

Should we use conservatives' ideas to fight the current threat to democracy and the rule of law? Can we afford not to?

For decades, conservatives have been obsessed with the idea of a runaway federal government crushing everything in its path. They've been successful in promoting ideas to rein in Leviathan, at a time when by our lights the government was behaving very reasonably.

But now we really do have a rampaging federal government. Conservative ideas could be very useful tools, but we may still think they're wrong in principle. What to do? In my view, given the seriousness of the threat, we can't afford to be squeamish.

What conservative ideas do I have in mind? In terms of administrative agencies, conservative Justices have come up with a couple of legal doctrines to limit agency discretion. One is called the major question doctrine. It creates a strong presumption that Congress doesn't use vague language to empower agencies to make radical changes. The other doctrinal move was overruling the *Chevron* doctrine and emphasizing that courts must make their own judgments about the legality of administrative actions rather than deferring to the executive branch. Although it's not a legal doctrine, the insistence that all agency actions must pass cost-benefit analysis is another restraint on agency discretion. These ideas could be used against some of Trump's abuses of federal statutes to impose his wildly ideological policies.

The Court has also come up with some doctrines to protect states against the federal government. One is the anti-commandeering doctrine, which says that the federal government can't force the states to help administer federal laws. We are seeing a federal effort to do that with Trump's drastic deportation program. Another doctrine prohibits the federal government from using funding conditions to coerce state governments. That one was used to limit Medicaid expansion under Obamacare. But it could also help prevent Trump from extorting states to make policy changes that he desires.

Do we legitimize these ideas by using them ourselves? Maybe a little. Does it matter? Probably not. The six conservative Justices aren't going to rethink their ideas if we only stay consistent in showing our disapproval. They really don't care. In addition, many of these legal doctrines do have a grain of sense; the problem is that conservatives have applied them too rigidly and have often misapplied them. I

don't think we lose too much by using them while arguing for modifications. If these arguments don't work, at least the courts, by rejecting them, would have to narrow the underlying doctrines.

And besides, if we don't hang on to democracy and the rule of law right now, these disputes over legal doctrine won't mean a thing later anyway.