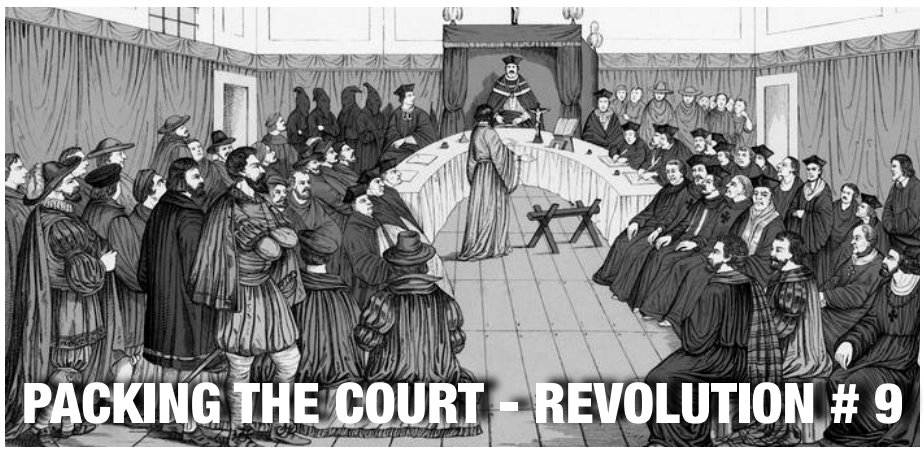

PACKING THE COURT - REVOLUTION # 9

Almost as soon as **Anthony Kennedy** announced his retirement from the Supreme Court, putting the legality of abortion and the safety of protections for LGBT people in immediate jeopardy, calls started pouring in from liberals and leftists for a drastic response: court-packing.

There is nothing in the Constitution mandating that the Supreme Court have nine members, and a simple act of Congress could increase that number to 11, or 15, or even more. That effectively creates a way for a political party in control of the House, Senate, and presidency to add a large number of ideologically sympathetic justices to the Court, all at once.

To many leftists and left-liberals, such drastic action is needed if any progressive legislation in the future is to survive. The concerns in question have less to do with hot-button social issues like abortion and LGBT rights and more to do with the constitutionality of economic regulation and redistributive programs. Just this past Wednesday, the Supreme Court effectively gutted public sector unions under the guise of the First Amendment. In 2012, there were four votes on the Supreme Court (including Anthony Kennedy) for striking down the Affordable Care Act *in full*. And there's an emerging movement of judicial conservatives, championed prominently by Donald Trump's appellate appointee Don Willett, which wants the courts to become much more aggressive in blocking economic regulation.

If that kind of judicial conservatism comes to dominate the Supreme Court, then even winning back the White House and Congress won't be enough for programs like a $15 minimum wage, or Medicare-for-all, or a free college plan, to be passed and secured. The Supreme Court would stand ready to rule them unconstitutional nearly as soon as they are passed. In such a scenario, court-packing starts to look like a reasonable defensive measure.

The prospect of a Court slapping down progressive economic measures brings to mind the last time court-packing was seriously considered. In 1937, Franklin Roosevelt was facing off with a hostile Supreme Court that routinely ruled aspects of the New Deal unconstitutional on the same grounds. During that era, the Court interpreted the due process clauses of the Fifth and 14th Amendments as sharply limiting economic regulation and ruling out things like federal bans on child labor, minimum wage laws, and legislation limiting work weeks to 60 (!) hours.

Roosevelt's plan to increase the court's size — which would've allow him as many as six new justices, for a 9-6 majority for the New Deal on a 15-member court — ultimately failed in the Senate, but not before successfully pressuring Justice Owen Roberts to switch his alignment from the Court's conservatives to the liberals and rule for the constitutionality of minimum wage laws and the National Labor Relations Act.

If calls for court-packing grow loud enough, you could see something similar happen on the current court, if John Roberts, soon to be the median justice, starts to view a major part of his job as avoiding the radical disruption of the Court by Democrats who fear being locked out of policy influence for a generation.

One of the most extensive arguments for court-packing comes from David Faris, a political scientist at Roosevelt University, whose book *It's Time To Fight Dirty* argues for court-packing as part of a larger set of strategies to amplify Democrats' political power, including statehood for DC and Puerto Rico, breaking California into multiple states, and expanding the House of Representatives.

The Republican Senate's refusal to even consider Merrick Garland for Antonin Scalia's seat, Faris writes, violated "a norm that presidents should get to nominate whoever they like, within reason."

