

The Fight For The Supreme Court Is Just Beginning

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Brett Kavanaugh's confirmation to the Supreme Court caught the attention of progressives. (BRENDAN SMIALOWSKI via Getty Images)

Brett Kavanaugh is an associate justice of the Supreme Court, his confirmation solidifying a five-vote majority for the court's extreme conservatives. Progressives are bracing themselves for the effects of a fully empowered right-wing court, and so they should. Yet most Americans are unaware of how deeply the court has already damaged American society, even without a conservative majority.

Over the past two decades, the extremist court has resegregated schools, made it easier for abusive cops to avoid punishment, weakened protections for survivors, poisoned children, empowered racist vote suppressors and even thrown elections — including the presidency — to the Republican Party. Now, the limited restraints offered by Justice Anthony Kennedy have disappeared, and the threat is even greater.

There is, however, one difference between the past two decades and now: Progressives are finally paying attention.

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The Supreme Court has rarely been a force for progress. In its most famous and popular decisions — such as *Brown*, *Griswold* and *Obergefell* — the court largely hedged its bets and acted after social movements had already paved the way. It has rarely acted, much less acted effectively, without support from the legislative and executive branches. Of course, the court can and sometimes does promote progressive change, but it's a narrower avenue for change than many people assume. And pursuing that change in court often means investing less in other tactics because lawsuits are costly and resources are limited.

Nonetheless, progressives have waged their battles primarily before the court — clinging to what Gerald Rosenberg called *The Hollow Hope* — instead of taking issues directly to voters. Measures like Amendment 4 in Florida to restore voting rights, automatic voter registration in Alaska and right-to-work repeal in Missouri suggest that taking our issues directly to voters is effective. Across the country, direct democracy and organizing have reaped rewards, while the courts — and in particular the Supreme Court — have remained a “hollow hope.”

The costs of over-investing in this uphill legal strategy have been immense but largely unseen. Money that pays high-priced lawyers can't fund canvassers and signature collectors. And talented progressives who go to law school generally don't become organizers; many, burdened by student debt, get stuck on the corporate track, where they may well perpetuate injustice by defending corporate interests.

Meanwhile, the right, knowing that its agenda is deeply unpopular, has turned to the courts to override the popular will, aggressively filing lawsuits that will be ruled on by radical right-wing judges. And while the right has recruited and empowered armies of political operatives to wage war on behalf of Trumpist judges and judicial nominees, the left has relied largely on members of the academy. When soldiers battle scholars, the soldiers win.

Because the right has weaponized the courts, progressives must do so as well. That means more organizations like Demand Justice, with political operatives doing the dirty work, and more local organizers ready and able to pressure key senators during close confirmation votes and in response to bad court decisions.



On the eve of the Senate vote to confirm Kavanaugh as the next Supreme Court justice, activists and furious citizens march to the Supreme Court to demand that he not be confirmed. (Andrew Lichtenstein via Getty Images)

This effort must be built from the ground up because few cases reach the Supreme Court. Far-right lower court judges like the George W. Bush-appointed Judges Edith Jones of the Court of Appeals for the 5th Circuit, William Pryor of the Court of Appeals for the 11th Circuit and Andrew Hanen of the District Court for the Southern District of Texas should be the subject of activist scrutiny.

Hanen enjoined Deferred Action for Parents of Americans and Lawful Permanent Residents, nearly enjoined Deferred Action for Childhood Arrivals (the Trump administration actually advised him against it) and is one of the most anti-immigrant judges on the bench.

Jones is basically a right-wing chain email with a gavel: She once said in a speech that African-Americans and Hispanics are “prone to commit acts of violence” and she once told a liberal colleague to “shut up.”

Pryor opposes Miranda warnings, criticized the Violence Against Women Act and believes the government should be allowed to execute mentally ill people.

And we haven't even discussed Bobby Shepherd, Raymond Gruender, Edward Earl Carnes, Jerry Smith, Kyle Duncan, James Ho, Joel Fredrick Dubina and Reed O'Connor. Or birther blogger-turned-federal appeals judge John Bush. These are just a few examples of some of the most extreme right-wing judges, who should be household names in progressive circles. Unfortunately, there are many, many more.



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Progressives should be much more aggressive about stocking these lower courts, because most decisions end there; a liberal Supreme Court is less meaningful if the

Joneses and Hanens of the world have free rein. The next Democratic president should feel more outside pressure, about both the speed of nominations and identities of nominees — progressives should prepare lists of potential progressive judges just like conservatives do.

Right now, every conservative justice on the Supreme Court is a Federalist Society member and there are even more on lower courts. But not a single federal judge owes their career — and, thus, their allegiance — to the American Constitution Society, the Federalist Society's closest thing to a liberal counterpart. (I asked the ACS if there were any judges who were members of the ACS. The ACS claims that they exist but refused to name any.)

Analysis by my think tank Data for Progress suggests that progressives have messaged poorly to members of their base about exactly how the Supreme Court has made their lives miserable. Progressive presidential candidates need to take the gloves off, landing punches that are both hard and precise, and operatives should as well. The norm against attacking justices made sense when they were nonpartisan. But Kavanaugh has shown himself to be less a judge than a partisan hatchet man, and a predatory one at that. Democrats should attack him, track his approval ratings and regularly run ads against him. Ideally, Democrats would be spending millions on each Supreme Court seat both during and after confirmations fights and a few million around each major decision.



The Federalist Society presented President Donald Trump with a number of judges on lower courts that he could consider for the Supreme Court opening. Progressives haven't put the same attention into pushing judges for such roles. (ASSOCIATED PRESS)

Ultimately, the court's reputation, and thus its power, derives almost exclusively from popular and elite opinion. If Americans understood the court to be a partisan institution, they would demand that it act more modestly. The other branches of government have at least some democratic legitimacy; the court does not. Chief Justice John Roberts may be a bit more of an institutionalist than the four justices to his right, but only a bit: He did, after all, write the decisions gutting the Voting Rights Act and upholding Trump's Muslim ban, and he joined virtually all of the court's other most troubling decisions over the past decade.

Better strategic thinking about the court is a key first step, but a second step is more aggressive tactics. Progressives must put adding justices to the court on the table. While "centrist elites" may howl, unelected right-wing justices striking down every piece of progressive legislation threatens American democracy far more than does a democratically elected legislature expanding the court, which has expanded and

contracted throughout American history. Project 1/20/21, an organization I work for, is working to make this case to progressive voters.

Benches full of reactionary old white men, systematically dismantling progress, are not an inevitable product of our Constitution; they've been built by decades of conservative activism. Progressives can win this fight, but only if they understand that this is an exercise in politics, not justice.

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