

Supreme Court as Superweapon: A Response to Epps & Sitaraman

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ABSTRACT. Is the Supreme Court’s legitimacy in crisis? Daniel Epps and Ganesh Sitaraman argue that it is. In their Feature, *How to Save the Supreme Court*, they suggest legally radical reforms to restore a politically moderate Court. Unfortunately, their proposals might destroy the Court’s legitimacy in order to save it. And their case that there *is* any crisis may fail to persuade a reader with different legal or political priors. If the Supreme Court needs saving, it will be saving from itself, and from too broad a conception of its own legal omnipotence. A Court that seems unbound by legal principle is too powerful a weapon to leave lying around in a democracy; we should start thinking about disarmament.

INTRODUCTION

In the quiet, untroubled days of early 2018, before Justice Anthony Kennedy retired, conservative writer Michael Brendan Dougherty published the essay *Anthony Kennedy Can’t Be Allowed to Die*.¹ No fan of the Justice’s jurisprudence, Dougherty nonetheless saw Justice Kennedy as the linchpin of America’s political order. His “mercurial” decisions handed partisans on both sides “some victories in between their defeats”; they slowed the pace of political combat and even lent “the savor of legitimacy to a closely divided country.”² But were Justice Kennedy replaced, and the Supreme Court perceived as “the cat’s-paw of one party,” both

1. Michael Brendan Dougherty, *Anthony Kennedy Can’t Be Allowed to Die*, NAT’L REV. (Jan. 23, 2018, 6:15 PM), <https://www.nationalreview.com/2018/01/anthony-kennedy-swing-vote-supreme-court-we-need-him-alive> [https://perma.cc/R4R9-PAJQ].

2. *Id.*

sides might reach “for extraordinary measures” – court-packing, nullification, or worse – that might collapse “what’s left of our constitutional regime.”³

Dougherty had reason to worry. On the right, the 2016 campaign was marked by claims that Hillary Clinton would doom the Republic.⁴ Backed by a comfortable majority of Justices, an imperial Clinton Administration could do *anything* – a disaster from which conservatism would never recover.⁵ Not all legal conservatives believed this, of course,⁶ but enough Americans did to help elect Donald Trump as President: more than a quarter of his supporters named the Court as their “most important” issue.⁷

After Justice Kennedy’s retirement, and after the wrenching confirmation process of Justice Brett Kavanaugh, a similar dynamic emerged on the left. Justice Kavanaugh’s first term was relatively free of fireworks, producing more narrow victories for liberals than for conservatives.⁸ But the politics surrounding the Court grew only sharper, with claims of “stolen” seats and calls for court-packing,⁹ partly out of fear that a conservative majority might undo *anything* progressives achieve.¹⁰ *Après Kennedy, le déluge.*

No President of either party would appoint a Justice Kennedy today. But in *How to Save the Supreme Court*, Daniel Epps and Ganesh Sitaraman suggest

3. *Id.*

4. Publius Decius Mus [Michael Anton], *The Flight 93 Election*, CLAREMONT REV. BOOKS (Sept. 5, 2016), <https://www.claremont.org/crb/basicpage/the-flight-93-election> [<https://perma.cc/W3RY-EUJ>].

5. Hugh Hewitt, Opinion, *It’s the Supreme Court, Stupid*, WASH. EXAMINER (July 31, 2016, 5:00 PM), <https://www.washingtonexaminer.com/its-the-supreme-court-stupid> [<https://perma.cc/GQ34-JENF>].

6. See *2016 Statement*, ORIGINALISTS AGAINST TRUMP, <https://originalistsagainstrump.wordpress.com/2016-statement> [<https://perma.cc/NDL3-XXBR>].

7. Philip Bump, *A Quarter of Republicans Voted for Trump to Get Supreme Court Picks – and It Paid Off*, WASH. POST (June 26, 2018), <https://www.washingtonpost.com/news/politics/wp/2018/06/26/a-quarter-of-republicans-voted-for-trump-to-get-supreme-court-picks-and-it-paid-off> [<https://perma.cc/L8JA-KA9Y>].

8. Kimberly Strawbridge Robinson, *SCOTUS by the Numbers: Liberals Score in More Close Cases*, BLOOMBERG L. (June 28, 2019, 3:01 PM), <https://news.bloomberglaw.com/us-law-week/scotus-by-the-numbers-liberals-score-in-more-close-cases> [<https://perma.cc/7HVC-JULK>].

9. Philip Elliott, *The Next Big Idea in the Democratic Primary: Expanding the Supreme Court?*, TIME (Mar. 13, 2019), <https://time.com/5550325/democrats-court-packing> [<https://perma.cc/5HP8-TV8R>].

