

Why We Shouldn't Cancel the Supreme Court

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Nothing quite says popular justice like a good old-fashioned guillotine. Across the country, protesters have dragged around makeshift guillotines as they call for “radical” and “revolutionary” changes to our constitutional system. The symbol of the French Revolution remains a chilling reminder of how revolutions devour their own. What is even more unnerving than these prop guillotines is the increase in calls for radical and revolutionary changes—including the elimination or the packing of the Supreme Court, trashing the Electoral College, and doing away with the U.S. Senate—by establishment figures on the Left. Today's attacks on the American judiciary do indeed harken back to the rhetoric that raged before the advent of “The Terror” in revolutionary France—the rhetoric that gave rise to the kind of “mobocracy” that the Founders sought to avoid by designing our constitutional order as they did.

To help understand this, it is useful to recall the fundamental differences between the American Revolution, which led to the world's oldest and most prosperous republic, and the French Revolution, which led to a short-lived, blood-soaked tyranny. Both revolutions were based on Enlightenment ideas. But America's revolution was closely tied to the political philosophy of John Locke, who held that our rights come not from the government, but from God. The institutional arrangements of the Constitution, including the independent court system, were designed to protect these God-given individual rights.

Conversely, the French Revolution was inspired in the end not by Lockean principles but by the political philosophy of Jean-Jacques Rousseau, which extolled the “general will” of the people and opposed institutions (including courts) that interfered with that will. This concept of a general or popular will served as a license for French revolutionaries like Robespierre—who declared

that “Terror is only justice: prompt, severe and inflexible . . . a natural consequence of the general principle of democracy”—to unleash a torrent of executions that would eventually come to turn on the revolutionaries themselves.

There is a radical movement rising in the U.S. with chilling parallels to the French Revolution. Demands for the elimination or packing of the Supreme Court and other measures are ripped from the French revolutionary handbook. Most worrisome is the surrender of establishment figures, particularly in promising to make radical changes to the Supreme Court. Indeed, offering the Supreme Court up to this movement has become a litmus test for Democratic presidential candidates. Former Vice President Kamala Harris, former Secretary of Transportation Pete Buttigieg, and U.S. Representative Ro Khanna have embraced it. Harris and California Governor Gavin Newsom have characterized reluctance to change the Court as “nostalgia” and have warned that “nostalgia is not working.” The platform of the increasingly influential Democratic Socialists of America calls both for dissolving the Supreme Court and for creating a unicameral legislature by eliminating the U.S. Senate.

Much of this is animated by undisguised power politics. Here’s former Attorney General Eric Holder arguing that packing the Supreme Court should be made a priority: “[We’re] talking about the acquisition and the use of power if there is a Democratic trifecta in 2028.” And Democratic strategist James Carville: “If the Democrats win the presidency and both houses of Congress, I think on day one, they should expand the Supreme Court to 13. . . . Eat our dust. Don’t run on it. Don’t talk about it. Just do it.” Harvard Law School Professor Michael Klarman has laid out an agenda by which the Democrats can guarantee that they will never lose another election but warns that “the Supreme Court could strike down everything [that agenda consists of].”

Massachusetts Senator Elizabeth Warren has characterized the Court as illegitimate because it has rendered decisions against what she sees as “widely held public opinion.” Former U.S. Representative Eric Swalwell similarly objected that the Court “defies the will of the people.” U.S. Representative Alexandria Ocasio-Cortez, who is now leading in some Democratic presidential polls, asks why we even have a Supreme Court: “How much does the current structure benefit us? . . . I don’t think it does.”

The irony is that those calling to pack the Court say it will make the Court “less partisan.” Buttigieg has suggested not only expanding the Court from nine to 15 justices, but also having each party appoint five members, with those ten justices then selecting the remaining five. Such a court would then operate like the Federal Election Commission currently does, with party loyalists voting the party line.

This way of thinking runs completely counter to our nation’s founding principles. A non-partisan, independent judiciary serves two essential purposes: it plays a vital role in preserving the separation of powers, which prevents all government power from being concentrated in one place, and it stands as a bulwark in defense of minority rights against a majority faction. To ensure its ability to perform these essential roles without being threatened by the political branches—the Congress and the executive branch—the Constitution gives federal jurists life tenure and salary protections.

Despite these structural protections, early in our nation’s history there were few professional standards governing the American court system. Courts were openly biased, with Federalist judges becoming virtual grand inquisitors of Jeffersonians under the infamous Alien and Sedition Acts passed during the presidency of John Adams. Judges and justices routinely ran for political office and openly engaged in political commentary from the bench. But this would change. The first university-based law school in the U.S. was founded in 1779 at The College of William & Mary in Williamsburg, Virginia, and America’s first independent law school was created in 1784 in Litchfield, Connecticut. Relatively quickly the partisanship that characterized the courts came to be tempered by professional standards that eschewed political associations and advocacy. Even today, regardless of the charges hurled against the Supreme Court by both the Right and the Left, what critics call partisanship is actually deep and good-faith jurisprudential differences on both ends of the Court. This was also the case when, for a period of many decades, the Court had a liberal majority. And during that period—even during the years of the Warren Court in the 1950s and ’60s, when conservative precedents were overturned in large numbers and conservatives were often outraged—there were virtually no calls to pack or eliminate the Court.

