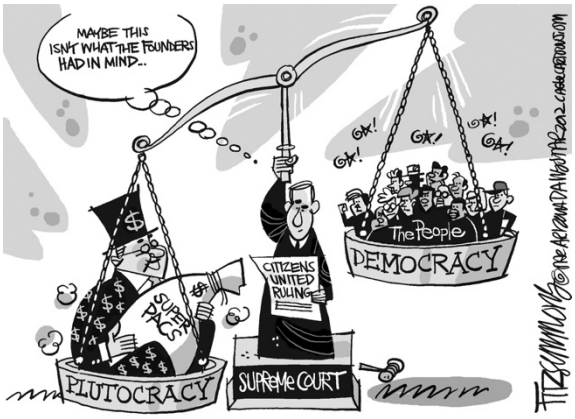
Unit 2 INTERACTIONS AMONG BRANCHES OF GOVERNMENT Room 2B HIVE

2.9 Legitimacy of the Judicial Branch



ESSENTIALS

1. Precedents (stare decisis) play an important role in judicial decision-making.
2. Ideological changes in the composition of the Supreme Court due to presidential appointments have led to the Court's establishing new or rejecting existing precedents.
3. Activism v. Restraint.

1. What is the underlying idea of this cartoon? [Write your response as a thesis using a "because" statement]

2. Who enforces Supreme Court decisions? What happens if they are not enforced?

Define PRECEDENT. Why does our court system depend upon precedent (stare decisis)?

List the nine (9) justices of the current U.S. Supreme Court. List the president that appointed them. List the senate confirmation vote (was the Senate a majority Democrat or Republican?) Determine if their decisions lean "conservative" or "liberal."

Name	President who appointed	Senate vote	Partisan bloc – provide evidence
1. Chief Justice			
2.			
3.			
4.			
5.			
6.			
7.			
8.			
9.			

Find three (3) examples of the President choosing NOT TO ENFORCE a Supreme Court decision.

The Court defines LEGITIMACY. How did they do?

"…The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court. As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.

The underlying substance of this legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws. That substance is expressed in the Court's opinions, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all. But even when justification is furnished by apposite legal principle, something more is required. Because not every conscientious claim of principled justification will be accepted as such, the justification claimed must be beyond dispute. The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation…"

Source: Opinion in Planned Parenthood v. Casey (1992), Justice O'Connor

Summarize Justice O'Connor's discussion in your own words. What are the ultimate roots of the Court's legitimacy? Do you agree? Any dangers of this definition? Do the ideals of our founding agree? Explain.

CONCEPT APPLICATION

Legitimacy is a complex and puzzling concept. But in legal discourse, we have an intuitive sense that illegitimate means something more than erroneous or incorrect. The term signifies something absolutely without foundation and perhaps ultra vires. So, when a government institution or organization lacks legitimacy, it may no longer be worthy of respect or obedience.

Given this intuition, it is striking how many commentators — including prominent constitutional scholars, a former Attorney General, and current members of Congress — have recently questioned the legitimacy of the United States Supreme Court. Indeed, some critics suggest that the situation is so bad as to warrant extreme measures: it may be time to rethink life tenure, take away broad swaths of federal jurisdiction, impeach Justices, disobey Supreme Court decisions, or — most commonly — "pack" the Court with additional members.

For those who study the federal judiciary, this onslaught is jarring. Although the Supreme Court has been subject to attacks in the past, recent decades have been a period of relative calm. Indeed, many court curbing measures — including court packing and disobeying court orders — have been off the table since the mid-twentieth century.

…To understand the tension between sociological and legal legitimacy, we need a better grasp of the former. Why does the Supreme Court's external legitimacy even matter? Political scientists agree: The judiciary has no army; it must rely on others to obey its decrees. Government officials and the general public are more likely to comply if they view the Court as "legitimate" — that is, as an institution that does and should have the power to affect legal rights and obligations. It is particularly crucial that those who disagree with a given decision view the Court as legitimate; such disappointed individuals will respect the adverse ruling if they view the institution itself as authoritative. Thus, political scientists have a refrain: "Legitimacy is for losers."

Source: Tara Leigh Grove, "The Supreme Court's Legitimacy Dilemma," *Harvard Law Review*, 2019

A. Describe evidence that today's Supreme Court has a legitimacy problem, according to this scenario.
B. In the context of the scenario, explain how the response in part A can be addressed by the Court.
C. In the context of the scenario, explain how Congress can respond to the Court's "legitimacy problem."