10. Dylan Matthews, *Court-Packing, Democrats’ Nuclear Option for the Supreme Court, Explained*, VOX (Oct. 5, 2018, 3:49 PM EST), <https://www.vox.com/2018/7/2/17513520/court-packing-explained-fdr-roosevelt-new-deal-democrats-supreme-court> [<https://perma.cc/GXB6-7DUE>].

remaking the Court in something like Justice Kennedy’s image.¹¹ Their radical, Constitution-bending reforms are ultimately designed to produce middle-of-the-road, Kennedyesque decisions. The authors are smart, creative, and dedicated to making the system better; the legal system could use more such trial balloons. Yet their proposals – rotating the Court’s membership biweekly or requiring a partisan balance for its Justices – are unfortunately ill-conceived. They might end up destroying the Court’s legitimacy in order to save it.

Indeed, the strangest thing about these proposals is the view that the Court needs saving at all. The last three years reflect not “an unprecedented legitimacy crisis,”¹² but a partisan realignment: something that might have occurred nearly thirty years ago, had circumstances been slightly different. That it *seems* like a crisis to many people is itself reflective of deep problems in our legal culture, which too often looks to judges for political guidance rather than for the decision of cases under law.

Maintaining an uneasy peace among warring factions is not, as Dougherty pointed out, the Court’s actual job.¹³ Justice Kennedy himself famously claimed the role, calling in *Planned Parenthood of Southeastern Pennsylvania v. Casey* for “the contending sides of national controversy to end their national division.”¹⁴ Needless to say, that did not work; there are no injunctions to stay proceedings in the court of public opinion. And any institution that seemed capable of issuing them – one powerful enough, and free enough from preexisting legal rules, to respond to the felt exigencies of the time – is an institution that political actors cannot afford to leave uncaptured. A Court that can do just *anything* is too powerful a superweapon to leave lying around in a democracy; sooner or later, someone is bound to pick it up. Rather than work to put “moderates” at the controls, perhaps we should start thinking about disarmament.

I. THE LOTTERY

Epps and Sitaraman offer two proposals to place the Supreme Court “above politics.”¹⁵ The first is the “Supreme Court Lottery,” a form of rotation in office. It would staff the Court with a new nine-judge panel every two weeks, randomly selected among federal appellate judges (all of whom might first have to be

11. Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 *YALE L.J.* 148, 150 (2019).

12. *Id.* at 153.

13. Dougherty, *supra* note 1.

14. 505 U.S. 833, 867 (1992) (O’Connor, Kennedy & Souter, JJ.) (plurality opinion).

15. Epps & Sitaraman, *supra* note 11, at 151.

renominated and reconfirmed).¹⁶ The authors hope this rotation would reduce the temperature of any one appointment battle, “prevent the creation of cults of personality around the Justices,” and encourage “more minimalistic, narrow, deferential decisions.”¹⁷

These goals are important ones, but the Lottery pursues them at a high risk of disaster. The basic problem is one of math. Even a perfectly fair lottery across a perfectly balanced appellate bench would not produce a balanced Supreme Court. Random chance would yield a partisan lineup of 7-2 in more than a sixth of all panels, and 6-3 in more than half.¹⁸ So the authors add two patches to the system: a five-Justice cap on same-party appointees for each panel, and a 6-3 supermajority requirement for overturning acts of Congress.¹⁹ These are tails that wag the dog: the briefly discussed patches are far more important than their underlying proposal.

To start with, the five-Justice cap means that Justices appointed by different Presidents would have different opportunities to serve on the Court, and that Democratic and Republican Presidents would have different authorities to staff it. Had Adlai Stevenson won the 1952 election, for example, his appointees would have competed for the same five slots with every circuit judge from the previous twenty years, while President Eisenhower’s appointees would have waltzed into One First Street. Is limiting the Justices’ opportunity to hear cases, depending on which Presidents are subsequently elected, consistent with the guarantee that they “shall hold their Offices during good Behaviour”?²⁰ (Could Congress impose a *one-Justice* cap for whichever party were out of power?)

Constitutionality aside, the political consequences of the cap are just as uncertain. A partisan-balance rule hard-coded for a two-party system can be shattered by the emergence of third parties, or by the borderline-plausible relabeling of existing ones. If the GOP rebranded as the “American Party,” it could campaign on a promise of appointing new judges who would be free of the cap, unlike the still-serving Democratic appointees. President Trump has appointed

16. *Id.* at 181.

17. *Id.* at 183.

