

Court packing? This isn't the first time this bad idea has come forward

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Apr 21, 2021

Public confidence in institutions is already low. Adding justices to the Supreme Court would make it worse

The debate over enlarging the U.S. Supreme Court would be largely unnecessary if Congress would take its power to legislate seriously.

Even so, history has plenty to offer on the subject, clearly demonstrating that court size has been used as a political weapon before. No one should doubt that, once unsheathed again after lying dormant for 152 years, it would be weaponized again.

The nation's high court has, in recent decades, become pivotal in battles over culture-war issues. That includes cases involving limits on abortion rights, such as a recent one striking down [a Louisiana state law](#) that imposed hospital-admission requirements on abortion clinic doctors. And in the [Hobby Lobby case](#) that exempted private corporations from regulations its owners objected to on religious grounds. And in [Masterpiece Cakeshop vs. Colorado](#), which ruled in favor of a baker who refused to make a cake for a transgender woman, to cite just three examples.

Each time a case arises, one side or the other hopes for a ruling that provides a decisive broadside establishing vital precedents for their side. Nearly every time, each side is somewhat disappointed. Court cases frequently fall short of being the decisive word either side desires.

But these struggles have been waged with a court set at nine justices — a level rarely challenged, until now.

Recent decisions by Republican-controlled U.S. Senates — first in declining to consider President Obama's nomination of Merrick Garland in 2016, then in quickly pushing through the appointment of Amy Coney Barrett close to the 2020 election — have raised cries of “stolen seats” from the left. In turn, some on the left feel justified in clamoring to expand the court to counter its conservative majority.

The judicial branch has been wielded as a political weapon many times in the nation's history. But its decisions in hotly contested matters that divide the nation can never substitute for the considered deliberation of elected representatives.

If, for example, the House and Senate would do the hard work of debating and compromising issues such as immigration reform, abortion or the intersection of religious liberties, as guaranteed by the Constitution, with the rights of LGBTQ people, those decisions would have an air of authority.

They might not be final — no decision in a democracy ever is. But the battle then would focus on elections, rather than on justices who serve for life and whose eventual interpretations of key issues are difficult to guess ahead of time.

The courts also bear some responsibility for this drift away from legislating solutions. As [Ilya Shapiro](#), vice president of the Cato Institute and director of the Robert A. Levy Center for Constitutional Studies, told me, “Over decades, courts have been passive in letting Congress give away its powers. Congress is the place where we’re supposed to look at these issues.”

And yet, he said, we consistently see protests outside the Supreme Court, rather than outside the halls of Congress. Special interests understand where the front lines are in culture-war battles.

Instead, imagine a nation in which Congress engaged in real debate and compromise over the hot-button issues of the day. Perhaps then, the Senate wouldn’t spend endless hours trying to guess how ideologically pure a Supreme Court nominee is on key issues — an effort that often proves to be inaccurate.

President Joe Biden has [established a 36-member commission](#) to study a variety of issues related to the court, including whether it should be expanded from its current level of nine justices.

We’ve been here before

“Court packing,” as it’s often called, is something the Constitution doesn’t address. The founders did not establish a number for Supreme Court justices. They provided few guidelines at all. Originally, George Washington appointed six, but that was only because it was considered the right number needed to travel to the circuit courts over which the justices presided.

Congress has the power to expand or contract the court. But If you want to really understand what would happen if Biden and the Democratically controlled Congress decided to expand it to negate a conservative majority, history — especially from the early to mid-19th century — provides an illuminating guide.

While people often reference 1937 and President Franklin Roosevelt’s ill-fated attempt to enlarge the court, a better example comes from 1801, or even 1869. The history of yo-yo Supreme Court levels is not a pretty one.

As a narrative on [history.com](#) explains, in 1801, John Adams was a lame-duck president, having lost the previous November to Thomas Jefferson. Just before that election, Chief Justice Oliver Ellsworth resigned because of an illness. So, Adams hurriedly nominated John Marshall to take his place only a month before Jefferson took office, and the lame-duck Federalist Congress confirmed him, making today’s complaints about the quick Republican confirmation of Barrett seem tame by comparison.

