GUEST ESSAY

The Supreme Court Has Grown Too Powerful. Congress Must Intervene.

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By Nikolas Bowie and Daphna Renan
Mr. Bowie and Ms. Renan are professors at Harvard Law School. They are the authors of the forthcoming book "Supremacy: How Rule by the Court Replaced Government by the People."

The Supreme Court's stunning decision this summer interpreting the Constitution to give presidents broad immunity from federal criminal laws is only the latest of its many opinions undermining Congress's efforts to protect constitutional democracy, from its 19th-century invalidation of federal civil rights laws to its more recent curbing of the Voting Rights Act.

Today even Americans who decry these opinions largely accept the idea that the court should have the final say on what the Constitution means. But this idea of judicial supremacy has long been challenged. And the

court's immunity decision has set in motion an important effort in Congress to reassert the power of the legislative branch to reject the court's interpretations of the Constitution and enact its own.

"Make no mistake about it: We have a very strong argument that Congress by statute can undo what the Supreme Court does," Chuck Schumer, the Senate majority leader, said recently as he announced the introduction of the No Kings Act. The measure declares that it is Congress's constitutional judgment that no president is immune from the criminal laws of the United States. It would strip the Supreme Court of jurisdiction to declare the No Kings Act unconstitutional. Any criminal actions against a president would be left in the hands of the lower federal courts. And these courts would be required to adopt a presumption that the No Kings Act is constitutional.

It might seem unusual for Congress to instruct federal courts how to interpret the Constitution. But the No Kings Act follows an admirable tradition, dating back to the earliest years of the United States, in which Congress has invoked its constitutional authority to ensure that the fundamental law of our democracy is determined by the people's elected representatives rather than a handful of lifetime appointees accountable to no one.

Should the No Kings Act pass, it would take its place among a constellation of occasions when Congress protected its more democratic interpretation of the Constitution.

As Congress considers the No Kings Act, it should not just embrace the presumption that its laws are constitutional but also institutionalize it.

The presumption that laws passed by Congress are constitutional is an old idea, one the court itself once avowed. Even after 1803, when the court took the position in Marbury v. Madison that it had the power to disagree with Congress about the constitutionality of federal legislation, the court spent the next five decades deferring to Congress about the meaning of the Constitution. It was not until 1857 that the court attempted to override Congress's constitutional judgment in a case, Dred Scott v. Sandford, that rejected Congress's power to limit the spread of slavery. The court's claim of supremacy inspired Abraham Lincoln to object 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."

As the abolitionist Frederick Douglass explained, the presumption that federal laws are constitutional reflects the fact that a bill becomes law only after it has been debated and passed by Congress and considered and signed by the president — all of whom, like judges, take an oath to support the Constitution. As the national legislature makes national policy, it necessarily determines what kinds of laws are constitutionally appropriate. Some might disagree about the constitutionality of a law, but regular elections give voters a say among competing interpretations. Like many of his contemporaries, Douglass argued that any judge who attempts to defy such a statute should have "strong, irresistible and absolutely conclusive" reasons for doing so.

In recent years, however, the court has seemed particularly uninterested in forbearance, as five or six justices routinely upend Congress's longstanding interpretations of the Constitution. For example, nearly 50 years after Congress and the president first decided that the Voting Rights Act of 1965 was appropriate legislation and after several more Congresses, presidents and Supreme Court majorities agreed that the law was constitutional, five justices in 2013 invalidated a crucial provision of the law.

Over 100 years after Congress and the president first determined that the integrity of federal elections required limiting the power of corporations to overwhelm voters by spending from their coffers, five justices in 2010 struck down Congress's bipartisan campaign finance reform, ruling that the government may not ban political spending by corporations in candidate elections.

Some of the challenges facing our democracy today are a consequence of the court disabling federal laws like those.

Though the court has declared itself supreme in constitutional interpretation, the only thing the Constitution explicitly allows the Supreme Court to do is exercise "the judicial power." The Constitution does not define this phrase. Nor does anything about the phrase inherently give judges the power to review acts of Congress. In Britain, the same phrase has long referred to judges' power to enforce, not second-guess, the laws passed by Parliament.