18. See *Chance of at Least Seven Heads in Nine Coin Tosses*, WOLFRAMALPHA, <https://www.wolframalpha.com/input/?i=chance+of+at+least+seven+heads+in+nine+coin+tosses> [<https://perma.cc/V7L5-YE4L>] (finding an 8.98% chance for either direction); *Chance of at Least Six Heads in Nine Coin Tosses*, WOLFRAMALPHA, <https://www.wolframalpha.com/input/?i=chance+of+at+least+six+heads+in+nine+coin+tosses> [<https://perma.cc/5JMD-D6NJ>] (finding a 25.4% chance for either direction).

19. Epps & Sitaraman, *supra* note 11, at 181-82.

20. See U.S. CONST. art. III, § 1.

roughly a quarter of the federal appellate bench since January 2017,²¹ so this is no minor detail.

The 6-3 supermajority rule is bolder still, and more likely to violate the Constitution. Congress has power to make laws “necessary and proper for carrying into Execution” the judicial power,²² as well as to prescribe “Regulations” for the Court’s appellate jurisdiction.²³ So Congress can require a quorum for the Court to act,²⁴ and *maybe* it can displace the common-law majority-voting rule, requiring a supermajority to enter orders or to disturb judgments on appeal.²⁵ Yet can it pick and choose among different *substantive holdings*—requiring a supermajority to express one legal conclusion, but letting a minority of Justices bind the Court to another? That would not carry the judicial power into execution, so much as control its exercise. Congress can supply statutory rules of decision, but it cannot tell the courts what to think about the law.²⁶ (Could the next Congress require 9-0 votes to overturn environmental regulations or abortion laws? The authors do not say.)

A supermajority rule is not some neutral intervention that merely gets the Court out of our hair. It shifts power to *Congress* in particular: it privileges federal statutes from ordinary judicial review, and it weakens individual rights, along with the independent authority of the President and the states. Applying the rule to state laws too, as the authors briefly suggest,²⁷ is entirely unworkable: should two states claim power over the same question,²⁸ or should both Congress and a state do so,²⁹ a 5-4 Court would be unable to rule either way. Even as to federal statutes, the rule creates severe incentives for misdirection: a strained constitutional-avoidance holding needs only five votes, while reading a statute fairly and striking it down takes six. A supermajority requirement thus remakes a substantial part of our legal order simply to avoid the unintended consequences of *some other* attempt at reform. And it does much more damage to our traditions of

21. See Carrie Johnson, *Trump’s Impact on Federal Courts: Judicial Nominees by the Numbers*, NPR (Aug. 5, 2019, 5:01 AM), <https://www.npr.org/2019/08/05/747013608/trumps-impact-on-federal-courts-judicial-nominees-by-the-numbers> [<https://perma.cc/SHP5-NDND>].

22. U.S. CONST. art. I, § 8, cl. 18.

23. *Id.* art. III, § 2, cl. 2.

24. See 28 U.S.C. § 1 (2018).

25. Cf. *United States v. Ballin*, 144 U.S. 1, 6 (1892) (stating “the general rule of all parliamentary bodies” that “the act of a majority of the quorum is the act of the body”); *Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107, 112 (1869) (“If the judges are divided, the reversal cannot be had, for no order can be made. The judgment of the court below, therefore, stands in full force.”).

26. See *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1872).

27. Epps & Sitaraman, *supra* note 11, at 182 & n.131.

28. See, e.g., *Franchise Tax Bd. v. Hyatt (Hyatt II)*, 136 S. Ct. 1277 (2016).

29. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

separation of powers, federalism, and individual rights than would the appointment of a few conservative Justices.

Is the Lottery worth all this headache? The authors say a randomly chosen Court would be more cautious, its Justices cowed by their temporary service.³⁰ But ephemeral tenure might also encourage the Justices to get their licks in while they can—especially on statutory or administrative questions, which are exempt from the supermajority rule. Empirical evidence suggests that short time horizons tend to harm cooperation, not help it.³¹ And appellate judges already pay less attention to the views of Justices who have left the bench;³² why would they give any more deference to these mayflies? A Supreme Court Lottery might produce narrow and deferential decisions, just as the authors expect; or it might produce a judicial goat rodeo, with wild and unpredictable swings in doctrine every two weeks. Who can tell? Plans for fundamental government reform should not leave this much up to chance.

II. THE BALANCED BENCH

The authors' other proposal is the "Balanced Bench."³³ The Court would have ten permanent Justices—five Democrats and five Republicans—who would invite five other federal judges to sit by designation for limited terms. Because both sides would have to agree, the Justices might choose at least "one moderate (or at least ideologically unpredictable) Justice whose vote could break ties"³⁴: the second coming, one imagines, of Justice Kennedy.

