

Critical Dialogue

A Supreme Court Unlike Any Other: The Deepening Divide Between the Justices and the People. By

Kevin J. McMahon. Chicago: The University of Chicago Press, 2024. 384p.
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In *A Supreme Court Unlike Any Other*, Kevin J. McMahon argues that there is a “democracy gap” between the Supreme Court and the nation. This is because a majority of the Court’s members are “numerical minority Justices” who won confirmation from senators representing a minority of voters (not to mention that three Justices were appointed by a president who did not win the popular vote in 2016). The proposition is troubling for regime politics scholars (such as McMahon and me) because we rely on the assumption that the Court is part of the dominant national alliance, the majority coalition seated in Washington. This is not the case today. In fact, conservatives on the Court are not even in line with most Republican voters. Instead, movement conservatives (e.g., the Federalist Society) have overtaken the Senate as the real confirmatory body. These ideologues have refused to consider certain individuals (Alberto Gonzales) for the Court, shot down nominees (Harriet Miers), offered alternatives in times of distress (Samuel Alito), and helped ram through confirmations (Brett Kavanaugh). This minoritarian push reached its apex when Donald Trump produced a “definitive” list from which he would select his Supreme Court nominees. But tellingly, the list was not definitive until Federalist Society Chair Leonard Leo added Neil Gorsuch, Kavanaugh, and Amy Coney Barrett to it.

McMahon itemizes the characteristics that movement conservatives (consciously or unconsciously) seek in a Supreme Court nominee: perceived ideology, Washington experience, presidential administration experience, a Court of Appeals judgeship (preferably in the DC Circuit), Federalist Society ties, a Harvard or Yale law degree, a Supreme Court clerkship, Catholic ties, and an age of 55 or younger. John Roberts and Kavanaugh check every box. Gorsuch and Clarence Thomas check nine, Alito eight, and Barrett seven. McMahon concludes that all six conservatives come from the “supreme elite” and form a “cookie-cutter Court” (p. 90). The Roberts Court conservatives are not New Deal era “administration men” who gained experience in, say, the Senate or the Cabinet.

Rather, they hail from a conservative legal network that cultivated their ideology and prepared them for possible nomination to the federal bench. They reached the Court on the expectation that they would produce certain decisions, such as overturning *Roe v. Wade*, undoing campaign finance reform, striking down affirmative action, upholding gun rights, and allowing ballot restrictions. These Justices show little concern about writing counter-majoritarian decisions because their audience is the supreme elite that favors those outcomes. As McMahon puts it, contemporary conservative Justices are “likely more closely aligned with Federalist Society than with ... the federal government” (p. 186).

The book also fends off several anticipated objections to its analyses. Allow me three examples. First, McMahon shows that while nominees are not “administration men,” administration experience is important because technical legal offices (e.g., special counsel) offer a proving ground for movement conservatism. Second, McMahon takes the time to explain how John Roberts might appear different from other Justices, but he conforms to the same cookie cutter and is still quite conservative on important issues (e.g., guns). Third, McMahon asks whether recent campaigns centered on Court nominations helped close the democracy gap. It is unlikely, he concludes, because elected Republicans (including Trump) saw no bump after any of their confirmations.

Some might assume this concern is just a liberal trope. That would be incorrect. McMahon assures us that he could find a similarly unrepresentative Democratic Court just as problematic. In fact, he lays out how Democrats have their own cookie-cutter checklist, and their nominees conform to it.

Careful in its analyses and data driven, this book can make the kinds of big claims that many political scientists typically avoid. As McMahon concludes:

Today, we apparently have something different: a Supreme Court more isolated than ever, more removed from the results of democracy, more replete with Justices largely unknown to the president who appointed them. It is fair to wonder if it has become a judicial aristocracy unmoored from the electoral foundations that give American democracy its legitimacy.(p. 195)

This is not a book that simply fills a gap in the literature; it is paradigm-shifting, for it challenges scholars of regime politics to think about how coalitional politics work under

new norms of polarization, partisanship, and pluralism. The analysis is also methodologically sophisticated. If there is a methods criticism to be leveled, it is that McMahon could more unabashedly announce that he brings multiple modes of analysis to a framework typically reliant solely on historical narrative. For example, his comparative case studies leverage similarities and differences to identify causal factors. Clever storytelling explains minoritarian rule, but his cartograms show the effect. The supreme elite checklists McMahon has pulled together, in turn, offer a list of measurable variables ready for future testing. McMahon matches polling responses with different Supreme Court abortion rulings. The pairings are intuitive and valid. I wish I had explained the polls similarly in my own work.

