AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES AND POWERS

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Supplementary Material

Chapter 12: The Contemporary Era – Judicial Power and Constitutional Authority/Judicial Structure and Selection

**Presidential Commission on the Supreme Court of the United States, Final Report** (2021)[[1]](#footnote-1)

*After the decisive defeat of President Franklin Roosevelt’s Court-packing plan in 1937, the idea of expanding the size of the Supreme Court in order to affect its jurisprudence had largely been taken off the political table. It was put back on the table in the second decade of the twenty-first century. So much so that soon after assuming office President Joe Biden appointed a presidential commission to analyze the legality and pros and cons of various Court reform measures.*

*In 2016, Justice Antonin Scalia unexpectedly died, creating a vacancy during the final months of the Barack Obama presidency. The Republican majority in the Senate refused to act on his nomination of Judge Merrick Garland to fill the seat. The Republicans expected to retain majority of the Senate, but Democratic nominee Hillary Clinton was widely expected to succeed Obama in the White House. When Donald Trump unexpectedly won the White House in the 2016 election, he was able to fill the seat with Neil Gorsuch. Anthony Kennedy subsequently retired, and his seat was filled by Brett Kavanaugh. The death of Ruth Bader Ginsburg resulted in the appointment of Amy Coney Barrett. With Kennedy as a swing vote, the Garland nomination might have created a working liberal majority on the Court. Instead, the Barrett nomination gave the conservatives a firm 6-3 majority on the Court.*

*During the Trump presidency, progressive activists began to insist the Democrats expand the size of the Supreme Court whenever they regained control of Congress and the White House. Those demands were loud enough that several Democratic candidates for president in 2020 indicated their support for taking such a step, but Joe Biden was noncommittal. As a senator, Biden had repeatedly denounced Court-packing as a “terrible, terrible mistake” that “put into question . . . the independence of the most significant body in this country, the Supreme Court of the United States.” On the campaign trail in 2020, however, he promised to appoint a bipartisan commission to study the issue. Biden won the presidency in 2020, and more surprisingly the Democrats were able to tie the Senate, giving them a working majority with the tie-breaking vote of the vice president. Calls to expand the Court while Democrats enjoyed unified government intensified, and in April 2021 Biden followed through with his campaign promise of appointing a presidential commission. It was unusually large for a presidential commission and dominated by law professors, but also included the president of the NAACP, three former judges and one political scientist. Some of the members had previously served as attorneys in the executive branch, but no members had previously held elective office. The commission included a handful of members from the political right (two of whom resigned during the course of the commission’s deliberations).*

*The “Court-packing Commission” considered a wide range of reforms affecting various aspects of the Supreme Court’s operations, including, for example, limiting the justices’ term of office to eighteen years, the reduction of the Court’s jurisdiction to hear cases, and the possibility of Congress being able to override judicial decisions. The most prominent feature of the report was a chapter on proposals to expand the size of the Court. The commission was unable to reach consensus on the wisdom of Court-packing, but concluded that expanding the size of the Court was within the constitutional authority of Congress. The commission’s report laid out several arguments both for and against pursuing Court-packing during the Biden presidency. Progressives were broadly disappointed that the commission did not recommend expanding the size of the Court, and the administration refused to endorse such a measure. The Democrats lost control of Congress in the midterm elections of 2022, ending the immediate prospect of altering the size of the Court.*

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Article III of the Constitution, which establishes the judiciary, requires that there be “one supreme Court” but does not specify the number of Justices that shall serve on that Court. Article I authorizes Congress to make all laws that are “necessary and proper” to carry out the powers conferred on various institutions of government, which include the Supreme Court. Determining the size of the Court that might be “necessary and proper” to its functioning seems well within Congress’s formal discretion.

. . . . Congress exercised that power on numerous occasions in the nation’s first century (in 1789, 1801, 1802, 1807, 1837, 1863, 1866, and 1869), expanding or contracting the Supreme Court’s size for both institutional and political reasons. On several occasions, Congress adjusted the Court’s size in large part to influence the future course of its decisions: The Federalists in 1801, the Democratic Republicans in 1802, the Republicans in the 1860s, and the Roosevelt administration in 1937 had this objective. President Roosevelt explained a few years after the failure of his 1937 plan that he turned to Court expansion to influence the Court in part because of its “undoubted constitutionality.” . . .

During the Commission’s public hearings, one witness argued that, although Congress has broad power to modify the size of the Supreme Court for many purposes, it cannot do so for “partisan” reasons. This argument faces a few challenges. First, it is doubtful that “partisan” reasons can be disentangled from “good-government” reasons. For example, the changes to the Supreme Court in 1807 and 1837 by the Democratic Republicans and Jacksonian Democrats, respectively, had both institutional and political motives; lawmakers not only sought to give the Court more personnel to serve a growing nation but also enabled their party leaders—Presidents Jefferson and Jackson—to shape the Supreme Court. Second, and relatedly, the argument has little historical support; . . . *every* change to the Supreme Court’s size has tended, at least in part, to serve the interests of one political party.

In order to fulfill our charge to provide a complete account of the contemporary Court reform debate, this Part sets out arguments made by proponents and opponents of expansion. The Commission as a whole takes no position on the validity or strength of these claims. Mirroring the broader public debate, there is profound disagreement among Commissioners on this issue. Accordingly, we present arguments for and against expansion independently of each other.

