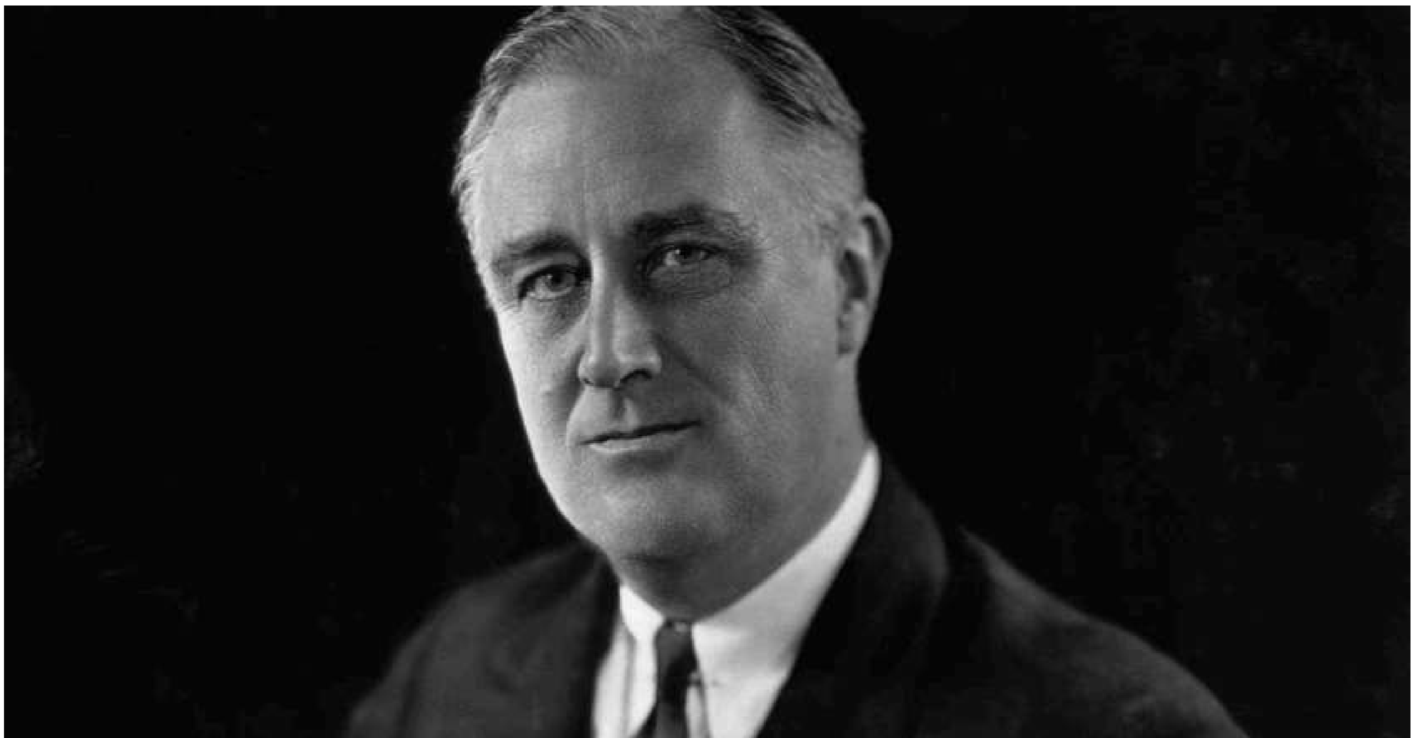
THE FUTURE IN CONTEXT

Supreme Court Packing: A Bad Way to Get Even (or Ahead)

The Constitution is silent on the number of justices on the Supreme Court. The independence of the judiciary is put in jeopardy when partisans settle political scores by rebalancing the courts.

April 30, 2021 • **Clay S. Jenkinson**



Franklin Delano Roosevelt, the 32nd president of the United States. In 1937, frustrated by the Supreme Court's habit of striking down key pieces of New Deal legislation, FDR tried to convince Congress to permit him to nominate up to six new justices.
(Photo: Pathfinder Magazine, April 17, 1937, via oldmagazinearticles.com)

... can listen to the companion audio version of this and other essays in the series ...g the player below or on Apple Podcasts, Google Podcasts, Stitcher or Audible.

Recent talk among some Democrats about expanding the number of Supreme Court justices has caused enormous consternation among Republicans, but also among many mainstream Democrats and conservative political commentators. The impulse to increase the number of justices is a partisan Democrat response to the refusal by Mitch McConnell and Republican senators to confirm (or even vet) President Obama's Supreme Court nominee Merrick Garland in the last year of his presidency (2016), and the same Republican establishment's seemingly hypocritical rush to confirm Justice Amy Coney Barrett in the last weeks of Donald Trump's tenure. Thanks to those partisan maneuvers, conservative justices now outnumber the progressives 6:3. To "right the balance," and exact some political revenge, some Democrats are now calling for some good old-fashioned court packing.