The proposal is intriguing, and it might succeed at producing a mushy-middle Court. (Though who fills the permanent seats? If a Republican Justice dies during a Democratic administration and is replaced with the equivalent of a Justice John Paul Stevens, all the ideological battles over control of the Court come right back.) Even if it works, however, the plan comes with serious costs. Permanently labeling certain Justices as Democrats or Republicans—making their party membership the very *condition* of their holding their seats—raises rather than lowers the salience of partisanship. It undermines, rather than supports, the authors' "very idea of law itself, as an enterprise separate from politics."³⁵

30. Epps & Sitaraman, *supra* note 11, at 183-84.

31. Matthew Embrey et al., *Cooperation in the Finitely Repeated Prisoner's Dilemma*, 133 Q.J. ECON. 509, 511 (2018).

32. Stuart Minor Benjamin & Georg Vanberg, *Judicial Retirements and the Staying Power of U.S. Supreme Court Decisions*, 13 J. EMPIRICAL LEGAL STUD. 5 (2016).

33. Epps & Sitaraman, *supra* note 11, 193.

34. *Id.* at 194.

35. *Id.* at 151.

Existing partisan-balance requirements have their own issues, but they generally do not function as political spoils systems. As in the authors' Lottery proposal, they often cap the number of appointees of the same party.³⁶ This mostly works in practice, because neither Republicans nor Democrats really want the Greens or the Constitution Party on the Federal Election Commission. But Presidents might be happy to nominate such people to the Supreme Court, where they might be even *more* reliable votes for their ideological bloc. By contrast, requiring five Democrats and five Republicans on the Court would render all independents and minor-party members statutorily ineligible for office. Maybe they were unlikely to have been appointed anyway; still, inscribing that requirement in statute would offend our traditions of free speech and association.

Alternatively, the authors suggest requiring the President to choose from lists provided by a bipartisan commission or Senate leaders.³⁷ This requirement plainly violates the Appointments Clause, letting the commission or the Senate seize the President's power to "nominate . . . Judges of the supreme Court."³⁸ The authors note that a similar system is used for some District of Columbia courts,³⁹ but that is a non sequitur, as territorial judges do not wield the "judicial Power of the United States."⁴⁰ Officers of a territorial government may or may not be "Officers of the United States," whom the President has exclusive power to nominate.⁴¹ But "Judges of the supreme Court" certainly are.

The authors believe they "have solid responses" to these constitutional objections.⁴² Yet they are willing to advance proposals they see as "*plausibly* constitutional," notwithstanding the "significant risk that the Supreme Court itself would strike down reform on constitutional grounds."⁴³ As constitutional crises go, a dispute over the Court's lawful membership seems like a worst-case

36. *E.g.*, 52 U.S.C. § 30106(a)(1) (2018) ("No more than 3 members of the [Federal Election] Commission appointed under this paragraph may be affiliated with the same political party.").

37. Epps & Sitaraman, *supra* note 11, at 204.

38. U.S. CONST. art. II, § 2, cl. 2.

39. Epps & Sitaraman, *supra* note 11, at 204.

40. U.S. CONST. art. III, § 1; *see* *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 546 (1828).

41. U.S. CONST. art. II, § 2, cl. 2; *see* *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 915 F.3d 838 (1st Cir. 2019), *cert. granted*, 139 S. Ct. 2735 (U.S. June 20, 2019) (No. 18-1334); William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. (forthcoming 2020) (manuscript at 15-20), <http://ssrn.com/id=3194945>; Will Baude, *Keeping PROMESA?*, VOLOKH CONSPIRACY (June 24, 2019, 4:25 PM), <https://reason.com/2019/06/24/keeping-promesa> [<https://perma.cc/9UMM-ME7Q>].

42. Epps & Sitaraman, *supra* note 11, at 185.

43. *Id.* at 171.

scenario: imagine standoffs outside the Court building, contests for the loyalty of the Supreme Court Police, and so on. (The authors are uncertain whether the old Court or the reformed one would have authority to hear these challenges;⁴⁴ if *they* cannot tell, how will we?) So the authors encourage Congress to add severability clauses that would pack the Court or strip its jurisdiction if it rules against their reforms. In other words, the authors would employ the very devices they decry as potentially “damaging the rule of law”⁴⁵ in order to bludgeon the Justices into accepting “constitutional arguments that are less than bullet-proof.”⁴⁶ If legitimacy is the goal, this cure seems worse than the disease.

III. LEGITIMACY

One might wonder if the game is worth the candle. If saving the Court means running such risks, are we sure that the Court needs saving? Is there any “legitimacy crisis” at all?⁴⁷ The authors contend that there is, but their case may fail to persuade a reader with different legal or political priors.

“Legitimacy” is a word of many meanings. The authors are most concerned with the Court’s “sociological” legitimacy—the “prevailing public attitudes” toward the Court as an institution,⁴⁸ and especially the public’s willingness to accept a judicial settlement of contested issues.⁴⁹ On one broad review of the empirical literature, however, we simply know very little about what promotes or undermines this kind of respect for the courts.⁵⁰ That weakens the case for radical reform.

