Washington Examiner

How the Supreme Court undermines its own legitimacy

Ilya Shapiro

July 18, 2019

Another Supreme Court term is in the books. Although the radical right turn that liberals had feared after Justice Brett Kavanaugh's bruising confirmation fight failed to materialize, there was still plenty of hand-wringing about judicial partisanship and ominous warnings about the Court's "legitimacy" being in jeopardy. We've come to expect this sort of "working the refs" — most notoriously on display ahead of the Obamacare decision seven years ago — a cynical tactic that will continue so long as it appears to be an effective guilt trip against "institutionalist" judges such as Chief Justice John Roberts.

Even as the term was less heated than most from the last decade, its final day still featured the latest chapter in Roberts' neverending quest to preserve the Court's reputation. The chief cast the key votes (and wrote the controlling opinions) in decisions to 1) remove federal courts from policing partisan gerrymandering, seen as a "conservative" ruling even though both parties do it; and 2) reject a question regarding citizenship for the 2020 Census, in theory allowing the Commerce Department to try again but in practice running out the clock on that maneuver.

These moves came after Roberts, who upon Anthony Kennedy's retirement became the median vote (even if Kavanaugh pipped him as the justice most often in the majority), faced a more-than-whisper campaign that allowing gerrymandering and, especially the census question, would damage the Supreme Court's "legitimacy." Joshua Geltzer, executive director of Georgetown's Institute for Constitutional Advocacy and Protection, warned in a *New York Times* op-ed that the Court had to "get the census case right" — in other words, rule against the administration — "[f]or the sake of its own legitimacy." UC Irvine law professor Richard Hasen, who had urged Roberts to "show in these cases that he is above politics," later despaired that the census case had echoes of *Bush v. Gore*, the *ur*-legitimacy-buster where the justices "let politics get in the way of a fair decision."

Then there was a meta-piece about the legitimacy of discussing the Court's legitimacy published in the *Washington Post* by law professors Leah Litman, Joshua Matz, and Steve Vladeck. The trio argued that conservatives were "hypocritical" to insist that "only a weak-willed, weak-kneed judge would ever deviate from right-wing orthodoxy to preserve the court's legitimacy" because "[t]he institutional legitimacy of the court is itself essential to the rule of law." Legal conservatives in this telling are purely results-oriented and don't hesitate to criticize when they don't like a ruling. But there's a difference between doctrinal disagreement, even of the sharp

sort practiced by the late Justice Antonin Scalia, and accusing justices of "decisions allowing one side to manipulate the political process to their partisan, anti-democratic advantage."

To be fair, populist conservatives now assail "judicial supremacy," particularly when it involves district courts' nationwide injunctions. But their prescription is either for the Supreme Court to cut down on lower-court mischief — how the system is supposed to work — or for Congress to strip jurisdiction over certain types of claims. Or for the administration to become more aggressive in pushing back on judicial rulings. It's largely an aspirational position, unless you also argue that judicial review is itself improper or that the executive branch should ignore court rulings, which nobody serious does (yet!) but would indeed signal a debate over legitimacy.

In any case, modern legitimacy concerns can be traced to three key moments: *Bush v. Gore* (2000), the battle over Obamacare (2010-2012), and the early Trump era (2016-2018), meaning the combination of Mitch McConnell's blocking of Merrick Garland and Donald Trump's winning the presidency while losing the popular vote, thus getting to replace not just Scalia but the swing-vote Kennedy (with a reputationally damaged Kavanaugh at that).

In the wake of *Bush v. Gore*, prominent figures in the progressive legal community rent their garments over the end of the rule of law. In January 2001, 585 law professors signed an ad in the *New York Times* that decried the decision, foreshadowing the nearly 1500 who signed a letter opposing Jeff Sessions' nomination as attorney general 16 years later. Neal Katyal, one of Al Gore's lawyers and later acting solicitor general under President Obama, described George W. Bush's victory as the Supreme Court's "immolation": "By elevating politics over principle, the court revealed itself to be no better than any other institution or actor that touched this election." Katyal also compared the decision to *Dred Scott*, in which the Court denied black people citizenship rights, as a time when the Court delegitimized itself while playing politics.

Harvard law professor Alan Dershowitz, who wrote a book about the case, argued that the majority's decision to "substitute their political judgment for that of the people threatens to undermine the moral authority of the high court for generations." "Unless steps are taken to mitigate the damage inflicted on the Court by these five justices, the balance struck by our Constitution between popular democracy and judicial oligarchy will remain askew," Dershowitz wrote, presaging today's populists.

Yale law professor Bruce Ackerman, in a piece titled " The Court Packs Itself," built on Justice John Paul Stevens' dissenting lament that *Bush v. Gore* had shaken "the nation's confidence in the judge as an impartial guardian of the rule of law." Ackerman suggested that Bush himself was an illegitimate president. "If such a president is allowed to fill the Court, he will be acting as an agent of the narrow right-wing majority that secured his victory in the first place," so Congress should prevent Bush from appointing new justices like it did during Reconstruction by preventing Andrew Johnson from doing the same by cutting seats. In other words, in a refrain that should sound familiar from the 2020 presidential campaign, restructuring the Court, or preventing a Republican president from adding justices, was the only way to preserve legitimacy.

