

## ANALYSIS

# The Long History of Supreme Court Reform

Americans have tinkered with the high court since the founding.



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For Americans in 2026, the Supreme Court can seem set in stone and not just the imposing marble facade at One First Street. Major changes to the Court's size, structure, or docket haven't been made in decades or, in some cases, centuries. Seats on the Court are often filled for a generation or more; one is currently occupied by a justice who took office before

nearly half of the people alive today were born.

In such a stagnant climate, big changes feel impossible to achieve. No wonder people despair! At a moment when tens of millions of Americans are deeply unhappy with the Court and its behavior, it is hard to envision a clear path to reform. But, as a brief glance at our history demonstrates, that path has already been trodden many times.

This history is one of near-constant reform: Throughout the 19th century, at least, presidents and Congress shaped and reshaped the Court's size, jurisdiction, responsibilities, and more as they pleased. It was understood to be a part of normal politics. Sometimes the changes were in the service of adapting the Court to a growing and changing country, but more often they were driven by widespread anger at specific decisions or by a desire to cement political gain. Taken together, they offer an

encouraging counterpoint to the modern conventional wisdom about changing the Court: It can be done, if you're willing to play political hardball.

Exhibit A: The Judiciary Act of 1801, which eliminated a Supreme Court seat and at the same time created several new lower federal courts. The law was the handiwork of President John Adams and his Federalist allies in Congress, who had just lost the election to Thomas Jefferson and the Republicans. It was a heads-I-win, tails-you-lose scenario. Jefferson would be denied the chance to fill the next high court vacancy, while Adams could spend his final days in office installing the people he wanted in his new lower court posts: "midnight judges," as the last-minute appointments came to be known.

Jefferson was furious, writing to a friend that the Federalists had "retired into the judiciary as a stronghold." Within months, he and

the newly empowered Republicans struck back, repealing the Federalists' 1801 law and passing a new one that restored the Supreme Court seat and eliminated the lower court seats Adams had created.

(In case any originalists are reading, I'd like to note that all this tinkering with the Court is being done by America's founders themselves.)

Sixty years later, it happened again. Newly elected President Abraham Lincoln faced a Supreme Court dominated by slavery-protecting Southerners who had recently ruled, in the *Dred Scott* case, that Black people could not be American citizens. Anti-slavery Republicans responded not with despair but with determination. Sen. William Seward, who would become Lincoln's secretary of state, said, "We shall reorganize the Court, and thus reform its political sentiments and practices, and bring them into harmony with the Constitution and with the laws of nature."

Soon after taking office, Lincoln and congressional Republicans did just that, expanding the Court to 10 justices and helping him tip the balance in favor of Northerners who would vote against slavery. After Lincoln's assassination, Republicans in Congress undid the expansion, providing for the Court to be gradually reduced to seven justices. This blocked Lincoln's pro-slavery successor, Andrew Johnson, from filling a pending vacancy with his chosen nominee.

In all, the size of the Court has changed seven(ish) times (more on that below). And all of it was perfectly legal, which illustrates the central lesson for supporters of Court reform today: Congress has far more power over the Supreme Court than most people realize.

Article III of the Constitution, which established the Supreme Court, gives Congress enormous control over its fundamental features — not just its size, but the sorts of cases it

has the power to hear. For example, it says, “The supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”

In the words of a 1982 memo from the attorney general’s office, “This clear and unequivocal language is the strongest argument in favor of congressional power.” The author of that memo was a young assistant named John Roberts, now the chief justice of the United States.

Roberts was making what was for a long time an uncontroversial point. Adams, Jefferson, and Lincoln got it. Progressive-era lawmakers and activists in the early 20th century got it, too, demanding reforms like term limits, supermajority voting requirements, and restrictions on the Court’s jurisdiction. President Franklin Roosevelt may not have succeeded in adding justices to the Court, but his threat to do so scared

the conservative justices into voting in favor of his New Deal agenda, showing the power of the other branches to influence the functioning of the Court.

Considering this history from our sclerotic moment, what’s striking is not only how often political actors have reformed or tried to reform the Court, but how much their debates sounded like the ones we are having now — and how much they can serve as a model going forward.

The bottom line is that the Court can be changed, as long as the political will is there. “The attempt to change it is such a moment of drama that people assume there’s something untoward about it,” Justin Crowe, a political scientist at Williams College, told me. “It’s regarded as something highly politicized. But it was always political!”

Speaking of political will, let's return to the seven instances in which Congress changed the Court's size. A more accurate number is eight. In February 2016, Mitch McConnell and Senate Republicans refused to grant so much as a hearing to Merrick Garland, President Barack Obama's nominee for the Court, not because of any questions about his qualifications (top Republicans had previously said he would be an ideal nominee), but on the ground that the upcoming election was too near and the American people's voices should be heard first. They kept the seat vacant until the following spring, when it could be filled with a justice nominated by President Donald Trump.

For more than a year, then, McConnell and his fellow Republicans literally changed the Court's size — reducing it to eight justices, then expanding it back to nine when they were assured that a president of their party could fill the

vacancy. (Adding insult to injury, the Republicans reversed their position in 2020, pushing through Trump's nomination of Amy Coney Barrett barely one week before Election Day, after millions of Americans had already cast their ballots.)

Echoing Jefferson's "stronghold" charge against Adams more than two centuries before, Democrats in 2020 vented their fury. "The issue is that this is a power grab," Alabama Sen. Doug Jones said. But to McConnell, it was just smart politics. "A lot of what we've done over the last four years will be undone sooner or later by the next election," he said. "They won't be able to do much about this for a long time to come."

Those who want to restore legitimacy and integrity to a Court currently lacking in both can continue to stomp their feet over McConnell's taunt, or — if they win enough power in 2028 — they can

take inspiration from it. That is what political will looks like.

The point of lingering on this episode isn't to praise McConnell, whose cynical destruction of norms that both parties had observed for generations inflicted severe damage on the Court and on American democracy. Rather, it is to remind ourselves of Congress's awesome power to change the Supreme Court when it wants to. The path to successful reform going forward runs from the founding through today, and it can be boiled

down to a simple message: Do not be afraid to think boldly and act accordingly.

*CLARIFICATION: An earlier version of this post stated that President Andrew Johnson reduced the Court's membership following Lincoln's assassination. While Johnson did sign that legislation, it was driven by anti-slavery Republicans in Congress who wanted to prevent southern states from regaining too much power during Reconstruction.*

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## Links

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