

# The Quill

Conversations  
& Commentary from  
The LeMieux Center  
for Public Policy

AT PALM BEACH ATLANTIC UNIVERSITY



## The Politics and History of Supreme Court Expansion

By JAMES A. TODD

It's happening. The oft-discussed tinkering with the Supreme Court in the 2020 Democratic presidential primary is now closer to becoming a reality.

As a presidential candidate, Joe Biden was guarded on the issue. Biden had been quite vocal as a senator against adding new seats to the Supreme Court, a notion often derided as "Court packing." However, to shore up left-wing voters, the former vice president eventually promised, if elected, that he would study the issue of judicial reform. True to this promise, in April 2021, President Biden formed a commission of academics to conduct this study. Two days after the Biden announcement, Progressive Democrats in Congress introduced legislation to expand the size of the

Supreme Court from its current number of nine justices to thirteen.

The Biden commission's conclusions are not public as of this writing.

Biden's commission will not need to spend much time examining the constitutional issues involved. Congress clearly has the power to determine, legislatively, the number of seats on the Supreme Court. Congress can add to the number of seats or abolish them as long as one seat remains, presumably.

Perhaps the commission would turn to the performance of the Court in recent years. Many have argued that the Court should decide more cases per year than it does. Each year, the Court accepts for full review less than 1% of all cases brought by petitioners. Perhaps with more justices, the Court could decide more cases per year.

## CONTINUED FROM FRONT

However, there is a far simpler solution to this problem of a shrinking docket than Court expansion. This would be to modify the Court's discretion to reject certain petitions for writ of certiorari. The Court's power to decline cases is entirely of Congress's making. The current Court could be required by Congress, for example, to accept all federal criminal cases, or cases concerning agency action, or cases involving the United States as a party, or cases heard *en banc* by a Court of Appeals, etc. And, in the past, a nine-member Court has shown itself capable of deciding more cases than the Court does today. Some reform other than adding to the number of justices could restore the larger docket. And adding to the number of justices, without simultaneously taking away the Court's full discretion to decline cases, would not necessarily accomplish the objective of more Court decisions per year.

Perhaps the commission could study the history of Court expansion, which would not take very long, either. Expanding the Supreme Court was a live issue in American politics until Reconstruction, for good reason. From 1789 to 1869, Supreme Court justices spent the vast majority of their time sitting as circuit court judges. In the early republic, Supreme Court justices had a dual role. For about two months per year, while the justices were in Washington, they served together on the nation's high court. For the remainder of the year, when each justice was in his regional judicial circuit, he heard circuit court cases. In the pre-1869 era, each federal judicial circuit needed a Supreme Court justice to assist its district court judges in deciding circuit court cases (district judges and the Supreme Court justice sat together on the bench as the "circuit court"). Thus, before 1869, the number of justices was necessarily tied to the number of federal judicial circuits. As the nation grew westward, new circuits had to be created for the new states, and

a new justice would be needed to work in any new circuit.



This "circuit riding" was pretty arduous for a justice, seriously diminishing the desirability of serving on the Court. Due to the workload and the travel involved, each justice could feasibly only serve in one judicial circuit. To assist the justices, in 1869, Congress created the position of circuit court judge. Also in that year, Congress set the number of Supreme Court justices at nine (down from ten), where it has remained ever since. Thanks to the existence of circuit judges, justices spent less time on circuit duties after 1869 until circuit riding was finally abolished in 1891.

The justices' circuit duties formerly provided a very strong reason for Court expansion, but of course that rationale is gone. Now, each justice is assigned a circuit purely for supervisory purposes — to hear emergency appeals from the circuit. Some of today's justices supervise more than one judicial circuit. No justice has ever indicated that these supervisory duties present a workload challenge, thus undercutting any rationale for having one justice per each of the 13 existing circuits.

Perhaps the commission will look at the only obvious historical parallel: President Roosevelt's failed attempt at Court packing in 1937. This was the only time in history that a Court expansion proposal was made for reasons not related to the circuit courts. Here, the precedent would not be at all reassuring to proponents of Court packing. First, historians and constitutional scholars have not been kind to Roosevelt on this. FDR's court packing plan was transparently political

and outcome-oriented. Roosevelt's New Deal items had passed Congress overwhelmingly, only to be stymied by the Court in a series of 5-4 decisions in FDR's first term. In 1937, the New Deal proposals were clearly popular with the American public, and FDR had just enjoyed a landslide re-election in 1936.

Roosevelt's idea was to create a new seat on the Court for every justice who had reached a certain age but would not retire. This would have had the effect of creating immediate appointment opportunities for the president — either to new seats or to vacated seats.

In the end, Roosevelt failed to convince enough members of his own party in Congress to support his Court expansion plan. As gifted as FDR was as a politician, he could not overcome the argument that his Court packing plan was anything more than a power grab. And of course, that was exactly what it was. The proposal harmed

FDR, politically, but it did perhaps have the effect of influencing one justice's vote (Owen Roberts)

in a series of cases later heard by the Court. Ultimately, the Court changed its mind about the constitutionality of the New Deal. And FDR would go on to fill a majority of seats on the Court through normal attrition.

Even though it was rejected in its time and in the court of history, in many ways FDR's court packing plan was more meritorious than any plan that could be offered today. FDR won a clear mandate in the 1936 election to push forward with the New Deal. No president in recent times has enjoyed a similar mandate — certainly not Biden, who won in 2020 by eking out very close wins in three states even as his party lost seats in the House. FDR's New Deal proposals passed overwhelmingly through Congress. No significant legislation gets overwhelming

support in Congress now. The Court of 1937 had thwarted legislation that was seen as necessary by Congress, the president and the American people to combat the Great Depression. The Court was arguably acting in an extremely undemocratic fashion, insensitive to the economic needs of the nation. The Court of today has not invalidated any major law of Congress enacted in the past decade and has, in fact, upheld as constitutional the two significant federal policy changes since 2010 (the Affordable Care Act and the Dodd-Frank financial regulation).