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Some proponents of Supreme Court expansion charge that Republican lawmakers since 2016 have disregarded institutional norms in order to secure a conservative supermajority on the Court. They see expansion of the Court as particularly justified in light of Senate Republicans’ handling of the election-year nominations of Judge Garland and Justice Barrett. . . .

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Proponents of expansion who point to this series of events argue that the addition of new seats to the Supreme Court, at the next opportunity, by a Democratic President and Congress, could help restore the balance on the Court that was disrupted by significant norm violations in the confirmation process, thus protecting the legitimacy of the Court. Some of those who argue for expansion in light of recent events emphasize that they are not motivated by partisan politics but rather by a commitment to the protection of longstanding norms and important constitutional rights. They worry that the current conservative supermajority established by the recent norm violations threatens to take the law, and particularly federal constitutional law, in a still more troubling direction than where it was already moving—perhaps by reversing or continuing to revise longstanding precedents in the areas of reproductive rights, racial justice, workers’ rights, the regulation of guns, religion, administrative law, voting rights, and campaign finance law. But for the improper confirmation tactics of Republican lawmakers, the argument goes, the Court’s doctrinal trajectory might have been considerably different.

Others emphasize that a failure to respond to what they regard as confirmation “hardball” by Republicans since 2016—as well as a failure to advance expansion as a viable option in the political process—might encourage future aggressive measures in the confirmation process, such as a refusal to hold hearings on any judicial nominee put forward by a President of the opposite party. . . . On this account, a significant reform such as Court expansion may be needed to calm the controversy surrounding the Court, by attaching consequences to the Senate’s actions during the Trump years in order to deter future conduct of this kind.

Some proponents of expansion believe it to be essential to address the urgent circumstances brought on by developments in the Court’s jurisprudence that predate recent confirmation controversies but that have been accelerated by those appointments. They believe that these developments threaten to seriously and perhaps irreversibly damage the democratic process. These critics maintain that the Supreme Court has been complicit in and partially responsible for the “degradation of American democracy” writ large. On this view, the Court has whittled away the Voting Rights Act and other cornerstones of democracy, and affirmed state laws and practices that restrict voting and disenfranchise certain constituencies, such as people of color, the poor, and the young. This has contributed to circumstances that threaten to give outsized power over the future of the presidency and therefore the Court to one political party and to entrench that power. . . .

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Some participants in the debate over Court reform also regard expansion as worth considering because of its potential to strengthen the Court as an institution. An expanded Court might better incorporate diverse personal and professional perspectives. . . .

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Opponents of Court packing contend that it would significantly undermine the Supreme Court’s independence. Courts cannot serve as effective checks on government officials if their personnel can be altered by those same government officials. In a system that permitted Court packing, any time the Supreme Court issued a decision that was at odds with the preferences of those in power—whether the matter related to the U.S. census, immigration policy, or the validity of a presidential election—the party in power could respond by stacking the Court with loyalists. One witness before the Commission further explained: “Court-packing risks undermining the *willingness* of the Justices to maintain their independence” from “the very political forces they are supposed to police in the name of the Constitution.”

Given these concerns, opponents underscore, it is crucial that for much of the past century, there has been a strong—and bipartisan—constitutional norm or convention treating Court packing as “something that just isn’t done.” As one scholar wrote a few years ago, one could say confidently that “court packing is essentially considered a wholly illegitimate means of seeking to alter existing Supreme Court doctrine. No serious person, in either major political party, suggests court packing as a means of overturning disliked Supreme Court decisions, whether the decision in question is *Roe v. Wade* or *Citizens United*.” Scholars could say, until very recently, that even as compared to other Court reform efforts, “‘Court packing’ is especially out of bounds. This is part of the convention of judicial independence.”

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For opponents, the United States’ fidelity to this norm has particular significance in light of developments in other parts of the world where manipulation of the composition of the judiciary has been a worrying sign of democratic backsliding. . . .

Opponents also cite a concern related to the threat to judicial independence. . . : that Court packing would almost certainly undermine or destroy the Supreme Court’s legitimacy. Some witnesses testified that the reform would be perceived by many as a partisan maneuver, or a dangerous power grab by one political party—a move that would render the decisions of the resulting (larger) Supreme Court of questionable legitimacy to much of the public. Critics argue that the public is less likely to treat the decisions of a packed Court as authoritative, diminishing the Court’s capacity to protect individual rights, equality, or constrain abuses of executive power.

Opponents of Court packing in this moment warn that it would also almost certainly generate a continuous cycle of future expansions. Expanding the Court would be on the agenda of every administration under unified government. One (purportedly modest) estimate of the consequences of expansions as parties gain Senate majorities and add Justices concludes that the Supreme Court could expand to twenty-three or twenty-nine Justices in the next fifty years, and thirty-nine or possibly sixty-three Justices over the next century. Critics worry that these repeated fights over the Court could lead the public to see the Court as a “political football”—a pawn in a continuing partisan game.

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1. Excerpt taken from Presidential Commission on the Supreme Court of the United States, Final Report (December 2021). [↑](#footnote-ref-1)