Indeed, from the available data, it’s hardly clear that the public has lost much confidence in the Court. Even after the nominations of Justices Gorsuch and Kavanaugh, polls suggest that trust in the Court has remained largely the same over

44. *Id.* at 171 n.90.

45. *Id.* at 153.

46. *Id.* at 171.

47. *Id.* at 153.

48. *Id.* at 151 n.4 (quoting RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* 21 (2018)).

49. *Id.* at 160–62.

50. Michael J. Nelson & James L. Gibson, *U.S. Supreme Court Legitimacy: Unanswered Questions and an Agenda for Future Research*, in *ROUTLEDGE HANDBOOK OF JUDICIAL BEHAVIOR* 132, 141–44 (Robert M. Howard & Kirk A. Randazzo eds., 2017).

the last decade;⁵¹ its approval rating may even have gone *up*.⁵² Perhaps these crude measures overlook deeper trends or longer-term declines – but the past thirty years have seen declining trust in many American institutions, and the Supreme Court is in better shape than some.⁵³ Regardless, a *post-2016* legitimacy crisis *among the general public* ought to show up somewhere in the general data, and not just in the channels of liberal opinion.⁵⁴

So what explains the *sense* of crisis that underlies the calls for radical reform? Consider a few alternative explanations:

Partisanship. The current Court is the first in many years in which party labels and judicial ideology are fully aligned.⁵⁵ Yet this is a distinction without a difference. Why should one believe, per Lee Epstein and Eric Posner, that the Court will *now* “be seen by the public as a party-dominated institution,”⁵⁶ if the general public has no idea who appointed Justice David Souter, let alone Justice James McReynolds? When ordinary Americans think about the 5-4 vote in *District of Columbia v. Heller*,⁵⁷ do they remember that two Republican appointees were in dissent (Justices Stevens and Souter), or do they just think of the Court as split 5-4 along the usual lines? The judicial philosophies are what matter, not the party labels.

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51. See GALLUP, *Confidence in Institutions*, <https://news.gallup.com/poll/1597/confidence-institutions.aspx> [<https://perma.cc/VH2M-5B3Q>] (showing, from 2009 to 2019, virtually no change in three categories of trust, with a “Great deal” or “Quite a lot” of trust, “Some” trust, or “Very little” or “None” moving from 39/41/18 to 38/40/21).
52. Compare Pew Research Ctr., *Supreme Court, US*, POLLING THE NATIONS (Jan. 24, 2019), http://poll.orpub.com/document.php?id=polls_05012019.out_992&type=hitlist&num=0 [<https://perma.cc/C4ZN-8Q4K>] (demonstrating an approval/disapproval rating of 71/23), with Pew Research Ctr., *Supreme Court, US*, POLLING THE NATIONS (May 21, 2009), http://poll.orpub.com/document.php?id=questo9.out_16671&type=hitlist&num=33 [<https://perma.cc/KZW2-BYJX>] (demonstrating an approval/disapproval rating of 64/21).
53. Compare, e.g., Amelia Thomson-DeVeaux & Oliver Roeder, *Is The Supreme Court Facing a Legitimacy Crisis?*, FIVETHIRTYEIGHT (Oct. 1, 2018, 6:00 AM), <https://fivethirtyeight.com/features/is-the-supreme-court-facing-a-legitimacy-crisis> [<https://perma.cc/V2DC-XW25>] (showing a decline in trust since late 1980s, based on the data in GALLUP, *supra* note 51), with GALLUP, *supra* note 51 (showing a substantially greater decline in trust in “[t]he church or organized religion”).
54. Cf. Epps & Sitaraman, *supra* note 11, 159 n.44 (citing opinion pieces by Bruce Ackerman and Erwin Chemerinsky); see also *id.* (citing Tara Leigh Grove, *The Supreme Court’s Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2240 (2019) (reviewing FALLON, *supra* note 48) (noting criticisms leveled by various Democratic officeholders)).
55. *Id.* at 156.
56. *Id.* (quoting Lee Epstein & Eric Posner, *If the Supreme Court Is Nakedly Political, Can It Be Just?*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/opinion/supreme-court-nominee-trump.html> [<https://perma.cc/L497-C3VE>]).
57. 554 U.S. 570, 572 (2008) (syllabus).