He continues: "Because of this unspoken agreement between the two parties, both sides regarded Supreme Court openings as what they are — lotteries to be won by lucky presidents, or lost by those unfortunate enough not to preside over an opening. The GOP's treatment of Merrick Garland means that this informal agreement is trashed."

That, to Faris, makes extraordinary measures like court-packing suddenly viable. And the threat of a conservative court undoing just about any legislative accomplishments of the next unified Democratic government makes it necessary: "A Court that strikes down a Medicare For All insurance system, or legislation establishing equal funding for public education, or that chips away at abortion rights, gay rights, and other issues that are now supported clearly by a majority of the public will create a profound crisis in American society of the likes that we haven't seen since the Great Depression."

To lower the stakes of confirmation battles, Faris favors eliminating lifetime tenure for judges and adopting the nonpartisan group Fix The Court's plan of nonrenewable 18-year term limits. But unless nominees voluntarily pledge to step down after 18 years (which would effectively be a form of unilateral disarmament if only one party's nominees take that pledge), term limits would require a constitutional amendment to enact. Court-packing, by contrast, only requires an act of Congress and could pressure Republicans to accept term limits as a compromise.

"If the reactionary right is unwilling to go along with this idea, as they almost certainly won't be due to short-term political calculations, Democrats must use the power granted to them by the Constitution to pack the Supreme Court, protect the legislation demanded by a majority of Americans and, hopefully, to convince their opponents that the current structure of the court system cries out for a bipartisan solution," Faris concludes.

In the aftermath of Kennedy's retirement, a number of leftist/liberal writers echoed Faris's arguments. @kept_simple, a pseudonymous lawyer with a popular Twitter account, argued in the Outline, "increasing the size of the Court is an entirely proportional response the GOP's abuse of process. Gorsuch's appointment alone justifies it. In shifting the Court from a potential 5 to 4 liberal majority to a 5 to 4 conservative majority, the Republicans effectively stole two votes. Increasing the Court's size to 11 justices would merely rebalance what was taken."

Todd Tucker, a political scientist and fellow at the Roosevelt Institute, argued more explicitly on the basis of policy outcomes in Jacobin. "With union density near an all-time low and climate catastrophe on the horizon, future lawmakers will need tools even more robust than what FDR was able to get through — think a Green [National Industrial Recovery Act] on steroids," Tucker writes. "A handful of justices pulled from Federalist Society debating clubs can't and shouldn't get in the way of a more democratic and sustainable economy."

The existence of historical precedents for court-packing beyond FDR further bolsters the argument for it. In a 1968 article for the Baylor Law Review, political scientist JR Saylor detailed "seven occasions Congress has enlarged or diminished the size of the Supreme Court by one or two judges." Each of these seven times, the changes were made either to "purge the Court of … justices making decisions objectionable to an incumbent of the White House or to a dominant party majority in Congress" or to "'pack' the Court in order that the policies of the government in power would be upheld as constitutional."

Those seven times were:

- In 1801, before the inauguration of Thomas Jefferson, the outgoing Federalist Party passed the Judiciary Act of 1801, shrinking the court from six to five members by providing that the next member to die or resign would not be replaced. Saylor describes this as "undoubtedly an attempt made by the Federalists to keep the Court wholly Federalist."
- In 1802, Jefferson's Democratic-Republican party repealed the 1801 law and returned the court to six members.
- In 1807, the Jeffersonian-dominated Congress expanded the Court to even members, to accommodate a new judicial circuit covering Kentucky, Tennessee, and Ohio, then new additions to the union.
- In 1837, two new circuits were created and the Court's size increased to nine; Saylor credits this to the geographic pressures of America's westward expansion, but notes that Andrew Jackson quickly took advantage and appointed two new justices the day before he left office.
- In 1863, Congress increased the Supreme Court's size to 10 members in the midst of the Civil War. Saylor explains, "There was a widespread suspicion that Lincoln wanted another man on the Court on whom he could depend lest the body invalidate some of the crucial and doubtful wartime legislation which was coming before it at that time."
- In 1866, as pro-Reconstruction Republicans in Congress did battle with President Andrew Johnson, Congress passed a law barring Johnson from filling vacancies until the Court shrank to eight members, which occurred the following year.
- In 1869, with pro-Reconstruction President Ulysses S. Grant in office, Congress increased the court's size to nine, where it's stayed ever since.

That history is not one of politically disinterested policymakers negotiating impartially as to the Court's size. It's a history of political manipulation with an eye toward partisan advantage, and some of the most heroic figures in American history — Lincoln, Radical Republicans in Congress like Thaddeus Stevens and Charles Sumner, Grant — engaged in the practice.

-Dylan Matthews ***vox.com***