ADVERTISEMENT

The Roberts Court, November 30, 2018. Seated, from left to right: Justices Stephen G. Breyer and Clarence Thomas, Chief Justice John G. Roberts, Jr., and Justices Ruth Bader Ginsburg and Samuel A. Alito. Standing, from left to right: Justices Neil M. Gorsuch, Sonia Sotomayor, Elena Kagan, and Brett M. Kavanaugh.
(Photo: Fred Schilling, Collection of the Supreme Court of the United States)

What Is in a Number?

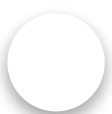
The U.S. Constitution does not specify the number of justices on the Supreme Court. The Founding Fathers left that to Congress. In 1789, just a year after ratification of the Constitution, Congress specified that the Supreme Court "shall consist of a chief justice and five associate justices." Six total.

The number of justices increased during the 19th century from six to nine, and for a brief period, ten, not by way of court packing, but with the inevitable increase in the number of judicial circuits as western expansion increased the size of the United States. Since April 1869 the number has been stable at nine.

ADVERTISEMENT

That number seems so “fixed” in our civic consciousness that most Americans regard it as having full Constitutional weight. But there is nothing magical about a nine-member court except that it prevents a tie vote. Congress has full and unrestrained power to set the number as high or low as it wishes by a simple majority vote of both houses. The nine-member tradition, however, has become a norm of what might be called the small-c constitution (the unwritten but deeply rooted way our system is constituted) with such other small-c traditions as judicial review (not in the Constitution), executive orders (not in the Constitution), cloture in the Senate and the President’s Cabinet. The American people have proved to be remarkably unwilling to tinker with small-c constitutional norms and traditions. It seems very unlikely that the current Congress (the 117th) will pass legislation that would break the 162-year tradition of nine justices. In this time of great political instability, and particularly after the norm-busting presidency of Donald Trump, the country seems especially reluctant to tamper with stable provisions of our governance that seem sacred, fixed and unalterable.

FDR’s Court Packing Ignominy



A 1937 magazine cartoon depicting a trap set in a court packing plan by President Franklin Delano Roosevelt. *(Pathfinder Magazine, April 17, 1937, via oldmagazinearticles.com)*

The most famous attempt to pack the courts was the brainchild of Franklin Delano Roosevelt. In 1937, frustrated by the Supreme Court's habit of striking down key pieces of New Deal legislation, FDR tried to convince Congress to permit him to [illegible]inate up to six new justices (by way of a complicated formula depending on the [illegible] of existing justices and the length of their tenure on the court). Senator Henry

Ashurst, a fellow Democrat and the chairman of the Senate Judiciary Committee, was sufficiently alarmed by this political maneuver that he stalled the proposal in committee for 165 days. Many senators, including a large number of Democrats, opposed the bill on constitutional as well as political grounds. Ultimately, the Judiciary Committee released a report calling FDR's proposal "a needless, futile and utterly dangerous abandonment of constitutional principle … without precedent or justification." That was the end of that.

Jefferson, the Judiciary and the Midnight Judges Act

The first attempt to use the number of justices as a political weapon came just before Thomas Jefferson was inaugurated as the third president of the United States on March 4, 1801. The Federalists, fearful of what Jefferson was calling "the second American Revolution" (1800), passed the Judiciary Act of 1801 in the last days of the Adams administration. The bill reduced the number of Supreme Court justices from six to five. That meant that the next vacancy on the court would not be filled, and the "radical" Jefferson would therefore be less likely to install men of his own political outlook on the bench. (In the end, Jefferson placed three men on the Supreme Court, two of whom proved to be a political disappointment). The same lame duck legislation created 16 new circuit judgeships in the fledgling U.S., all of which were filled by Federalists (anti-Jeffersonians) in the last weeks of the Adams administration. They became known as Midnight Judges. A few of the judicial positions were actually filled on the last day of Adams' one-term presidency.

Jefferson and his Republican partisans were offended both by the reduction of the size of the court and by this circuit court-packing measure. Jefferson was no friend to the judiciary generally. As late as 1820, 12 years after he left the presidency, he wrote, "The Judiciary of the United States is the subtle corps of sappers and miners constantly working under ground to undermine the foundations of our confederated fabric." Among other things, life tenure appalled him. The goal, he said, was for justices to be independent of the regular political process, but not entirely independent of the will of the American people. He wanted justices to be appointed for no more than six years and to be removable by the joint decision of the president and the Senate. When the lame duck Congress passed the last-second Judiciary Act of 1801, Jefferson wrote, they have "retired into the judiciary as a stronghold . . . and from that battery all the works of Republicanism are to be beaten down and destroyed."

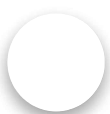
The Need for Stability: Circuit Breakers and Circuit Makers

The Jeffersonians soon repealed the Judiciary Act of 1801, restored the sixth seat and elimated a number of circuit court judgeships. In 1807, when a seventh circuit was added to the federal judiciary system, the number of justices was raised to seven.

