

Interview

United States: Socialists Have Long Fought to Disempower the Supreme Court. That's More Urgent Than Ever Now.

Sunday 4 October 2020, by [MARCETIC Branko](#), [MOYN Sam](#) (Date first published: 20 September 2020).

The Supreme Court has been a reactionary institution for most of its history, law professor Sam Moyn tells Jacobin. We need to take on its power and fight for real democracy in the United States. Interview by Branko Marcetic with Samuel Moyn.

After years of ill health and worries from progressives, Ruth Bader Ginsburg's death this past Friday has sent tremors through the political world. Her newly empty Supreme Court seat has already reshaped the stakes of this year's election for all involved and opens the door to a hard-right supermajority on the high court.

However, the understandable panic over the implications of Ginsburg's death speaks to a wider problem: the undemocratic and disproportionate power of the Supreme Court in American life. On Friday, right after the news of her passing, *Jacobin* spoke to Yale law professor Sam Moyn about Ginsburg's legacy and what's next for the body to which she devoted almost thirty years of her life.

Branko Marcetic (BM) : Ruth Bader Ginsburg just died. What is her legacy? How would you assess her career?

Sam Moyn (SM): She had an extraordinary career. Even if you think of her as a progressive neoliberal who was interested in feminist equality and inclusion without engaging larger structural unfairness, she realized some of her wildest dreams. She also was edgy at times. She spoke against *Roe v. Wade*, or hinted that it might've been better for the court not to resolve that conflict, because it demobilized the movement and enraged the Right into a massive counterattack and backlash. And she was deservedly an icon for many. In the end, however, I think we'll have to read her legacy through the bet she made on her own longevity, while leaving others to deal with the consequences.

BM: What are the less positive, at least from a progressive standpoint, aspects of her jurisprudence? She's often thought of as this ultra-liberal, but also one of the criticisms that has been lobbed against her is that she sided with conservatives on cases relating to business rights.

SM: The liberals on the court today would have been on the Right on Earl Warren's Supreme Court, and they're really kind of center-left in their politics. As you might predict, it is the most business-friendly court in a century. And the liberals have been deferential in a range of areas to the right-wing drift of the court's jurisprudence. To her credit, however, Ginsburg sometimes chose the path of dissent in her later years, rather than making compromises with the Right, which has been the strategy of Stephen Breyer and especially Elena Kagan. So she filed a number of honorable dissents in the past few years, notably on the health care case and in a voting rights case.

BM: Let's talk about Ginsburg's death. What does that mean for the Supreme Court now, and is it going to end up overshadowing or even canceling out some of the good that she has done through her career?

SM: A lot will turn on how the story ends. I don't see much downside for Donald Trump at least claiming to want to replace her either before the election or by January. And I think Mitch McConnell also has a huge incentive to attempt to push a nominee through. And if he succeeds, then Ginsburg becomes notorious for a new reason. Ultimately the Right will be to blame for a reactionary court, but she will have given them an enormous opportunity to push the institution even further to the dark side.

The sobering thing I hope Americans take from this result is that we've made a court so powerful that we've converted the politics of democracy too often into a referendum on who makes it on to this council of elders. And it's just a sad thing that, once again, this season of electoral democracy is going to be converted into just a debate about the circumstance of her replacement, even if Trump doesn't get his way or McConnell does decide for strategic reasons not to push it through.

You cannot blame Ginsburg in the end for holding fast to a powerful office the rest of us have created for her and the other justices: a lifetime appointment to make policy for the country.

BM: One of the reasons that John Roberts has become the new swing justice is there's this well-publicized concern that he has about the legitimacy of the court in the eyes of the public. If Trump manages to get another hard-right nominee onto the court, and there is a non-Roberts, hard-right majority, is there a possibility that we will see the court moving in an even further right direction regardless of what he thinks, and therefore hurting the court's standing in the public eye?

SM: Oh, undoubtedly, John Roberts is disempowered in that case, and the justices further right make gains. Now, it's still plausible that not just Roberts, but in some cases, Brett Kavanaugh would join a centrist bloc with Stephen Breyer and Elena Kagan. The conservatives have different issues they care most about and are not always in lockstep. Only maybe Clarence Thomas is a fan of Trumpism, but the rest are not just products of an earlier phase of the conservative movement, but faithful to it, and they have other games than Trump himself has — notably when it comes to abortion.

But there's just no doubt that affirmative action, which is probably already dead, is on the way out if Ginsburg is replaced by Trump, and abortion may not last long. The most frightening possibility is the constitutional invalidation of the administrative state, which may also already be in the cards no matter what. And in general, the jurisprudence will move to the right, because Roberts will no longer be the swing vote who sometimes defects.

BM: What are the historical precedents for the Supreme Court losing popular legitimacy, and what can we learn from some of these episodes?

SM: The historic left project, which some of us have been trying to revive, was always to disempower the court. Socialists in the early twentieth century denounced the court for its defense of laissez-faire capitalism. And the Left originated a ton of reform proposals.