But Adams went further. He and the Federalists passed a law shrinking the court to five justices, making it less likely Jefferson would ever get to nominate one.

When Jefferson assumed office, he and the new Congress quickly returned the number to six. This was the first time the judicial branch was used as a political weapon.

During the ensuing years the court gradually expanded to nine, but this was to keep up with the nation's expanding circuit courts.

The number then jumped to 10 during the Civil War because, as author and historian Timothy Huebner wrote for the [Scotus Blog](#), Abraham Lincoln "sought to appoint Justices who would further the federal war aims of preserving the Union and (end) slavery."

After Lincoln died, Congress and President Andrew Johnson clashed over Reconstruction, and Congress decided to punish the president by reducing the number of justices to seven, keeping him from appointing any of his own. But in 1869, when Ulysses S. Grant took over the White House, a Republican Congress expressed its delight by increasing the number to nine.

It has remained there ever since.

All these 19th century examples of court tinkering could be described as politically motivated, although their proponents would no doubt argue they were done in the nation's best interests. And despite liberal sentiments today that a conservative court majority is bad for the nation, expanding the court to pack it with more liberal judges would take a page out of the 19th century playbook. It would unleash the court as a political weapon, with Republicans likely to respond in-kind, either shrinking or expanding to grant themselves an advantage when they assume power once more.

Biden's view

As [Newsweek](#) recently reported, even Biden, when he was a senator in 1983, called court packing "a bonehead idea."

Given the modern sense of importance on court decisions regarding matters that divide the country, the results today could be much more damaging than they were in the 19th century.

A poll conducted by the [Annenberg Civics Knowledge Center](#) in 2019 found that 68% of Americans trust the Supreme Court to operate in the best interests of the American people. It also found 70% responding that the court has "about the right amount of power."

Even so, a majority of Americans said the court often gets "too mixed up in politics."

Expanding the number of justices on the court would likely increase that sentiment while hurting trust.

Tinhorn dictators control their courts to ensure that friends are protected and enemies punished. In the United States, jurists judge on the law and the merits of each case. The life-time appointments of Supreme Court justices makes them independent of the political system. Upholding that tradition is vital.

A 2018 report by the [Washington Post](#) discovered something that may startle modern partisans. Since 2000, the most common ruling in all Supreme Court cases was unanimous, 9-0. Split decisions were most often either 8-1 or 7-2, still offering decisive majorities. The dreaded 5-4 decision along ideological lines was the result only 19% of the time.

In addition, justices often rule in ways opposite to what the presidents who nominated them might have hoped. The current chief justice, John Roberts, for instance, was appointed by a Republican. Yet, his decision was crucial in upholding the Affordable Care Act, or Obamacare, as it is known. Justice Anthony Kennedy was nominated by President Ronald Reagan, and yet he authored the majority opinion that made gay marriage legal.

This sense of independence takes the wind out of court expansion. So do the recent statements of some of the court's more liberal justices, who opposed such a move.

Before she died, Justice Ruth Bader Ginsburg, a liberal appointee, made strong statements against court expansion. "I think it was a bad idea when President Franklin Roosevelt tried to pack the court," she told NPR. "If anything would make the court look partisan, it would be that — one side saying, 'When we're in power, we're going to enlarge the number of judges, so we would have more people who would vote the way we want them to.'"

Justice Stephen G. Breyer, also described as a liberal, has spoken against it, as well. In a speech at the Harvard Law School, he said public trust is necessary to establish the court's authority. As the Washington Post reported, he said this was "a trust that the court is guided by legal principle, not politics."

Biden's commission apparently will consider a number of potential court reforms, including limiting the terms of service on the Supreme Court or setting age limits. Each of those would require a constitutional amendment.

Court packing, by contrast, would be the easiest type of reform to produce, although it likely wouldn't be able to overcome Senate Republican filibusters. It might even lack total Democratic support.

If enacted, however, it could potentially be the most destructive type of reform for the court, public confidence and the future of the republic. Getting Congress to deliberate and legislate the nation's toughest challenges — the best of all solutions — would become that much more difficult.