During the confirmation hearings for Neil Gorsuch in 2017, I had an exchange with a Democratic senator who rattled off a series of 5–4 decisions to show that

conservative justices were robotic partisans. I asked the senator if the four liberal justices showing the same consistency in dissent were also partisans. The reaction was disbelief. After all, the liberal justices were right in his eyes.

In reality, the attack on the Court as partisan is entirely disconnected from its actual voting record. It is a too-little-known fact that 44 percent of cases that come before the Supreme Court are decided unanimously. When you include nearly unanimous cases—those decided by 8–1 and 7–2 margins—that figure jumps to over 60 percent. It is also common for liberal and conservative justices to vote with colleagues on the opposite end of the ideological spectrum. In a case this year, for example, conservative Justices Thomas, Alito, and Kavanaugh joined liberal Justices Sotomayor and Jackson in the majority decision, while liberal Justice Kagan joined Chief Justice Roberts and Justice Barrett in the dissent.

Liberal justices from Stephen Breyer to Elena Kagan have refuted claims that today's Court is a partisan institution. Justice Kagan, as reported in *Politico*, spoke recently on this topic and “reject[ed] claims that the high court’s conservative majority is in President Donald Trump’s corner.” The fact is that the ongoing enthusiasm for packing or eliminating the Supreme Court is based less on the voting records and views of the justices than on the idea, as Senator Warren put it, that the Court should follow what she perceives as “widely held public opinion.”

For those on both ends of the political spectrum, judicial restraints on their favored policies can be frustrating or even infuriating. And sometimes, as history shows, the Court can get things wrong. On the other hand, those restraints often represent a firewall for natural rights.

Consider the attacks on free speech that came to a head during the Biden administration, when a coalition of forces in government, academia, and corporations created the largest censorship system in the history of our country. Free speech as guaranteed in the First Amendment has been understood throughout our history, almost universally among Americans, as a bedrock principle essential to all our rights. Yet there was an aggressive campaign between 2020 and 2024 to curtail free speech on the Internet and elsewhere by labeling it “disinformation,” “misinformation,” “malinformation,” or “hate speech.” Those standing in defense of free speech were dismissed, in the words of one law professor’s book, as members of a “cult of the Constitution.” This

campaign followed a trend in Europe, where speech is increasingly criminalized. But European laws never understood free speech as a natural right, and Europe's courts have never aggressively protected it.

Here in the U.S., on the other hand, one of the greatest triumphs for free speech came in the Supreme Court's 2023 decision in *303 Creative LLC v. Elenis*, which held that Lorie Smith, a Christian website designer, could refuse to provide services for a same-sex marriage. Justice Gorsuch, writing for the majority, argued that "the framers designed the Free Speech Clause of the First Amendment to protect the 'freedom to think as you will and to speak as you think.' . . . They did so because they saw the freedom of speech 'both as an end and as a means' . . . an end because the freedom to think and speak is among our inalienable human rights."

Had *303 Creative* been decided in a different way, states and cities could compel or curtail speech according to whatever their leaders viewed as discriminatory elements under public accommodations laws. Instead, the Court adopted a bright-line rule that business owners could decline to create expressive products from cakes to websites. The counter-majoritarian function of the Court worked in the *303 Creative* decision to protect natural rights. Regardless of whether it reflected the will of the Colorado majority, it upheld the right of free speech.

We are living in a time of rage. It is not the first such time in our country. Indeed, America was born in rage. It was rage that fueled the Boston Tea Party. It was righteous rage, but rage all the same. It is especially during such periods that the judiciary must stand in defense of our individual natural rights. It is also especially during such times that we must stand as a people to prevent extremists of any ideological bent from politicizing or destroying our constitutional judicial system.

Ironically, those establishment figures trying to cancel the Court today are delusional in not foreseeing that they will be undermining their own freedom and security should they succeed. They might recall the answer of Abbé Emmanuel-Joseph Sieyès, often described as the Thomas Paine of the French Revolution, to the question of what he had done during the Revolution. "I survived," he said.

The history of canceling courts is a history replete with unhappy endings. Courts are by necessity one of the first targets of revolutionaries. Following the October Revolution that brought the Bolsheviks to power in Russia, one of their first decrees was the “Abolition of Existing Legal Institutions.” Soon after came the establishment of the infamous People’s Courts. In revolution after revolution, newly-established courts carried out the purported will of the people with terrible consequences. In an age of rage, it is too often reason itself that is canceled.