It wasn't until 1837 that Congress created the eighth and ninth circuits of the U.S. Judiciary. President Andrew Jackson signed the legislation on his last day in office, March 3, 1837. That same day, Jackson sent the names of two new associate justices to the Senate. They were promptly confirmed *after* he retired from the presidency. It was a simpler time.

Under the separation of powers doctrine, the legitimacy and prestige of the Supreme Court are increased when it is as immune from the routine political process as possible and degraded when it wanders into partisan politics or is politicized by one or both of the other branches of the national government. Although the ideal of an entirely nonpartisan judiciary is more honored in the breach than in the observance — humans, Aristotle said, are political animals — for long stretches of American history, the courts have been shielded from the passions of electoral politics.

The Senate Judiciary Committee, Low-Brow Political Theater and a Litmus Test



President Reagan, SCOTUS nominee Bork and Justice Thomas

The Senate's rejection of President Ronald Reagan's nomination of Robert Bork in 1987, followed by the intense national conversation over the nomination of Bush appointee Clarence Thomas in 1991, brought on an era of ardent, even vicious, partisanship over Supreme Court nominations. Abortion has become the most visible of political issues distorting the nomination process. Until recently, both parties have pretended that abortion is not a "litmus test" for Supreme Court candidates, but it is clear that a nominee's attitude toward abortion and the controversial 1973 decision Roe v. Wade, is a matter of urgency both to the executive branch and the Senate. President Trump openly declared that he would not nominate any pro-choice candidates. This put his nominees in an awkward position during Senate confirmation hearings, when they assured angry Democrats that they had not made up their mind about future cases challenging the controversial Roe decision.

In the last 30 years, Senate Judiciary Committee hearings have become a species of low political theater. Senators ask legitimate questions about legal theory and specific issues likely to come before the court, and nominees invariably declare that they could not possibly have an opinion about hypothetical cases, which they could only begin to evaluate once those cases — with all of their specific circumstances — actually come before the court. As often as not, senators spend their time in the hearings delivering political lectures to the nominees, often playing to the cameras

rather than to the process of determining whether an individual should get a job with guaranteed life tenure. Nominees are groomed by their sponsoring party to provide vague and vapid answers to questions of grave importance to the lives of 340 million Americans. The goal for the nominee is to survive the process unscathed, without revealing anything of value. The goal for the senators is to lobby (often browbeat) the nominee to pursue a certain judicial path, or to find a way to trick the candidate into revealing a position on an important national issue that can then be used to discredit her or his candidacy. The public learns nothing from the process except disappointment in the nominee and contempt for certain senators.

The illusion that the Supreme Court is nonpartisan and politically neutral has been eroded by the political wrangling in the Senate Judiciary Committee since 1987, and — perhaps more severely — by the court's controversial decision in Bush v. Gore on Dec. 12, 2000. In a 5:4 vote strictly along party lines, the Supreme Court handed the presidency to George W. Bush. Almost nobody, not even Bush partisans, regarded the decision as a solely *legal* resolution of the irregularities in the presidential election in Florida. The court has always been touched by partisan politics, as early as the Jefferson administration, but the increased visibility of its actions in an age of 24-hour, 365-days-per-year media attention, and the explosion of social media, have eroded its prestige and, in the minds of many, its basic integrity. As Edwin C. Hagenstein writes in his new book, *The Language of Liberty, A Citizen's Vocabulary*, "the Court's capacity to speak authoritatively on our highest legal matters depends on public faith in its judgments, which can only decline when it is seen as overtly politicized. If the Supreme Court is seen to be taking political stands in its decisions, it spends down its store of civic capital, upon which its own effectiveness depends."

The current Chief Justice John Roberts has worked hard to shield the Supreme Court from the hyper-partisanship of recent years. His reluctance to let the court seem to express political rather than judicial opinions has not immunized the court from overt partisanship, but he has managed to serve as a moderating force in a very difficult time. The court's refusal to hear cases pertaining to President Trump's claim that the 2020 presidential election was stolen will almost certainly, in the long run, be seen as a wise refusal to enter the fray.

The fact remains that the Congress of the United States has a perfect right to adjust number of seats on the Supreme Court. But as FDR learned to his barrassment, the small-c constitution is much more tenacious than innovators,

reformers and mischief makers estimate in their thirst to shape America's fundamental institutions to their will. Remember, too, that life tenure produces not only independence from the nation, but also from the president who made the appointment. President Dwight David Eisenhower is said to have said, in 1958, "I have made two mistakes, and they are both sitting on the Supreme Court."

You can hear more of Clay Jenkinson's views on American history and the humanities on his long-running nationally syndicated public radio program and podcast, The Thomas Jefferson Hour*, and the new* Governing *podcast,* The Future In Context*.*

Tags: Courts, Elections, Abortion

Clay S. Jenkinson

Clay S. Jenkinson is a historian and humanities scholar based in North Dakota. He is founder of both the Theodore Roosevelt Center and Listening to America. He can be reached at ltamerica.org.

SEE MORE STORIES BY CLAY S. JENKINSON

ADVERTISEMENT

t Read