While the Constitution leaves the Supreme Court's power ambiguous, it empowers Congress to pass and the president to sign whatever laws they think are "necessary and proper for carrying into execution" all the powers vested by the Constitution in arms of government like the Supreme Court. The Constitution's text envisioned that Congress might decide to create federal trial courts, empowering them to decide certain cases and controversies. It also envisioned that Congress might make "regulations" and "exceptions" to the Supreme Court's appellate jurisdiction.

Congress has done all of that. It has always determined — and at times changed — the power of the Supreme Court and the lower federal courts to decide constitutional questions.

The very first Congress set up detailed rules for federal courts, telling them which cases they were allowed to decide, when and how they could reach those decisions and what kinds of orders they were allowed to issue. When Thomas Jefferson was worried that federal courts were too partisan, he signed laws passed by Congress that abolished circuit courts and effectively canceled the Supreme Court's next term.

When the Dred Scott court said that Congress could not ban the spread of slavery in federal territories, Lincoln signed a law in 1862 that did just that. When it looked as though the post-Civil War court would try to nullify Congress's Reconstruction-era attempt to create multiracial democracy in the South, Congress enacted a law that stripped the court of the power to review its statute. And when the court later refused to enforce federal laws

that promoted a more just political economy and banned child labor, Congress and the president ultimately compelled the court to change its mind by threatening to rein in the court or increase the number of justices.

The purpose of such legislation was not to evade the Constitution. To the contrary, it was to allow the people and their representatives to enforce their interpretation of the Constitution against a small group of judges who would defy it.

Previous justices understood that their power comes from Congress and the public's acceptance of how they exercise it. Shortly before Robert H. Jackson joined the Supreme Court in 1941, he testified before Congress to caution against judicial overreach. He observed that it is "a responsibility of Congress to see that the court is an instrumentality in the maintenance of a just and constitutional government and that it does not become an instrumentality for the defeat of constitutional government."

Jackson was uneasy about the power the court had arrogated to itself after the Civil War to declare an act of Congress unconstitutional. Echoing Douglass, he wrote that if the court were to exercise such a power, it should do so exclusively in a clear case — what Jackson described as "a case in which the incompatibility of the statute with the provisions of the Constitution was beyond honest dispute."

The No Kings Act gestures at this standard with the requirement that courts adopt it when they interpret Congress's command to treat the president as any other public official.

But as Congress debates the bill — and as future Congresses debate other laws to promote the general welfare — Congress should go further to institutionalize the idea that the court "not become an instrumentality for the defeat of constitutional government."

To do so, Congress could pass a statute declaring that when asked to apply a federal law, a judge must do so unless the judge believes the law is unconstitutional beyond honest dispute. To ensure there is no honest dispute, Congress could require the judge to enforce the law unless the Supreme Court certifies by a supermajority or unanimous vote that there are no reasonable grounds to defend it. In this way, Congress would require the justices to show, by their votes, that the incompatibility of the law with the Constitution is beyond honest dispute.

There are other approaches to reconciling the role of the court with representative democracy — from allowing Congress to override specific constitutional rulings to eliminating constitutional review of congressional legislation more generally. Many of these have been proposed across American history and imposed by other Western democracies like Canada and Britain. The No Kings Act would be no panacea. But it would be a start.

Critics of these sorts of measures have charged Congress with attempting to allow a tyrannical majority to ignore the Constitution. They argue that the Supreme Court's power to substitute its own interpretation of the Constitution over that of a law passed by Congress and signed by the president is essential for protecting political and racial minorities.

But the history of the court's power proves otherwise. The federal laws that the court has invalidated are often precisely those intended to protect political and racial minorities. By contrast, the court has typically upheld federal laws that harm immigrants, Native Americans or political dissidents. Overcoming such harmful laws has taken politics, not judicial supremacy. Meanwhile, judicial supremacy grants voters no realistic remedy for harmful Supreme Court decisions.

Importantly, statutes protecting federal law would preserve the court's ability to check state laws that defy federal constitutional commitments, as the court did in Brown v. Board of Education when it enforced a federal statute to find racial segregation by states unconstitutional. While the court's defiance of laws enacted by Congress and the president puts an unelected tribunal at the top of our democracy, its enforcement of federal law secures national authority against state nullification.

For this reason, members of the civil rights bar, the labor movement, Congress, the judiciary and the academy who have historically opposed the court's supremacy over Congress have often supported federal laws that invite courts to review state actions.

The No Kings Act is well grounded in our constitutional tradition. Rather than allow any president or justices to hold themselves above the law, Congress should force them all to live by it.

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