Just like FDR, Biden's commission will not be able to develop any rationale for Court expansion that Americans will find suitably non-political. This is because there is no current rationale for Supreme Court expansion that is not tied to the political fortunes of the Democratic Party.

Progressive Democrats make two major

claims today in favor of Court expansion.

First, they claim that the Court itself is undemocratic.

But the Court is not supposed to be “democratic”

in a sense that it simply implements the will of the majority. Instead, the Court is supposed to uphold important constitutional principles *despite* the public mood. As Alexander Hamilton pointed out long ago, in upholding the Constitution the Court is upholding the long-term will of “We the People” against the whim of a temporary majority. And, of course, Court expansion presents no obvious remedy to the undemocratic nature of the Court.

Second, would-be Court packers argue, the Court's recent decisions have harmed our democracy by allowing restrictions on the right to vote. This is more nuanced, for sure, but not exactly borne out by any available evidence. On the strength of a high voter turnout, Democrats enjoyed

**There is no current rationale for Supreme Court expansion that is not tied to the political fortunes of the Democratic Party.**

success in the most recent two federal election cycles. In 2018 they won the House of Representatives and (as importantly) swing-state governorships critical to their eventual victory in the 2020 presidential race. They also won the Senate. The Court actually assisted Democrats by rejecting any cases that would have brought into question the 2020 election results.

It is true that the Court rolled back certain portions of the Voting Rights Act, but not before it left Congress with a clear opening to update the Act to account for present-day realities of voting. (The Court simply refused to let Congress put some states under harsh restrictions because of what was happening in them *in 1965*.)

Lastly, the Progressives say that recent Republican appointments have “packed” the Court. This is untrue if one uses the accepted meaning of “Court packing.” The three most recent Republican justices were appointed to fill *existing* Court vacancies according to the Constitution’s prescribed process.

In the final analysis, it comes to this: the Progressives have bold proposals — featuring federalizing all voting, major gun restrictions, the Green New Deal, statehood for the District of Columbia, reparations for slavery — that, if enacted by Congress, will no doubt result in immediate and formidable constitutional challenges. If they pack the Court with seats filled by Biden, the 7-6 Democratic majority will more than likely uphold these legislative items. It will be telling, indeed, if the Biden commission ends up recommending just enough new seats to tip the Court’s partisan balance.

Many voters opted for Biden over Trump because of Trump’s alleged violation of supposedly-sacred constitutional norms. But a Biden court packing proposal would present the most serious threat to any constitutional norm since, perhaps, 1937. ✍️

*Dr. James A. Todd is assistant professor of politics at Palm Beach Atlantic University, and earned both his J.D. and Ph.D. from the University of Alabama.*



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# From the desk of Senator LeMieux



I am pleased to welcome you to the latest edition of *The Quill*! This publication highlights the LeMieux Center's mission to provide a space for reasoned, thoughtful and civil discourse on pressing public policy issues confronting Florida, the United States and the world. Every quarterly issue includes an article written by a scholar, policy maker, journalist or other thought leader with the knowledge, expertise and prudence to inform the reader on topics of broad public interest.

The previous issue of *The Quill* examined the legislative branch of government in light of the November 2020 federal elections, noting policies, processes, and power in an evenly divided Congress. This issue turns attention to the federal judicial branch. Dr. James Todd, a political scientist at Palm Beach Atlantic University — and an expert of the judiciary — examines the Supreme Court in a Biden Administration. He examines, in particular, the impact on constitutional norms of calls by some Democrats to increase the number of Supreme Court justices.

*The Quill* and *The Quill Podcast* are but one facet of the Center's interests and activities. In addition, the Center's Distinguished Speaker Series hosts luminaries such as former Prime Minister Tony Blair of the United Kingdom, Associate Justice Clarence Thomas of

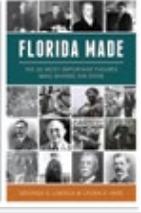
the United States Supreme Court and Dr. George Will, a well-known political commentator with *The Washington Post*. These speaking events, offered free of charge to the community, are held on the beautiful campus of Palm Beach Atlantic University in West Palm Beach, Florida.

Finally, the Freidheim Fellows program seeks to inculcate young people with the principles, perspectives and training to empower them to lead a new generation. Each year Palm Beach Atlantic students selected as Freidheim Fellows conduct research and present their findings on public policy questions. Their public presentations are certainly one of the highlights of the year for me.

The activities of the LeMieux Center would not be possible without the dedication and support of a number of individuals and organizations. I would like to take this opportunity to thank the president of Palm Beach Atlantic for the University's strong support. It is a partnership that already has borne much fruit, and I firmly believe it will continue to make a difference in the life of this nation. Members of the LeMieux Center Board of Advisors deserve special commendation and thanks. Their energy, generosity, wisdom and leadership are an amazing testament to the commitment of these leaders to the broader public good.

A handwritten signature in black ink, appearing to read 'G. LeMieux', written in a cursive style.

George S. LeMieux  
U.S. Senator & Founder of  
The LeMieux Center for Public Policy  
[www.lemieuxcenter.org](http://www.lemieuxcenter.org)



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## Tune in: *The Quill Podcast* is streaming now!

Last year, Senator LeMieux and Dr. Robert Lloyd launched *The Quill Podcast* — the official podcast of The LeMieux Center, in which they tackle conversations of consequence to the political, economic and social realms. Listen and follow today on Spotify and Apple Podcasts: [go.pba.edu/quill-podcast](http://go.pba.edu/quill-podcast)

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