their hands about partisan gerrymandering, even as Republican politicians explained that the rural white residents of their states had more of a right to have their votes count than Black Democrats in cities had.

The Court's conservatives have consistently found that state restrictions on the franchise do not justify their intervention. Just as consistently, they have seen almost any attempt to protect the voting rights of American citizens as impermissibly intrusive, despite the existence of constitutional amendments

adopted to empower Congress to protect those rights. During the pandemic, they have resisted even the modest adjustments designed to help voters exercise the franchise, forcing them to needlessly risk infection in order to vote. They issue such decrees from the safety of their remote deliberations.

Every Republican effort to restrict the franchise, no matter how ephemeral its justification, is met by the Court's conservatives with wilting modesty, while every effort to protect voting rights is struck down as tyrannical state overreach. The pattern holds in the lower courts; one recent study found that "Republican appointees interpreted the law in a way that impeded ballot access 80 percent of the time, versus 37 percent for Democratic ones." The reason for this is simple: Republican-appointed judges, like Republican voters, believe that voter fraud is real and racism is a myth, when in fact the reverse is true.

As the Republican-appointed Judge Jerry E. Smith of the Fifth Circuit wrote this week, in a ruling allowing Texas to reject signature matches on mail-in ballots without giving voters a chance to prove their identity, "Texas's strong interest in safeguarding the integrity of its elections from voter fraud far outweighs any burden the state's voting procedures place on the right to vote." Set aside that signature matching is a useless process—this is still exactly backward: Protecting the right of citizens to cast a ballot is far more important than giving the state an arbitrary pretext to toss out people's votes.

David A. Graham: Signed, sealed, delivered—then discarded

Until this past May, the Trump Justice Department had not filed a single new case seeking to protect the voting rights of racial minorities. Perhaps the most ominous recent sign of the Republican Party's current direction, though, was the administration's effort to use the census to give more political influence to rural whites at the expense of minorities, under the transparently false pretext that it was just trying to enforce the Voting Rights Act—a statute that the administration had previously shown little interest in enforcing. The plan was

to add a citizenship question to the census, in order to depress minority turnout and undercount Democratic-leaning areas for the purposes of congressional redistricting.

The case was already before the Supreme Court when the files of Thomas Hofeller, a Republican operative, posthumously became public. The files showed that Hofeller had not only designed the census scheme with an aim toward reducing the political power of minority voters, he had also practically ghostwritten the Justice Department's memo on the subject, despite the sworn testimony of Trump officials to the contrary. Roberts blinked, as he occasionally does when the facts of a case threaten to harm the Court's legitimacy: He joined the Democratic appointed justices to reject the administration's bid on a technicality.

The chief justice's conservative colleagues were quick to remind him, however, that his ruling against the administration was inconsistent with his prior jurisprudence. Alito complained that the transparently racial census scheme had been "attacked as racist," while Neil Gorsuch and Brett Kavanaugh joined a Thomas opinion condemning "the din of suspicion and distrust that seems to typify modern discourse," as if it were irrational to doubt the administration's motives. Not long after, Trump blurted out the truth, confirming that the purpose of manipulating the census was to give Republicans a partisan advantage. The Court rewarded that confession of malice this month, by giving the administration explicit permission to shut down the census count early.

Modern methods of voter suppression have been nowhere near as successful as the terror and murder of the post-Reconstruction South. Some actually backfire, strengthening the resolve of the communities they target—although no amount of voter enthusiasm can tip a state that has gerrymandered its Black communities into electoral insignificance. But absent a Court willing to preserve Americans' right to the franchise, Republicans are free to keep experimenting until they find more effective methods. There were two decades

between the end of Reconstruction in 1877 and the complete alienation of Black men from the franchise at the dawn of the 20th century. It's unlikely to take the GOP nearly as long to devise effective methods of disenfranchisement that can pass muster with the Roberts Court. That the schemes Republicans have devised thus far have failed to completely suppress Democratic constituencies does not excuse their efforts, nor is it any reason to allow them to keep trying.