Since 2016, there has been talk of packing the court in response to the denial of Barack Obama's last nomination, Merrick Garland, and in response to Ginsburg's death this talk is reaching a crescendo. But actually, court packing was not what the socialists wanted. They wanted to disempower the court through various devices, like getting rid of judicial review (the power to invalidate popular legislation as unconstitutional), which is a late development in US constitutional

history. And socialists also devised various strategies of disempowering the court, like jurisdiction stripping (prohibiting the court from hearing cases) or requiring a supermajority rule for it to strike down laws.

All this was thought out a century ago in the context of attempts to get labor law to pass and then survive constitutional scrutiny. Our memories are of court packing, because that's what FDR attempted. But there are good American traditions, especially on the Left, of trying to face down the Supreme Court in many different ways.

BM: You've written before about reorienting our thinking from questions of legitimacy and the politicization of the court and more about democratizing, which some of this fits into. Can you elaborate on what you mean by this?

SM: The standard centrist discourse has been that McConnell stole the court, and it needs to be put back as a space of elder compromise between center-left and center-right. But the baseline before the recent theft was already intolerable. The trouble was long since about how much the center-left and Right agree, not merely that the Supreme Court is moving even further right.

The alternative to "restoring the court's legitimacy" is to make America more democratic, along the lines of that old socialist tradition. I am hoping to see a debate about what tactics to deploy if McConnell succeeds, and the place to start is to warn against the idea that the Supreme Court was ever legitimate or that the problem is its legitimacy was only tarnished in recent years. Actually, it's been a reactionary institution for most of its history.

BM: There is this reverence for the Supreme Court that really looms large in liberal political culture, probably dating back to the Warren court, maybe even earlier. Why is this so misguided?

SM: The liberal relationship to the Warren Court is somewhat like the relationship of nineteenth-century intellectuals toward religion: they understood that it was no longer credible, but worried what would happen if they gave it up. More important, liberals continue to think of the problem in American politics not as minority rule by the powerful and wealthy, but the tyranny of the majority over minorities. The truth is that popular majorities have expanded rights and justice more than any other force, while entrenched minority power has proved most dangerous to the vulnerable and weak.

BM: Some people point to Republican presidents appointing conservative nominees who ultimately end up moving more to the liberal side — for example, David Souter with George H. W. Bush. What is the prospect for a modern Republican president, or in this case, specifically Trump, appointing someone like that, who ends up being this traitor to the cause and moves in a more liberal direction?

SM: It's unlikely. Of course, it's always unpredictable what appointees will do. And even Neil Gorsuch, who is on the far right on most issues, surprised a lot of people by finding that federal antidiscrimination law protects sexual orientation. But after the experience of earlier turncoats, like David Souter or John Paul Stevens, the Right refuses to be fooled again. They have responded by doing much more intense ideological grooming, and they are trying to make sure that they appoint reliable people. There is no doubt they can.

BM: What could a broad anti-Trump coalition do now, one of both liberals and leftists? What are the prospects for blocking a Trump nominee in the same way that Republicans blocked a Merrick Garland under Obama?

SM: This is an interesting question, because as I say, I don't see any downside to Trump at least nominating someone. He may want it to go down to the bitter end or even beyond the election, just because it's an electoral plus for him to say that the future of the court is at stake. And he doesn't have a lot of other arguments in favor of his candidacy. McConnell is in a different position. First, he has a rambunctious caucus, and some of them could defect under certain circumstances, three in particular. And people will be watching those three senators, Susan Collins, Lisa Murkowski, and Mitt Romney, very closely in the coming days. If McConnell loses a fourth, he cannot rely on Vice President Mike Pence to break the tie in the Senate to approve Trump's nominee.

Beyond vote counting, McConnell has a momentous strategic choice of whether to put Senate control even more at risk and risk Democratic responses like court packing. I speculate that McConnell probably thinks he is going to lose his majority, anyway. And with the Supreme Court the big prize, a sixth conservative vote on it is worth more than Senate control — maybe even more than the presidency. And so, I can't think of a good reason to conclude that he will avoid any hypocrisy, any power play, to make a confirmation happen.

BM: What can we learn from this episode?

SM: The deep lesson is how bizarre it is that in a democracy, many of our most dramatic political moments are about the composition of a council of elders. It is an offense to the idea we rule ourselves through making new laws that instead we fight about who's going to make them for us in the name of the Constitution or by interpreting old laws.

P.S.

• Jacobin. 09.20.2020:

<https://www.jacobinmag.com/2020/09/supreme-court-socialists-ruth-bader-ginsburg-death>

• Samuel Moyn is Henry R. Luce professor of jurisprudence at Yale Law School and a professor of history at Yale University.

About the Interviewer

Branko Marcetic is a Jacobin staff writer and the author of *Yesterday's Man: The Case Against Joe Biden*. He lives in Toronto, Canada.