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February 23, 2019: Opening of the Memphis talk on Court-Packing

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Title: Opening of the Memphis talk on Court-Packing

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2/23/2019--Here is the opening of the talk I will be giving at Memphis Law School in two weeks. I mentioned the themes back on January 29 below.

To Save American Democracy, Prevent Court-Packing

Bruce Ledewitz

The University of Memphis 2019 Law Review Symposium: Barriers at the Ballot Box

I never expected to have to ask for help in saving American democracy. And when I say saving democracy, I don't mean something abstract, like curbing the power of courts or limiting the influence of big money. No, I mean help in preventing a military takeover.

For this can happen here. It might be closer than we think.

It is not news that American democracy is in trouble. Republicans and Democrats do not trust each other. Americans inhabit different narrative universes. We are bitterly divided even though the issues over which we differ appear to be quite ordinary.

The reason the threat to democracy is so clear to me is a 2018 book, entitled *How Democracies Die*, that compares the current American situation with historical examples of how democracies have actually ended. The authors, Harvard University political scientists Steven Levitsky and Daniel Ziblatt, show that democracies end when the norms of tolerance and forbearance are violated.

Tolerance means the acceptance that "the other side" will attain power from time to time. Forbearance is the related norm that when this situation occurs, the minority will not do everything within its legal powers to prevent the enactment of the policies of the other side.

Clearly American politicians are not practicing tolerance and forbearance today. In terms of tolerance, the 2016 election was regarded by some Republicans as the "the Flight 93 election: charge the cockpit or you die." And most Democrats regarded the possibility that Donald Trump might be elected President as loathsome and unthinkable.

In terms of forbearance, the Republican majority in the Senate refused to even hold a hearing on the nomination of Judge Merrick Garland to the Supreme Court. More recently, the Democrats filibustered the nomination of Neil Gorsuch without much justification.

In a healthy democracy, you let the other Party enact its policies and then reverse them when your side is returned to power. You can always tear down a border wall, for example. A border wall not an existential threat.

The norms of tolerance and forbearance have been slowly weakening for a long time. Bill Clinton's first budget, in 1993, for example, passed without a single Republican vote in Congress, for example. In 2013, Democrats ended the Senate tradition of the filibuster for many

judicial and executive nominations.

Levitsky and Ziblatt place the major blame on the Republican Party. That may be part of the reason that their book has not had the same effect across the political aisle.

That limited appeal is unfortunate because “who started it” is quite irrelevant. Once tolerance and forbearance begin to slip, partisans on both sides are justified in claiming that every new outrage is just a response to a previous outrage by the other side. When you fight fire with fire, the whole world burns. When you fight the absence of tolerance with intolerance of your own, democracy is destroyed.

It takes real statesmanship to break this cycle. It is not clear that such statesmanship is available in America today.

We cannot expect help from the Supreme Court. In the first place, the Justices do not yet appreciate the danger to American democracy. That is obvious from their unwillingness to address gerrymandering on the merits.

But even if the Justices were cognizant of the danger, there is not much they can do. The decline of forbearance does not require illegality. It was not illegal to refuse Judge Garland a hearing. It was not illegal to limit the filibuster. It would be helpful if the Justices proclaimed the fragility of democracy. But in the end, the responsibility to sustain democracy lies with us.

How will American democracy end? In my paper, I describe two nightmare scenarios that could so undermine the legitimacy of the American governing structure that some kind of takeover would be inevitable. These two scenarios are the partisan manipulation of the Electoral College and the packing of the U.S. Supreme Court by increasing the number of Justices.

These two scenarios pose very different threats today. For the moment, the Electoral College looks safe. The current threat is much more likely to come from the Democratic Party packing the Supreme Court.