Since Barack Obama's election in 2008, some conservatives have grown insistent that they—and only they—can legitimately wield power, and that members of their rival party's constituencies are but usurpers. Fox hosts darkly warn that "Latin American countries are changing election outcomes here by forcing demographic change on this country" and that Democrats "want to replace you, the American voters, with newly amnestied citizens and an ever-increasing number of chain migrants." Before going on to serve in the Trump administration, the conservative writer Michael Anton published an essay arguing that only a Trump presidency could reverse "the ceaseless importation of Third World foreigners with no tradition of, taste for, or experience in liberty," leading to an electorate that "grows more left, more Democratic, less Republican, less republican, and less traditionally American with every cycle."

These arguments have seeped into the Republican base. Neither party has a monopoly on voters with illiberal instincts, but, according to a 2020 study by the political scientist Larry Bartels, a majority of Republicans and Republican-leaning independents believe that "the traditional American way of life is disappearing so fast that we may have to use force to save it," and three-quarters believe that "it is hard to trust the results of elections when so many people will vote for anyone who offers a handout." Surveying the source of anti-democratic attitudes among Republicans, Bartels concluded that "in every case the factor most strongly associated with support for antidemocratic sentiments is ethnic antagonism." Even the prevalence of the voter-fraud myth, the brittle foundation of post-*Shelby* voting restrictions,

reflects a sense of denial that the electorate could ever legitimately reject Republican dominance.

Read: Voter suppression is warping democracy

Where race proves an unacceptable method of discerning the worthy from the unworthy, and true citizens from impostors, sectarianism will do. William Barr, the attorney general of the United States, recently argued that the Founders believed that "free government was only suitable and sustainable for a religious people," not the "militant secularists" against whom he envisions himself waging a war for civilization. The actual faith of non-Republicans is irrelevant—they are secularists by virtue of their opposition to conservatism. As Fintan O'Toole writes, in Barr's mind these "secularists" are condemned "to an exterior darkness, beyond the realm of the authentic citizenship of the holy elect."

The logic here is as clear to present-day Trumpists as it was to Democrats decrying "negro rule" in the South: Their inalienable rights can only be preserved as long as the worthy deprive the unworthy of power. As Woodrow Wilson wrote in the January 1901 issue of *The Atlantic*, it was natural for southern legislatures to restrain the rights of those "unpracticed in liberty, unschooled in self-control; never sobered by the discipline of self-support, never established in any habit of prudence; excited by a freedom they did not understand." Americans who fail to vote Republican are similarly unschooled in the virtues of liberty, and their ability to choose their leaders must be constrained until they are disciplined enough to choose the right ones.

Conservatives might retort that liberals regard Trump as an illegitimate president. The difference, which many conservative intellectuals avoid acknowledging with monk-like discipline, is that there are no Democratic efforts to deprive Republican constituencies of the franchise. Many Democrats see Trump's presidency as illegitimate because of his reciprocal acceptance of aid from foreign adversaries in 2016. They do not view *Republican*

constituencies themselves as illegitimate and unworthy of a right to participate in democracy. Although both parties engage in partisan gerrymandering, the absence of a concerted Democratic effort to, for example, deprive non-college-educated white men or white evangelicals of the ballot illustrates that this retort is an empty farce.

The diversity of the Democrats' political coalition means that they cannot engage in such schemes without hurting their own constituents; the Republican Party's uniformity has led it to see disenfranchisement, rather than inclusion, as a viable path. This political project is authoritarian in nature, as it seeks to win elections by keeping the other side from being able to fully participate.

In any democracy, there will be a fight over the rules, some trivial and some serious. But disenfranchisement of rival constituencies is not the same as boxing out a primary challenger or arguing over the shape of a ballot; it is an attack on democracy itself.

The Roberts Court's eager acquiescence to the Republican Party's political project of restricting the electorate along racial lines for partisan advantage makes the question of how Democrats should respond much more urgent. It is one thing for fortune and politics to produce a conservative majority on the Court to resolve the usual questions of law and policy in the right's favor. It is another matter entirely for a majority of the justices to adopt the posture that it is acceptable for the party that appointed them to rig democracy on its behalf. Competing and losing is part of democracy. Voters being locked out of competition by a rival faction is not.

Ibram X. Kendi: A campaign of voter subtraction

The conservative justices' attack on the franchise will not resurrect Jim Crow, but it will continue to enable the Republican Party to wield power without the consent of the majority. In doing so, it will prolong the racial and religious

chauvinism at the heart of Trumpism long after Trump is gone.

Mitch McConnell is angry that Democrats would describe filling court vacancies as "court packing." "It is not 'court-packing' when the Senate confirms nominees to fill actual vacancies," he said on October 14. "When leaders abuse language, it is because they seek to abuse power."