Polarization. Judicial philosophies do seem farther apart than in the past. The authors fear that the conservative majority will employ “doctrinal theories that are at least open to serious question” to “strike down laws that progressives favor.”⁵⁸ But as they recognize,⁵⁹ the main legal question hanging over the Kavanaugh hearings was whether the Court would overturn *Roe v. Wade*.⁶⁰ And whatever one thinks of its merits, such a decision would presumably employ long-familiar theories to *uphold* various laws.⁶¹ By shifting attention to state legislatures, a reversal of *Roe* seems unlikely to make the Court, at least over the long term, “even more of a political focal point than it is right now.”⁶² In any case, one might wonder why the legal academy failed to perceive a similar crisis of polarization in 2016, when many people expected a *liberal* Court, *also* split 5-4 on party lines, to use theories “at least open to serious question” to “strike down laws” that others favor. Judge Merrick Garland enjoys a moderate reputation, but standard measures of ideology show him to be much more liberal than Justice Kennedy is conservative—leading the *New York Times*, after his nomination, to anticipate “the most liberal Supreme Court in 50 years.”⁶³ Had this come to pass, would it not have led “half the country,” as the authors put it, “[to see] the majority of Justices as political agents working for the other team”?⁶⁴ Does polarization only matter in one direction?

Process. The last three confirmation battles were surely unusual. The Senate declined, sans hearing, to consent to Judge Garland’s appointment—and then it consented, under circumstances of great controversy, to those of Justices Gorsuch and Kavanaugh. To some, what happened in these confirmation proceedings should be taken to invalidate their ultimate outcomes.⁶⁵ But these were ordinary vacancies that had to be filled, and the Senate’s decisions about how to fill them were decisions of substance, as well as of procedure: it had to make a judgment about who should hold the office of Associate Justice and about what kind of job the nominee might do there. If the Senate’s judgments were wrong, even seriously wrong, that might be a ground for passionate objection, but usually not for charges of *illegitimacy*. The Senate was surely the proper body to

58. Epps & Sitaraman, *supra* note 11, at 168.

59. *Id.* at 160-61.

60. 410 U.S. 113 (1973).

61. Cf. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) (presenting some of these theories).

62. Epps & Sitaraman, *supra* note 11, at 161.

63. Sarah Almukhtar, *Why Obama Nominated Merrick Garland for the Supreme Court*, N.Y. TIMES (Mar. 16, 2016), <https://www.nytimes.com/interactive/2016/03/16/us/politics/garland-supreme-court-nomination.html> [<https://perma.cc/8PUY-UAJ5>].

64. Epps & Sitaraman, *supra* note 11, at 155.

65. See sources cited in Epps & Sitaraman, *supra* note 11, at 157 n.35, 158 n.39.

decide, and it was neither bribed nor threatened; the Senators made their choices of their own free will, and they had every opportunity to vote “no.” One might say that the Senate’s decisions “call[ed] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.”⁶⁶ This rhetoric may be convincing to few (as it has been before); but if so, what does that tell us about the procedural concerns?

Pedigree. The authors cite the current Court’s “serious democratic deficits” and “lack of democratic pedigree,” which they lay at the feet of the Senate and the Electoral College.⁶⁷ On this argument, the plurality of voters who preferred Hillary Clinton, and the majority of voters who chose President Barack Obama, were entitled to fill any vacancies with Justices who shared their views. Strangely, this argument renders Justice Souter illegitimate too: the majority of voters who chose President George H.W. Bush had their deepest judicial preferences frustrated by a countermajority of one. If the goal is a Court that “follows th’ illiction returns,”⁶⁸ then Justice Souter would seem a far greater threat to the Court’s democratic legitimacy than Senator McConnell—whose maneuvers Justice Souter may have indirectly triggered, encouraging Republicans to “make dangerous plays to win the lost point back.”⁶⁹

Viewed another way, of course, Justice Souter’s legitimacy is obvious. He was appointed by the President with the Senate’s consent; his job was not to support anyone’s political program, but to “support this Constitution”⁷⁰ by his own best lights. Yet Justice Souter’s example shows us how hard it is to talk about “legitimacy” in isolation from the merits. Had the Justice turned out as his supporters had hoped, the 5-4 conservative Court that some now consider a crisis would have arrived on schedule in October 1991. One might celebrate or denounce that Court for its conservatism, of course, but why would a similar realignment be so extraordinary today? It is hard to escape the conclusion that the sense of crisis depends on whose ox is gored.

66. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 867 (1992) (O’Connor, Kennedy & Souter, JJ.) (plurality opinion).

67. Epps & Sitaraman, *supra* note 11, at 156.

68. FINLEY PETER DUNNE, *MR. DOOLEY’S OPINIONS* 26 (1901).

69. Ross Douthat, Opinion, *David Souter Killed the Filibuster*, N.Y. TIMES (Apr. 12, 2017), <https://www.nytimes.com/2017/04/12/opinion/david-souter-killed-the-filibuster.html> [<https://perma.cc/CWS5-U6ND>].

