

The Tit-for-Tat Supreme Court Game is about to Reach a Catastrophic Conclusion

by Megan McArdle *The Washington Post*, September 22, 2020

Inquiring Minds topic, November 20, 2020
Moderator: Doug Cartwright

Everyone wants the wars over the Supreme Court to end, but no one wants to be the one to end them . . . everyone wants last licks, but no one is willing to take a licking. And thus the continuously escalating battles have continued for the simple, stupid reason that no one can take the high road, or even recognize this giant, multigenerational game of tit-for-tat is unwinnable.

Tit-for-tat works, when it works, by quickly pushing people back toward cooperation. By the time you're in the 18th round, with everyone intent on punishing the punishment-for-the-punishment, the strategy has not only failed, but also [backfired](#). With the war over the federal courts, we are now in so deep that we may be entering the endgame, simply because there are almost no norms left to destroy.

There are so many points at which we could have avoided this. If Robert Bork hadn't been borked. If Harry M. Reid hadn't touched off the assault on the filibuster. If Merrick Garland had been given hearings and a vote. If two more Republican moderates (I'm looking at you, Mitt Romney) had been too sensible to play with civic dynamite, and balked at confirming a Trump nominee to a seat long held

by a liberal icon, in the midst of a contentious national election. If only. . . .

None of these things happened. Instead, Ruth Bader Ginsburg, of blessed memory, died at the worst possible time. So now we've come off the bitterest election fight in living memory, and quite possibly reached the point where things get so bad they cannot get worse — where the game finally reaches its catastrophic conclusion with no winner, only losers.

That's the only way things can go unless someone decides to end this stupid game rather than initiating the next round. Unfortunately, everyone has convinced themselves it's only the other side that is playing games, while their own, nobler partisans keep trying to bring a civics textbook to a gunfight.

If you believe this, then it follows that your only hope of victory is to take off the gloves and (temporarily) abase yourself to the level of your opponent. If that doesn't work, well, the other guys were just going to keep ratcheting up the outrages anyway, no matter how nice you played. If you win, meanwhile, you can finally return to that happy era when courts “just followed the law” — to the results you wanted, of course.

This was precisely the logic driving all the previous rounds of this game, but everyone has a bad case of strategic amnesia about their own side's escalations. This curious

disease somehow persists even when you remind the afflicted of these past adventures, and indeed, even while they explain how justified their actions were.

If you've forgotten how your own years of escalations ultimately made things worse rather than better, then you probably expect different results from more of the same. And so, naturally, some on the left are already suggesting that if Republicans succeed in replacing Ginsburg, Democrats must retaliate by packing the court with a number of new, reliably left-wing justices. That's a threat conservatives should take seriously, to the point of reconsidering. But they won't, because in addition to amnesia about the past, they can no longer remember there's a future worth worrying about. As a nation, we have forgotten how to ask: "And then what?"

We will pack the court to appease our base and show those Republicans who is boss . . . and then? They'll wait until they're back in power, and then they'll pack it right back, so I guess you're going to have to add some states so that can't happen . . . and then?

After enough and-thens, it should be obvious where we'll end up: with the foot soldiers of the Court Wars destroying the village to save it. Collectively, we'll turn our highest court into an explicitly political superlegislature that will lack the democratic legitimacy to so much as stay an execution, eviscerating the court's power and function rather than ceding it to enemy hands.

And when this packed, stacked and now thoroughly shellacked court starts issuing rulings that simply cannot be abided by the other party — well then, pray tell, what then?

Questions for Discussion

This article was written before the election and final action on the Supreme Court nomination; however it makes a cogent point about the vagaries of political division and the polarization of the Supreme Court. I've somewhat modified the op-ed because of recent events, but the essence of the article stands.

- 1. Do you see any way out of what McArdle calls this tit-for tat?**
- 2. How about making Supreme Court appointments term-limited.?**
- 3. Could we ever go back to requiring a 60 vote approval rate for nominees?**
- 4. What are the dangers of hyper-partisanship down the road?**
- 5. Is court-packing a legitimate use of power?**
- 6. And finally, do you share McArdle's skepticism about the future of the Court?**