

Op-ed | **Is 9 Still a Fine Number for the U.S. Supreme Court?**

by *Peter G. Verniero*

How many U.S. Supreme Court justices speaking against an idea are sufficient to defeat it? We may soon find out.

The idea is whether to alter the court's composition from nine members to some larger number, which would dilute the voting power of the supposed conservative members.

[Justice Stephen Breyer](#) was the first major jurist to express disapproval of the idea at a public event in April. "Nine is fine," he said. The justice did not mention any particular proposal by name or sponsor, but the idea continues to be expressed in several political quarters.

Justice Ruth Bader Ginsburg was even more emphatic [in a recent interview with National Public Radio](#), saying, "Nine seems to be a good number. It's been that way for a long time."

She added that increasing the number is a "bad idea." The justice cited the so-called court-packing plan offered by President Franklin D. Roosevelt in response to the court's rulings against New Deal legislation early in his administration. The plan prompted so much criticism (unusual for the otherwise popular president) that even F.D.R.'s vice president at the time, John Nance Garner, had opposed it.

The U.S. Constitution establishes [the judicial branch under Article III](#), but it does not set the number of Supreme Court justices. Indeed, Article III is rather sparse as compared to the provisions involving the other two governmental branches.

That might be partially explained by the fact that the founders believed that the judiciary's powers would pale in comparison to those of Congress and the president.

Alexander Hamilton expressed his view in the federalist papers (specifically, [Federalist No. 78](#)). "It proves incontestably," he wrote, "that the judiciary is beyond comparison the weakest of the three departments of power." (How the judiciary evolved from a relatively anemic branch to a powerhouse is a topic for another day.)

In any event, the authority to set or adjust the number of court members resides in Congress. Since the founding, the number has ranged from five to 10, with the current number of nine established by statute in 1869. So why change something that has suited the court as an institution for 150 years?

The policy impetus basically is the same as the one that had prompted the court-packing plan of the 1930's. And it is just as unappealing, namely, to influence the Supreme Court's jurisprudence by bald legislative force.

The problem with that approach, of course, is that it strikes at what the founders had cherished most about the judiciary: its independence to decide cases without fear of reprisal. As Hamilton, again, so succinctly put it: "The complete independence of the courts of justice is peculiarly essential in a limited Constitution."

Adding justices solely to dilute the court's current composition would be seen as political, at least that is what Justice Ginsburg has suggested. She explained that enhancing the number "would make the court appear partisan."

She added, "It would be that -- one side saying, 'When we're in power, we're going to enlarge the number of judges, so we would have more people who would vote the way we want them to.'"

There is already too much partisanship surrounding the judiciary, especially the nomination and confirmation of justices in the modern era. We should not contribute to that unfortunate reality by legislative fiat.

Hopefully, the public voices of two respected jurists -- who surely are in the best position to judge the merits of the court-expansion idea -- are enough to quash it.

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