70. U.S. CONST. art. VI, cl. 3.

IV. SUPERWEAPONS

“[L]egitimacy is for losers”⁷¹: it helps those on the outs to accept a result and live to fight another day. If the Supreme Court’s legitimacy is in crisis, it is because both sides are increasingly unwilling to take a loss and move on. Their ideological distance renders unthinkable the ordinary transfer of power. The source of *that* crisis, however, may well be the aggrandizement of the Court’s own influence, and the fearsome scope of its powers. Tinkering with the Court’s machinery will not solve that problem; we need to make those powers less fearsome to begin with.

The authors’ discussion of legitimacy reveals a vast intellectual gulf separating the two sides. Many legal conservatives do not see the current Court as a “citadel of justice” floating “above the political fray,”⁷² much as they might like to. Nor do they see a world in which a “conservative majority was earned using underhanded tactics,” in order to “block [the Democrats’] favored policies.”⁷³ Rather, they see a world in which the *other* side has engaged in “underhanded tactics,” misconstruing the Constitution *not* to “block their favored policies” — in which the *other* side refuses to “admit defeat” on various projects of constitutional amendment,⁷⁴ successfully “identifying ideologically reliable nominees”⁷⁵ and letting the substance of the Constitution take something of a back seat.⁷⁶

This is not to say these conservatives are right. It is to say that claims about “legitimacy” in a two-party system count for very little unless they can also be seen through the other party’s eyes. Confronted with the fact that Democrats have appointed only four Justices in the last fifty years, while the Republicans

71. Nelson & Gibson, *supra* note 50, at 142 (internal quotation marks omitted) (quoting James L. Gibson, *Legitimacy is for Losers: The Interconnections of Institutional Legitimacy, Performance Evaluations, and the Symbols of Judicial Authority*, in *MOTIVATING COOPERATION AND COMPLIANCE WITH AUTHORITY: THE ROLE OF INSTITUTIONAL TRUST* 81, 81 (Brian H. Bornstein & Alan J. Tomkins eds., 2015)).

72. Epps & Sitaraman, *supra* note 11, at 167–68.

73. *Id.*

74. *Id.* at 176 (quoting Michael Klarman, *Why Democrats Should Pack the Supreme Court*, TAKE CARE (Oct. 15, 2018), <https://takecareblog.com/blog/why-democrats-should-pack-the-supreme-court> [<https://perma.cc/62LV-PBNH>]); cf. Barry Cushman, *Court-Packing and Compromise*, 29 CONST. COMMENT. 1, 3 (2013) (“[T]here was disagreement within the [Roosevelt] administration and in the broader liberal legal community over the form that such an amendment should take, and indeed over whether one should be offered at all. Two years of effort by Justice Department lawyers had failed to yield an acceptable proposal.”).

75. Epps & Sitaraman, *supra* note 11, at 193.

76. Cf. David E. Pozen et al., *A Computational Analysis of Constitutional Polarization*, 105 CORNELL L. REV. (forthcoming 2019), <https://ssrn.com/id=3351339> (manuscript at 48) (“Put (overly) simply, Democrats used to dominate constitutional discourse. Now Republicans do.”).

(with more fortunate timing) have appointed fourteen,⁷⁷ many liberals conclude that the deck has been stacked against them – that the Supreme Court is actually theirs by right. But many conservatives look at the very same numbers (and at the judicial records of Justices Blackmun, Stevens, O’Connor, Kennedy, and Souter, among others) and conclude that the deck has been stacked against *them*: the voting booth has proven helpless against the proverbial Georgetown cocktail-party circuit, a force just as arbitrary and countermajoritarian as the timing of retirements. If both sides believe that the game has been rigged, it is hardly surprising that neither wants to play by the rules.

The modern conservative legal movement was born at a time when the shoe was on the other foot, and when many conservatives perceived a crisis of judicial legitimacy. Its sense that the Court had gone off the rails was only partly due to policy objections to Warren Court rulings – many of which, by the 1980s, had already gained broad political acceptance. It was also due to the perception, shared even by many outside the movement, that the Court had lost its “internal”⁷⁸ legitimacy as a simple matter of legal craft; that its “handiwork in constitutional cases” had not lived up “to the standards of professionalism, responsibility, intellectual coherence, and intellectual honesty that have applied to the decisions of courts in the common-law tradition.”⁷⁹ A Court that rests decisions of extraordinary social importance on “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life”⁸⁰ may do more to promote the image of “politicians in robes,”⁸¹ and to undermine “public confidence in the very idea of law itself,”⁸² than any number of 5-4 decisions.