The pushback to these attacks was encapsulated in a concise law review article by University of California, Berkeley law professor John Yoo that was appropriately entitled "In Defense of the Court's Legitimacy." Yoo argued that *Bush v. Gore* would not have a sustained impact on the Court's legitimacy when viewed through the lenses of public opinion, history, and impartiality.

First, it turns out that people's confidence in the Court remained relatively stable, at least in the short term. Next, Yoo compared the moment to other times when the Court's legitimacy was in doubt: the early Republic, the *Dred Scott* era, initial resistance to the New Deal, and the Warren Court's fight against segregation. "Close inspection of these periods show that they bear little resemblance to *Bush v. Gore*. The defining characteristic of several of these periods was the persistent, central role of the Court in the political disputes of the day."

Finally, "only by acting in a manner that suggests that its decisions are the product of law rather than politics can the Court maintain its legitimacy." Yoo noted that the Court wasn't necessarily restrained here, but federal review of state election procedures isn't unusual and, after all, *Bush v. Gore* didn't "decide any substantive issues — on a par with abortion or privacy rights, for example — that call upon the Court to remain continually at the center of political controversy for years. Instead, the Court issued a fairly narrow decision in a one-of-a-kind case — the procedures to govern presidential election counts — that is not likely to reappear in our lifetimes."

More important than the specific analysis of *Bush v. Gore*, however — my point isn't to rehash that debate — is Yoo's exposition of factors to use in evaluating judicial legitimacy.

1. *Public opinion*. Because the Court's authority derives wholly from people following its decisions, public opinion matters. The critic might use data to show that the public has less confidence in the Court, argue that the Court shouldn't overturn democratically enacted laws, or suggest that justices appointed by a president who didn't win the popular vote are illegitimate. These sorts of claims can be summed up as: "The Court didn't rule my way, but the political winds are blowing in my favor, so democracy should win out."

2. *Historical precedent*. In what previous circumstances has the Court's legitimacy been in doubt? Except that when critics rely on historical precedent, they often compare current cases to past ones they feel were wrongly decided or to overturned cases that are so different from the one at hand that the comparison becomes hyperbolic at best, such as comparing the travel ban to *Korematsu* (Court approval of FDR's internment of Japanese Americans), *Bush v. Gore* to *Dred Scott*, etc.

3. *Impartiality*. Those who say the Court fails this consideration accuse justices of partisanship, lawless ideology, or bias towards a particular kind of party (for example, big business). These accusations become more common when the Court issues opinions on divisive issues, or, increasingly, if the justices subscribe to a coherent legal philosophy such as originalism — that is, reading the Constitution for the original public meaning its text had when ratified.

Arguments on these three grounds are found in every criticism of the Court's legitimacy, and they've been increasingly used since 2001 not just after rulings, but ahead of them, to influence swing votes. Most notable in that regard, at least until Donald Trump came down his escalator, was the Obamacare litigation. The first lawsuit was filed the same day President Obama signed the Affordable Care Act into law in March 2010. At first, the challengers' legal claims were treated by legal cognoscenti as frivolous sour grapes after losing a political fight. But when rulings started going against the government, the drumbeat of illegitimacy claims began. After a Virginia district court invalidated the individual mandate in January 2011, Yale's Akhil Amar, who had also been a prominent critic of *Bush v. Gore*, compared Judge Roger Vinson to Justice

Roger Taney, author of *Dred Scott*, in an op-ed that no longer appears on the *L.A. Times*' website.

Fast forward to the end of March 2012, when Supreme Court oral arguments did not go well for the government. *The New Republic*'s Jonathan Cohn argued explicitly that the "legitimacy of the Supreme Court" is at stake, singling out Justice Samuel Alito as being opposed to welfare programs on policy grounds while also appealing to "tens of millions of Americans" and that "nobody has said they want to stop government from providing universal access to health care."

Cohn was neither the last nor most prominent critic calling into question a potential ruling against Obamacare. President Obama himself said it would be "conservative judicial activism," a sentiment Senate Judiciary Committee Chairman Pat Leahy repeated a month later. The Vermont Democrat further admonished John Roberts from the Senate floor: "I trust that he will be Chief Justice for all of us and that he has a strong institutional sense of the proper role of the judicial branch. It is the Supreme Court of the United States, not the Supreme Court of the Democratic Party or the Republican Party, not the Supreme Court of liberals or conservatives."

Of course, Roberts did switch his vote to preserve Obamacare in *NFIB v. Sebelius*, on a bizarre taxing-power theory that most people recognize was a "twistification," his best attempt to uphold the law while not expanding Congress's regulatory authority. Slate 's David Franklin wrote that a decision to strike down the law "would have been received by the general public as yet more proof that the court is merely an extension of the nation's polarized politics." He also compared the chief to another Justice (Owen) Roberts, who made the "switch in time" in 1937 that started approving New Deal programs.

