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Nine is Not Prime: Court Size as Both Weaponization and Solution for Supreme Court Political Polarization, Inefficiency and Bias

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Abstract

Since the creation of the judicial branch, the nation's highest court has displayed vulnerabilities to politicization, biases and inefficiency. More specifically, the number of justices on the Supreme Court is a culprit in exacerbating these challenges. The Supreme Court has fluctuated its size six times, excluding unsuccessful attempts to change it, with the number of justices as low as five and as high as ten. Though the 155-year stasis in the number of Supreme Court justices has provided relative stability, the history of the institution reveals that previous and current sizes of the Supreme Court leave it vulnerable to not only political polarity and gender biases, but also inefficacy in hearing an adequate number of cases presented to the Court. The paper argues that while the size of the High Court has been a hurdle, it can also be a solution to ensure an independent, fair and productive government branch as the Founders intended.

Keywords: Court Size, Weaponization, Supreme Court, Political Polarization

“Presidents come and go, but the Supreme Court goes on forever.”

~ William Howard Taft, 27th President of the United States of America and 10th Chief Supreme Court Justice

In *Alice in Wonderland*, the protagonist Alice traverses a challenging world while changing her physical size, becoming larger or smaller upon ingesting certain foods and potions. Her miniature stature becomes a hurdle when she is too small to grab a key out of reach on an elevated table. Like Alice, the Supreme Court has fluctuated its size, a demonstrated hurdle in its functioning throughout its existence. Since the creation of the judicial branch, the nation's highest court has displayed vulnerabilities to polarization, biases and inefficiency. More specifically, the number of justices on the Supreme Court is a culprit in exacerbating these challenges. From President John Adams' attempt to stave off his political opponent to President Franklin D. Roosevelt's court-packing proposal and, more recently, the conservative justices voting to overthrow the precedent for womens' rights that *Roe v. Wade* set, the size of the Court allowed political weaponization, unconscious bias and lacking productivity to flourish. Its size, however, can also be the solution to mitigate these challenges.

In 1789, the Judiciary Act, signed by the first President of the United States, George Washington, created the very first Supreme Court. The statute was enacted by a newly formed Congress during its very first session (Legal Information Institute, n.d.). It established the Supreme Court, which originated with only six justices – one chief justice and five associate justices – along with a system of lower federal courts. John Jay of New York was the first Supreme Court Chief Justice; he remained on the High Court for five years (Legal Information Institute, n.d.). The United States Constitution, however, does not mandate a specific number of justices that should serve on the Supreme Court, as the Judiciary Act did not designate a minimum or maximum number of justices on the High Court (Jacobi & Sag, 2021). Although the highest court in the judicial branch was structured for independence, the Executive and Legislative branches have utilized the size of the High Court to weaponize against their political opponents throughout history.

Since its establishment in 1789, the number of Supreme Court Justices fluctuated six times throughout history, with the number being as low as five and as high as ten. Most of the changes were made in order to utilize the Court's size as a political weapon. President John Adams and the then-Federalist-led Congress lowered the number of Supreme Court Justices to five through the Judiciary Act of 1801 (Judiciary Act of 1801, 2018). The Judiciary Act was an effort to keep Adams' political opponent and successor, Thomas Jefferson, from appointing a new justice (Roos, 2023). However, Jefferson and his Republican-led Congress repealed the act, raised the number of justices to seven by 1807, and appointed three new justices in the duration of his presidency. The number of justices remained at six for only twelve years after the inaugural six-justice court; the first President established the Supreme Court and the second and third Presidents changed it.

The number of Justices fluctuated yet again during the Presidency of Andrew Jackson. President Jackson expanded the number of justices by two in 1837 after Congress expanded the lower federal courts (Roos, 2021). This was necessary for the Supreme Court to keep up with the workload that percolates from the lower courts. After President Lincoln's death, Congress, which disapproved of Lincoln's successor, Andrew Johnson, decreased the number to seven so President Johnson could not appoint any new justices (Jacobsen, 2004). In 1869, a Judiciary Act signed by President Ulysses S. Grant increased the number of Supreme Court justices to nine to favor his and the Congressional majority's own party. Justices William Strong and Joseph Bradley were added to the Court after the Judiciary Act of 1869 (Roos, 2021). Both these Justices politically aligned with many of Grant's policies.

Aside from political weaponization, the number of federal circuit courts highly influenced the number of Supreme Court justices. When the Judiciary Act of 1789 created the first Supreme Court, it also created the lower federal circuit and district courts. District courts reviewed new cases, while circuit courts acted as the middle bridge between the local district courts and the Supreme Court. Each circuit consisted of district courts that took lawsuits that fed up to circuit courts (Benesh, 2002). The circuit courts were composed of a circuit justice paired with a district justice who could not hear an appealed case they had seen before. The Supreme Court justices acted as ambassadors of the federal government to circuit and district courts in addition to deciding cases in those courts (Cameron et al., 2000). They traveled to the circuits to oversee more "local" cases, which spread the importance of federalism and showed the citizens that all courts were unified (Cameron et al., 2000). After all, the Supreme Court justices were likely the only federal officers many communities would ever meet. The justices' duty was called "circuit riding" because the Supreme Court justices hopped from circuit court to circuit court, "riding" the track of circuits. However, circuit riding meant that Supreme Court justices spent less time seeing cases on the Supreme Court, as they spent a considerable amount of time traveling to the lower circuit courts (Benesh, 2002). As the United States expanded in territory and population, the number of circuit courts rose, as did the amount of circuits the Supreme Court justices had to visit. This placed a higher burden on the justices to ride more circuits. Justice William Paterson, who served the Supreme Court from 1793 to 1806, perished in a carriage accident while journeying to New Jersey to oversee a circuit court case. As a result, the Judiciary Act of 1869 increased the number of Supreme Court justices from six to nine, one justice for each circuit. The act was meant to lessen the amount of circuit court cases each justice had to preside over so they could focus on taking more Supreme Court cases (Roos, 2021). As the nation grew, the sheer number of cases submitted to the Supreme Court swelled exponentially. Thus, the act also enabled the nine-member Supreme Court to meet the representative needs of a rapidly growing nation.