That's the McConnell of October 2020. The McConnell of May 2013, however, thundered that then President Obama was seeking "to pack the D.C. Circuit with appointees." Texas Senator John Cornyn rallied conservatives against Obama's efforts to "pack the D.C. Circuit" and supported shrinking the court. Iowa Senator Chuck Grassley denounced Obama's "efforts to pack" the D.C. Circuit, while Senator Mike Lee of Utah accused Obama of trying to "pack the D.C. Circuit with unneeded judges simply in order to advance a partisan agenda."

The term *court packing* was popularized during the backlash against President Franklin Roosevelt's proposal to expand the Supreme Court after the justices ruled several aspects of the New Deal unconstitutional. But to Republicans in 2013, Democrats simply appointing judges to existing vacancies was "court packing," a definition they now decry as an "abuse of language" and as a prelude to an "abuse of power."

As I wrote back then, "If court packing means to artificially alter the number of judges on a court in order to enable an ideological agenda, it's Republicans who are engaging in court packing." But the most egregious manipulations were yet to come: In 2016, Antonin Scalia died, leaving a vacancy on the Supreme Court. Senate Republicans refused to consider Obama's replacement nominee, Merrick Garland, a moderate who several Senate Republicans had previously publicly insisted would sail through confirmation. Rather, they held the seat open in the hope that a President Trump might fill it, arguing that the "people should decide" who should fill the vacancy. Republicans—from the right-wing Ted Cruz to the secular saint of moderation,

John McCain—were vowing to prevent Hillary Clinton from filling any vacancy on the Court, had she prevailed in the 2016 election. At least court packing requires a party to gain enough popular support to control both the White House and Senate.

Then, when the Democratic appointee Ruth Bader Ginsburg died last month, Republicans rushed the confirmation of Amy Coney Barrett to replace her just weeks before an election that they fear they might lose.

I am not recounting all this because I want to denounce Mitch McConnell and the Republicans for their dastardly deeds. I do not wish to rail against their hypocrisy, rebuke their partisanship, or condemn their villainy. I am rehearsing all of these details because everything they did was completely rational and understandable, and even constitutional. Republicans want to control the courts, and they have done everything within their power, and within the rules, to make that happen. Were the situation reversed, many Democrats would want their representatives to act with the same ruthless self-interest. And they should. McConnell's success is in no small part due to Democratic adherence to Senate rules Republicans had no intention of honoring.

There is no argument in favor of what Republicans have done in order to solidify their majority on the high court; however, that does not also apply to what Democrats now contemplate. As *The New York Times*'s Jamelle Bouie has written, "The same Constitution that says Republicans can confirm Barrett weeks before the election, that allows them to retroactively impose a new and novel partisan requirement (same-party control of the Senate) on judicial confirmations, also says Congress can add as many seats to the Supreme Court as it wishes." What McConnell and the Republicans did was cold, calculating, and constitutional. So is expanding the Supreme Court.

Read: The Democrats' Supreme Court hail Mary

Back when Clinton was favored to win the 2016 election, Kyle Sammin argued

in the conservative publication *The Federalist* that Republicans should not confirm any new justices to the Court should she prevail. There is, he pointed out, precedent for manipulating the size of the Court in defense of the suffrage. Republicans temporarily shrank the Court in 1866 to prevent President Andrew Johnson, an ardent white supremacist, from making appointments, then expanded it again after he was gone. "Southern states were already enacting restrictions on former slaves' voting and civil rights, and Republicans feared that the rapidly reassembled Union would place the erstwhile secessionists in an even stronger position than they had held before the war, while trampling on black Southerners' new-won freedoms," Sammin wrote. These measures, he said, presented "an unusual solution to an unusual situation, but it was also popular, constitutional, and arguably necessary for the survival of the republic." I couldn't agree more.

The Republican opposition to court packing, moreover, is hard to credit. The party has pursued the technique to shape state courts all over the country—using it successfully in Georgia and Arizona. Instead, their objection appears to reflect the belief that Republicans can do what they want because they are the only legitimate governing party. Their hope is that the capture of the Supreme Court will ensure for generations that they never have to answer to an electorate they have deliberately sought to disenfranchise.