As Tara Leigh Grove has pointed out, different kinds of legitimacy may conflict with one another.⁸³ Reliably serving up centrist results can trade off with actually following the law in a coherent way. Ideological movements will always try to put their fellow travelers on the Court, but how much damage they can do there partly depends on the Court’s perceived freedom of action, which itself partly depends on broader commitments to the rule of law. If the judiciary

77. Epps & Sitaraman, *supra* note 11, at 199.

78. See Grove, *supra* note 54, at 2249.

79. H. Jefferson Powell, *Further Reflections on Not Being “Not an Originalist,”* 7 U. ST. THOMAS L.J. 288, 293-94 (2010).

80. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (O’Connor, Kennedy & Souter, JJ.) (plurality opinion).

81. Epps & Sitaraman, *supra* note 11, at 163.

82. *Id.* at 151.

83. See Grove, *supra* note 54, at 2245; see also Epps & Sitaraman, *supra* note 11, at 151 n.4 (discussing Grove).

appears less clearly bound by legal principle, then it is harder to avoid the sense (increasingly common among partisans on both sides) that five Justices could conceivably adopt *any* position on *any* issue, and that “the legislatures’ judgments will matter not a bit.”⁸⁴

Control of the Court might then seem more important than control of the nuclear codes; it would be a superweapon too powerful ever to be entrusted to the other side. That is why threats of court-packing are so tempting, and so dangerous: because they envision a Court without rules, through which a determined party with possession of Congress and the White House can do *anything* it wants. And those who oppose the ruling party – who would have neither the guarantees of a written Constitution nor the traditions of a parliamentary system to protect them – will feel entitled, or even obliged, to do *anything* to stop it. Why “feel compelled to let the Court block [your] favored policies for a generation or more,”⁸⁵ when only a few measly norms stand in the way?

To some legal conservatives, this too might seem familiar. Not long after *Casey*, the religious journal *First Things* held a symposium on “The End of Democracy.”⁸⁶ Having watched the pro-life movement win three successive presidential elections, only to be defeated 5-4 at the Court, the editors asked whether a regime that no longer ruled “by the consent of the governed” had lost its claim to legitimacy and should be opposed by extralegal means.⁸⁷ These impulses were eventually quieted, in part by a conviction that there was still a path forward, and that it was “better to accept the system’s basic legitimacy and work within it for change than to take steps, violent or otherwise, that risk blowing the entire apparatus up.”⁸⁸ Similar conclusions might take hold today. Norms can strengthen as well as erode; having peered over the edge of the abyss, we might choose to take a few steps back.

In that effort to restore legitimacy, legal conservatives might have a few ideas to offer. Given the depth of our country’s polarization, maybe we should require less by way of social agreement, relying somewhat more on private ordering and reducing the number of questions that the political process needs to answer. Maybe we should reduce the scope of that process, encouraging working agreements by different parts of the country when consensus is lacking in the whole.

84. Hewitt, *supra* note 5.

85. Epps & Sitaraman, *supra* note 11, at 168.

86. Symposium, *The End of Democracy? The Judicial Usurpation of Politics*, *FIRST THINGS*, NOV. 1996, at 18.

87. *Id.* at 18, 19.

88. Ross Douthat, Opinion, *An Election Is Not a Suicide Mission*, *N.Y. TIMES* (Nov. 2, 2016), <https://www.nytimes.com/2016/11/02/opinion/campaign-stops/from-roe-to-trump.html> [<https://perma.cc/DQ6W-DGKG>].

And maybe, to reduce the threat of the Supreme-Court-as-superweapon – capable of vaporizing any target that shows up in the Justices’ gunsights – we should precommit to limiting the Court’s freedom of action, binding it to some discrete set of preexisting rules until there is a *very* broad consensus for changing them. (We could even write those rules down on a piece of paper, to be kept in the National Archives – and change them only by agreement of, say, two-thirds of each House of Congress, and some three-fourths or so of the states.)

Limited government, federalism, originalism, and so on may seem like naïve – and convenient – solutions to a bipartisan legitimacy crisis. And perhaps they are. But the Constitution was not designed for a nation of high-school civics teachers, full of corny enthusiasm for powdered wigs and tricorne hats. It was adopted for, and repeatedly amended by, those who had lived through civil war, economic crisis, and profound moral disagreement (over human slavery, among other topics). If, today, in circumstances of relative peace and plenty, our disagreements seem too great for us to bear, perhaps we should think more about the devices they used to make bad compromises when the alternatives seemed even worse.

CONCLUSION

If the Supreme Court needs saving – a doubtful proposition to begin with – it will be saving from itself, and from too broad a conception of its own legal omnipotence. These problems will not be solved by technical quick-fixes or institutional restructuring. Despite Justice Kennedy’s hopes, the Court on its own cannot end national divisions or reconcile the contending sides. We will have to do that instead.

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