I want to ask McMahon what he thinks is next for regime politics. Nearly 20 years ago, in his 2005 piece for the *Annual Review of Political Science*, “Constructing Judicial Review,” Mark Graber declared a “new paradigm for thinking about judicial review... [in which the] mantra ‘judicial review is political constructed’ is replacing chants that ‘judicial review is a deviant institution’” (p. 446). But judicial review is now deviant. *So how do regime politics scholars proceed?* Ultimately, McMahon’s hypotheses and methods push his closest allies—the new wave of scholars—to rethink baseline assumptions and points of inquiry.

Moreover, this book pushes the U.S. polity to consider ways to rein in a runaway Supreme Court. Put differently, what do we do about the most powerful Court in the history of the world being at the zenith of its powers and not necessarily concerned with the rest of the constitutional democracy? McMahon offers four prescriptions. First, he notes that we could amend the Constitution. For obvious reasons (i.e., super-majoritarian requirements), this is unlikely. Second, Democrats could add Justices and pack the Court. But the author finds this unsatisfactory because there is no guarantee that Republicans, once they won control of Congress, would not tack on more Justices, restrict jurisdiction, impose judicial review requirements, etc. Third, we could change lifetime tenure to 18-year terms, with presidents routinely appointing a new Justice every two years. McMahon favors this proposal because it would close the democracy gap by letting voters, presidential candidates, and the Senate know who is stepping down and when. It would also overcome the problem that Justices today serve longer than ever before.

My only hesitation when reading the book was with the endorsement of 18-year terms. I agree with McMahon that terms would inject transparency into the appointment process and make nominations less based on luck. I only wonder if there would be unintended consequences—and whether they would outweigh the benefits. For instance,

judicial independence might be threatened. Imagine a unified Democratic government facing a Court with five conservatives willing to strike down gay marriage, with Clarence Thomas set to retire in a year. Congress might limit the Court’s jurisdiction to hear such a case until they can install a new liberal swing Justice. McMahon would likely say that this would still close the democracy gap, for unified government in a polarized era sends a strong message from the national electorate. I would not refute that point; public accountability is a key tenet of American democracy. But so is an independent Supreme Court. Might 18-year terms make Congress bolder in trying to dictate what the judiciary will hear, when it will hear it, and what it will say? Would Justices on the verge of retirement be more eager to take on cases that need not be heard? I recognize that 18-year terms would close the democracy gap, but I wonder about the other effects.

Even if I hesitate on the costs and benefits of 18-year terms, it is hard to argue against McMahon’s fourth prescription—that the best way for a national majority to show the Supreme Court that it has overstepped its prerogative is to vote against its elected affiliates. To be clear, this is not a partisan call to vote for Democrats. In fact, McMahon might even say that this democracy gap would be better resolved within the Republican Party—that establishment conservatives need to turnout more consistently in the GOP primary and retake the platform. The point is not that movement conservatives do not deserve a say. The point is that they have captured the Supreme Court and turned it into a consistently counter-majoritarian institution. Though we have different cases, McMahon and I arrive at the same conclusion: in a constitutional democracy with popular sovereignty, elections are the ultimate check on a counter-majoritarian Court.

Response to Dave Bridge’s Review of *A Supreme Court Unlike Any Other: The Deepening Divide Between the Justices and the People*

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— Kevin J. McMahon

I thank Dave Bridge for his generous review. In this too-short reply, I will evaluate the state of the “democracy gap” and respond to two questions Bridge raised in his review.

In the time since Bridge reviewed *A Supreme Court Unlike Any Other* and the writing of my response here, Donald Trump won the presidency by capturing both the popular and electoral college votes. He was the first Republican to do so since 2004 and only the second since 1988. While Trump still fell short of winning a majority of the vote (49.5%), the victory was nevertheless a significant one from the standpoint of the Supreme Court. After all,