The conservatives on the Court have signaled that they are eager participants in this project. If Barrett is confirmed, there will be as many Republicans who worked on *Bush v. Gore* on the Court as there are Democratic appointees. In that 2000 case, the Court stopped Florida from completing a recount in the presidential election, using the absurd rationale that counting votes would violate the equal protection clause of the Fourteenth Amendment. The Court infamously announced that "our consideration is limited to the present circumstances," an inadvertent confession that the ruling was so arbitrary, it could not function as a precedent. The Court's conservatives are happy to use the Reconstruction amendments to prevent votes from being counted, but not to ensure that voters are allowed to cast them.

Alito, Thomas, Gorsuch, and Kavanaugh have made no secret of their commitment to allowing Republicans to disenfranchise Democratic constituencies. On Monday, all four indicated their support for a GOP lawsuit seeking to overturn a Pennsylvania Supreme Court ruling allowing absentee ballots postmarked November 3 to be counted, even if they are received up to three days after the election. Roberts, in one of his rare breaks with the right wing of the Court, joined the liberals in a split 4–4 decision that allowed the original ruling to stand.

The message is clear: There is no constitutional amendment, no federal statute, no state law, no half-baked legal philosophy, and no federalist principle that will prevent the conservatives on the Court from upholding Republican efforts to sever Democratic constituencies from the franchise. Whether Trump wins or loses in November, they will pursue this agenda in earnest. And with Barrett on the Court, it is unlikely that even Roberts's rare defections will be an obstacle to them.

The Democratic presidential nominee, Joe Biden, has refused to rule out the possibility of expanding the Court, and Republicans have responded with considerable alarm and anguish. They sacrificed their dignity, their House majority, and their principles to elevate a clownish reality star to the presidency, a would-be strongman whose disastrous tenure has seen hundreds of thousands of deaths, the collapse of the American economy, and the nadir of American global influence. Everything Republicans have done for decades has led to this moment, and the possibility of that victory becoming Pyrrhic is terrifying for them.

That's a shame, but it does not begin to justify accepting the Supreme Court's assault on the franchise. Certainly, one party engaging in constitutional hardball while the other adheres to a set of norms that no longer exist creates perverse incentives, as Quinta Jurecic and Susan Hennessey have written. But reaching a détente between the parties is less important than preventing the Court from foreclosing on democracy for millions of vulnerable people.

Some counter-majoritarian safeguards are necessary in a democracy. Fundamental rights like freedoms of speech or worship should not be subject to a show of hands. But the GOP is seeking to use the high court to insulate itself from a changing electorate. An expanded Court would not assure Democratic Party dominance in perpetuity, but it could force the Republican Party to reach out beyond its base to the voters it has spent years demonizing. In multiracial democracies, the members of parties that lack diversity will always come to view those unlike them as an existential threat. That once was true of southern Democrats, and now it is true of the party of Trump.

Expanding the Supreme Court will not destroy the Republican Party, nor will it usher in a one-party state controlled by the Democrats. Far from threatening the health of the republic, an expanded Court promises to restore it by protecting the franchise. Should Republicans lose one of the major counter-majoritarian levers of American democracy, they may be forced to relinquish the politics of white identity that have posed the most dire threat to liberty since the nation's founding.

As Rick Hasen has written, conservative legal groups are already teeing up challenges to Section 2 of the Voting Right Act, which bars voting changes that have the purpose or effect of discriminating on the basis of race or language. That these same groups previously justified gutting the act's preclearance provision by assuring the Court that Section 2 would remain as a safeguard has not deterred them.

All the protections of the Reconstruction amendments, the basis of multiracial democracy in the United States—from birthright citizenship, to barring discrimination, to the authority of the federal government to protect the vote—will be on the chopping block. The assumption that such protections are no longer needed because America has evolved into a post-racial society has been made laughable over the past four years. Americans have already seen how an unequal society emerges when the Reconstruction amendments are rendered null; there is no reason to risk it again.

Republicans appear committed to an agenda of dispossession and disenfranchisement, entrenching minoritarian rule without the consent of the electorate. Their appointees to the high court are bound to a legal ideology that would accept all but the most obvious of Jim Crow–era voting restrictions. The Democratic Party is left with only one option if it wishes to defend the most fundamental rights of its constituents and the vitality of American democracy: Pack the Court.

We want to hear what you think about this article. Submit a letter to the editor or write to letters@theatlantic.com.

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