

## Off-Balance: Bold Reforms Are Needed to Protect the Integrity and Legitimacy of the Supreme Court

Today's Supreme Court plays an enormous role in our lives, and it is responsible for much of the ways our economy and democracy work, or don't, for most Americans. Yet, the Supreme Court is facing a crisis of legitimacy, perhaps rightly, that threatens to undermine public confidence in our government and the basic tenets of our constitutional republic. Bold proposals to rebalance the Court's role in public life are essential to protect the rule of law and the health of America's democracy.

### Today's Supreme Court is facing a crisis of legitimacy.

- **The contemporary nomination and confirmation process have undermined the legitimacy of the Supreme Court.** While justices are not themselves directly accountable to voters, their legitimacy rests, in part, on the notion that the officials who appoint and confirm them are. Today, four out of five members of the Court's conservative majority were nominated by presidents who lost the popular vote.
- **The Supreme Court itself, and many of its recent decisions, are deeply unpopular.** Over the last 18 years—since the Supreme Court declared George W. Bush the winner of the 2000 elections despite losing the popular vote—the wedge between the justice system and voters' will has widened. In 2000, only 29 percent of Americans disapproved of the job the Supreme Court was doing. By 2016, this topped 50 percent for the first time in the history of Gallup's polling.
- **The Supreme Court bears little resemblance to the American public it serves.** Today, there is just one justice for every 35 million Americans, compared to one for every 5 million under the last court expansion. If the number of justices had kept pace with population growth, we'd have 77 Supreme Court justices today, instead of nine. While justices do not represent people in the same way that legislators do, having only nine voices limits the diversity of perspectives that the justices consider and limits the range of potential outcomes.
- **The Supreme Court has a substantial role in shaping economic rules in a time of stark, and growing, inequality.** While other issues may attract more public attention, economic rule-setting is the Court's relative priority. Out of 8,894 Supreme Court decisions in the postwar era, 27 percent (2,393) dealt with economic activity, labor issues, or taxation. Combined, that tops any other issue area on the Court's docket. The Court's determinations on economic cases bear impacts on the American people and their economic outcomes.

“The change of one vote would have thrown all the affairs of this great nation back into hopeless chaos. In effect, four justices ruled that the right under a private contract to exact a pound of flesh was more sacred than the main objectives of the Constitution to establish an enduring nation. . . . The Court has been acting not as a judicial body, but as a policymaking body. . . . We have, therefore, reached the point as a nation where we must take action to save the Constitution from the Court and the Court from itself.”

—March 9, 1937, President Franklin D. Roosevelt, reflecting on the role of the Supreme Court during the Great Depression

## There are a range of proposals available to rebalance the Supreme Court as a means of restoring its legitimacy as an institution.

- **Proposals to expand the size and composition of the Court would add legitimacy to the institution to better reflect the public's will.** Proposals to add justices or to remove them through impeachment would help to address what is otherwise an enduring challenge to the Court's legitimacy: that several of the Court's current members were nominated by Presidents or confirmed through processes that failed to confer rulings with the public support necessary for them to endure.
- **Proposals to change the role of the Court would help to better align policy outcomes with the intent of our representatives.** Congress has passed roughly 250 laws in the postwar period denying jurisdiction to the Court—ranging from matters like environmental regulation to policing. Altering the Court's jurisdiction is not only constitutional, but it is also a regular and common exercise of congressional power. Such changes could include eliminating judicial review altogether.
- **Proposals to change the way that justices are selected would rationalize the current process and make them more responsive to dramatic changes in our society.** Of the many options that have been contemplated, one of the most compelling ideas for Court reform would be adding a new justice every two years, with each justice serving a total term of 18 years. This option removes the element of chance of waiting for a Court seat to be vacated, while preserving the judicial independence that would be lost with renewable terms.

## Proposals to reform the Supreme Court have substantial historical precedent.

- **Court expansion and contraction (and proposals to do so) have been a recurring feature of U.S. political life.** On eight occasions, Congress has voted to change the number of seats on the Supreme Court. The most famous example of a proposal to expand the size of the Supreme Court was President Franklin Roosevelt's Judicial Procedures Reform Act, a proposal introduced in response to repeated efforts by the Court to strike down several New Deal reforms. Within weeks, in what came to be called "the switch in time that saved nine," the two swing votes joined with the three liberals to uphold the Wagner Act and Washington State's minimum wage law.
- **Judicial impeachment has been a feature of our system of government throughout history.** Not only can Congress expand the Court, but it also has the power to impeach judges—and has done so eight times before. The last four judges that were impeached occurred during the tenure of some current sitting members of Congress.

## Confrontations over the size of the Court and its proper role in our public life have happened at moments of national crisis.

- **Major changes to the role of the Supreme Court have been made in response to existential challenges to our nation.** In perhaps the most important example, Abraham Lincoln and his allies took a number of size- and composition-related steps to neutralize and remake the Supreme Court following its ruling in *Dred Scott*, including cutting in half the number of justices that would have to come from the

South by reorganizing the nine circuits, filling three vacancies on the Court with Northern justices, and expanding the Court to include a tenth justice from a non-slave state.

## Policymakers have been reforming their state courts, often under the radar, for the past decade.

- The 50 state supreme courts vary in membership between five and nine justices. Several state policymakers have been very active in introducing Court expansion or size changes at the state level, including:
  - **Arizona:** Republicans in the Arizona legislature passed a bill expanding the Arizona Supreme Court from five to seven members, thus giving two additional appointment opportunities to Republican Governor Doug Ducey. The legislative sponsor explained the change as creating “greater opportunity for diversity on the court, there will be more legal minds looking at critical issues and hopefully the opportunity to take on more cases and a diversity of opinion.”
  - **Florida:** Republican legislator Bill Posey introduced a bill to expand the Florida Supreme Court from 7 to 15 justices after the Court ruled against the use of public money for vouchers for use in Catholic schools.
  - **Georgia:** Republican Governor Nathan Deal signed legislation expanding the Georgia Supreme Court from five to seven. This allowed him two additional appointments, at a time when the jurisdiction of the Court was shrinking. Leah Ward Sears, a former chief justice, explained the decision in the following terms: “I know a number of people who believe that if the court contained more ‘friends,’ more cases would be decided the way they want them to be.”
  - **Iowa:** In 2009, the Iowa Supreme Court unanimously ruled in favor of gay marriage rights. Republican legislators responded by proposing to expand the size of the court from seven to nine members. Other bills exposed justices to impeachment if they did not rely solely on selected sources of law.

Bold proposals to rebalance the Court’s role in public life, such as those outlined above, are essential to ensuring to the health of America’s democracy. As the experience of FDR shows, even suggesting that the Court be reformed can contribute to the realignment of legal decisions with popular priorities. America’s founding generation gave us ample tools to check and balance the judiciary. We should not be afraid to use them.

For additional information, see [Off-Balance: Five Strategies for a Judiciary That Supports Democracy](#), by Roosevelt Fellow Todd N. Tucker.

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