Opinion | Schumer's presidential immunity fix will only make things worse

Jurisdiction-stripping is a terrible way to deal with even the worst excesses of this Supreme Court.

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No reasonable person wants the president to be a king. So, Senate Majority Leader Charles E. Schumer's No Kings Act, designed to undo the Supreme Court's ruling this year on presidential immunity, must be a good idea, right?

No. Schumer's proposed cure, endorsed by 36 of his colleagues when it was introduced earlier this month, would be worse than the disease of the court's immunity decision — a decision which, as I have written, is a travesty.

But telling the high court what kinds of cases it can and cannot hear, as Schumer's bill would do, is a dangerous and constitutionally questionable mechanism for dealing with Supreme Court decisions with which Congress disagrees.

Such jurisdiction-stripping was a bad idea when it was embraced by conservatives as a way to countermand liberal Supreme Court rulings on school prayer, abortion, busing and gay rights. Liberals understandably upset with the court today should think twice before getting behind an approach endorsed by the likes of the late Sen. Jesse Helms (R-N.C.) and conservative activist Phyllis Schlafly.

Helms, an archconservative who served in the Senate from 1973 to 2003, proposed stripping the court of its ability to hear constitutional challenges to school prayer. In 2006, Schlafly urged Congress "to pass legislation defining the jurisdiction of the federal courts so that supremacist judges will not be able to ban the Pledge of Allegiance, the Ten Commandments, the Boy Scouts, or the traditional definition of marriage as the union of a man and a woman."

Among those supporting this approach: a young Justice Department lawyer named John G. Roberts Jr. Taking on then-Assistant Attorney General Theodore B. Olson, Roberts argued that the administration should "not kowtow to the Tribes," a reference to Harvard Law School professor Laurence H. Tribe and other liberal academics who opposed conservative efforts to strip courts of jurisdiction.

Now that the tables have turned and there is a conservative supermajority on the high court, liberals are tempted by an approach they once decried. They were right the first time around. Jurisdiction-stripping is a terrible way to deal with even the worst excesses of this court, one that would invite and legitimate reprisals by Republicans unhappy with liberal precedents.

When *Roe v. Wade* was the law of the land, what would have stopped a Republican Congress, in league with a Republican president, from enacting the "No Abortion on Demand Act" free from court review? What would stop a future Republican Congress from passing the "No Gay Marriage Act" to effectively overturn the high court's 2015 decision establishing a constitutional right to same-sex marriage?

These aren't far-fetched scenarios. In 2004, the House approved measures to remove all federal courts, the Supreme Court and lower courts, from cases requiring students to recite the Pledge of Allegiance and from hearing challenges to the Defense of Marriage Act, which sought to block same-sex marriage. The bills died in the Senate, but imagine if they had passed: no Supreme Court ruling that the Defense of Marriage Act was unconstitutional, the precursor to its eventual decision in *Obergefell v. Hodges*.

Now comes Schumer (D-N.Y.) with the No Kings Act. It would establish that a current or former president or vice president "shall not be entitled to any form of immunity" from federal criminal prosecution — a position far beyond that endorsed by the Justice Department in the Trump case. All federal courts, not just the Supreme Court, would be divested of power to consider presidential immunity claims.

And that's not all. The No Kings Act purports to prevent the high court from even deciding whether the law itself is constitutional. That power would rest with the U.S. Court of Appeals for the D.C. Circuit, which conveniently has a 7-4 Democratic majority. For good measure, the law could only be overturned if its unconstitutionality is "demonstrated by clear and convincing evidence" — a departure from the ordinary standard for determining constitutionality.

How can Congress do this? The Constitution mandates that "the judicial power shall be vested in one Supreme Court," but it also provides that the court's jurisdiction is subject to "such exceptions, and under such regulations as the Congress shall make." (Congressional power over lower federal courts is even broader, because the Constitution leaves it up to Congress to create the courts in the first place.)

The exceptions clause clearly gives Congress some power to set limits on the court's jurisdiction, and the court over the years has approved certain restrictions — for instance, limits on state prisoners' ability to file petitions for habeas corpus. But it has never allowed limits that would entirely prevent the court from providing relief in a particular area.

Indeed, notwithstanding his youthful views, it's not hard to imagine the chief justice declaring that, especially when it comes to fundamental questions of how to ensure the separation of powers, Congress doesn't get the final word.

"The immunity opinion is the worst opinion in my lifetime, but this is even worse," Yale Law School professor Akhil Amar told me. "It not only purports to strip jurisdiction, it purports to tell courts to lock people up without considering their constitutional claims."

As a practical matter, the No Kings Act isn't passing anytime soon. It's more messaging — a showy protest against the *Trump v. United States* decision — than a serious threat. But that could change, depending on the election results and, if Democrats retain control of the Senate, their willingness to do away with the filibuster.

And the immunity ruling won't be the last time the justices issue a decision that infuriates congressional Democrats. Already, there have been calls from Rep. Alexandria Ocasio-Cortez (D-N.Y.) and other progressives to oust the Supreme Court from deciding cases on abortion.

Is this really what we want? As Georgetown University law professor Stephen Vladeck has noted, “There’d be little point in having an independent judiciary with the power to strike down acts of the democratically elected branches if those branches could take that power away at any time and for any reason.”

The strongest argument in favor of invoking this power is that it is, at least theoretically, available and preferable to even more unwise alternatives, such as expanding the size of the court. Other solutions, such as imposing term limits on justices, would take years to produce an effect, even if they could be implemented. Must liberals unilaterally disarm in the face of a court that aggressively disregards precedent and misreads the Constitution?

This is frustrating, but the better answer is yes. Adopting situational ethics — court-stripping is bad when Republicans propose it, dandy when pushed by Democrats — rarely produces good outcomes. Getting rid of the filibuster for lower court judges was a bad idea when Democrats adopted it, and a bad idea when Republicans expanded it to the high court.

The current, unbalanced state of the Supreme Court has yielded terrible outcomes, with consequences that are both immediate and long-lasting. That is going to take time, as well as Democratic electoral victories, to fix. Patience and restraint are difficult virtues to practice, but that is what is called for here.