The sad thing about the episode is that the chief justice didn't have to do what he did to "save the Court." For one thing, Obamacare was unpopular: particularly its individual mandate, which even a majority of Democrats thought was unconstitutional, according to a national Gallup poll taken a few months before the Court's ruling. For another, Roberts only damaged his own reputation by making the move after those warnings from pundits and politicians. As Jan Crawford described in breaking the story about his switch, "Roberts pays attention to media coverage. As chief justice, he is keenly aware of his leadership role on the court, and he also is sensitive to how the court is perceived by the public. There were countless news articles in May warning of damage to the court — and to Roberts' reputation — if the court were to strike down the mandate."

Now, I don't think that impolitic pressure had much to do with his ultimate vote, but the American public probably does. Indeed, if Justice Kennedy had agreed with the liberals that there are no structural limits on federal power, there would have been disappointment, but it would have been understandable given the conventional left-right rubric. But to lose in an extra-legal way was a sucker punch, belying the idea that there's a difference between law and politics and that the judiciary is an antimajoritarian check on the excesses of the political branches.

Most important, the whole reason we care about the Court's independence and integrity, its *legitimacy*, is so it can make the tough calls while letting the political chips fall where they may. Had the Court struck down Obamacare, it would have been just the sort of thing for which the Court needs its accrued gravitas. Instead, we got a strategic decision dressed up in legal robes, judicially enacting a new law. In refraining from making the sort of balls-and-strikes call

he's frequently invoked, Roberts actually decreased respect for the Court, thereby showing why judges shouldn't play politics.

And so we come to the Trump era, where nothing the administration does is seen as legitimate by a large segment of the population, but in the Supreme Court context especially because of the Merrick Garland saga. It's not surprising that last fall, *The Nation* published an article asserting " How the Supreme Court Lost Its Legitimacy," but that's hardly different from one called " The Supreme Court's Legitimacy Crisis" in the *New York Times*. The latter, by Michael Tomasky, argued for the double-illegitimacy of Justices Gorsuch and Kavanaugh because they were nominated by a president who didn't win the popular vote and confirmed by senators who collectively won fewer votes in their last election than those who voted against them.

Sen. Dianne Feinstein, the Judiciary Committee's ranking member, went on to tweet that Justice Kavanaugh's confirmation "undermines the legitimacy of the Supreme Court." Former attorney general Eric Holder likewise tweeted: "The legitimacy of the Supreme Court can justifiably be questioned." Maybe the Democratic presidential candidates will lead a massive resistance?

At least the quant jocks at 538 merely asked the question: " Is the Supreme Court Facing a Legitimacy Crisis?" Their conclusion was that, while the Supreme Court is still trusted more than other institutions, that trust is declining, as are the margins by which justices are confirmed.

So what are we to make of all this? Is it simply that where you stand on the question of judicial legitimacy now also parallels where you sit politically? In two words: pretty much. It's easy to see why people are attacking the Court's legitimacy when we apply Yoo's considerations, when big issues are on the docket and we have the culmination of trends whereby divergent judicial theories map onto ideologically sorted parties (something that Justice Sonia Sotomayor noted in an appearance at Princeton last October).

And that goes as well for the related debate over stare decisis, the extent to which the Court should refrain from overturning erroneous precedent for legal-stability reasons. For all the gnashing of teeth over *Citizens United* or *Janus*, is there any doubt that a progressive majority would act the same way toward conservative shibboleths?

Anyway, that's all overblown. As Adam Liptak and Alicia Parlapiano wrote in their term wrap-up for the *New York Times*: "When [the Court] overruled precedents, it was in technical cases that attracted little attention." Moreover, Case Western law professor Jonathan Adler has shown that the Roberts Court overturns precedents at a significantly lower rate than its predecessors.

In the end, the only measure of the Court's legitimacy that matters is not the "playing the refs" nonsense we see each spring but the extent to which it maintains (or rebalances) our constitutional order. As Indiana law professor Luis Fuentes-Rohwer wrote last year in " Taking Judicial Legitimacy Seriously," "judicial legitimacy is a trope deployed by judges in the pursuit of specific outcomes … a warning about the future and how a judicial outcome may be received, yet a warning that operates more as a boogeyman. It is a criticism, a call for restraint, yet lacking in empirical support."

"The man on the street does not care that the Court appears to side with one party over the other," Fuentes-Rohwer (no conservative) explained in an update of the Yoo article. "He only cares that the Court follows a principled process."

The reason we have these legitimacy disputes isn't because the Court is partisan but because it can't be divorced from the larger political scene, and because sometimes justices seem to make decisions not based on their legal principles but for strategic purposes. The public can see through that. Ultimately, it's when justices think about legitimacy that they act most illegitimately.

Ilya Shapiro (@ishapiro) is director of the Robert A. Levy Center for Constitutional Studies at the Cato Institute. He also contributes to the Washington Examiner *'s Beltway Confidential blog.*