Since 1869, the number of Supreme Court justices has remained constant at nine, making up a cadre of the selected few making breakthrough decisions that change the direction of America for the past 155 years (Roos, 2021). The decision on the *Brown v. Board of Education* in 1954 desegregated schools, marking the turning point of the Civil Rights Movement. The *Roe v. Wade* decision in 1973 made abortions constitutional, which gave women's rights a tremendous leap forward (Epps & Sitaraman, 2019). Most recently, the 2022 *Dobbs v. Jackson Womens' Health Organization* case overturned the *Roe v. Wade* decision, making most abortions after fifteen weeks unconstitutional and regressing womens' reproductive rights nationwide (Mendoza, 2022). The Supreme Court has an undeniably great deal of power and influence on American citizens. With a "majority rule" final decision of the Supreme Court, where only five individuals can pivot the direction of our nation, the number of justices thus play a critical role in making ground-breaking decisions that can move America toward either progress or regression.

Political weaponization also presents the largest motivator for attempted changes to the number of Supreme Court Justices. One of the most famous examples is Franklin D. Roosevelt's 1937 court-packing proposal. The proposal was regarded as a tactic to put more justices on the High Court who would vote according to the President's agenda, ruling his New Deal policies constitutional (National Constitution Center, 2022). It is widely considered to be the most progressive attempt to increase the number of Supreme Court Justices. In the years preceding President Roosevelt's proposal, the four conservative justices serving at the time continually ruled policies in his New Deal as unconstitutional (National Constitution Center, 2022). President Roosevelt's New Deal policies enacted sweeping legislation and programs to reinvigorate the shattered economy following the Great Depression. After winning his 1936 re-election by a landslide, Roosevelt proposed increasing the number of justices to 15 and replacing all members of the Court over the age of 70 (Roos, 2021). Roosevelt proposed the plan to solve his issue of justices on the opposite ideological spectrum dictating his policies unconstitutional. The proposal included a generous retirement plan for Supreme Court members over the age of 70. The proposal was meant to incentivize serving justices to retire. If the serving justices refused to retire, Roosevelt would simply appoint a new "assistant" justice, whose political ideology aligned with his (Roos, 2021). Six members of the Court, including the Conservative justices, were over the age of 70 at the time of Roosevelt's proposal, which meant he would have added another six justices to the Supreme Court, but Congress shot down the plan in a 70-20 vote (Roos, 2021). If Roosevelt's court-packing plan had been passed by Congress, he would have appointed twelve new Supreme Court justices.

Dating as far back as 1801, the number of Supreme Court justices has fluctuated as Congress and each President's battles with opposing political ideologies and party lines developed. In the past century, political polarization has significantly spiked, with justices determining landmark decisions along politically ideological lines. According to a 2022 report from ABC News, around 21% of the case decisions that the Supreme Court made were along political lines, whereas only a decade ago, only approximately 5% of cases were polarized (Thomson-DeVeaux & Bronner, 2021). However, discussions in the media surrounding the Supreme Court are dramatically sparser than other branches of government. Though the 155-year stasis in the number of Supreme Court justices has provided relative stability, the history of the institution reveals that the current number of Supreme Court justices leaves it vulnerable to not only political polarity and gendered biases, but also inefficacy in hearing an adequate number cases presented to the Court.

Most Americans today lean toward one political party or the other in the two-party system, and the current nine justices are no exception. Presently, Justices John Roberts, Clarence Thomas, Ketanji Brown Jackson, Samuel Alito Jr., Sonia Sotomayor, Elena Kagan, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett are the serving members of the Supreme Court (Supreme Court of the United States, n.d.). Justice Stephen Breyer retired at the end of the 2022 term, and was replaced by Ketanji Brown Jackson, the first female African American Supreme Court Justice (Chowdhury et al., 2022). Since justices are nominated by the President, it is no surprise that modern-day presidents selectively nominate those whose ideologies align with their party's. Liberal judges tend to be nominated by Democratic presidents, while conservative judges are favored by Republican presidents (Georgetown Law Library, n.d.). Further, the Senate confirms the nominees, giving the majority party the power to ensure that only their party's preferred candidates are put on the Supreme Court. Even if the President puts forth a nominee, the Senate can derail the nomination process (Georgetown Law Library, n.d.). For example, President

Obama in 2016 nominated Merrick Garland, a liberal judge, to replace Justice Scalia (Elving, 2018). The Republican-controlled Senate at the time, however, refused to allow the nomination to get on the voting agenda (Elving, 2018). Despite having a Democratic President when Scalia's seat was open, the vacancy was subsequently filled by a Trump-nominated conservative, Republican-approved Neil Gorsuch (Borensen, 2017). As the nomination and confirmation process is fraught with partisanship, political polarity in the Supreme Court then becomes a consequence. The partisanship in the White House and Congress bleeds into the Supreme Court, resulting in the escalation of political polarity.

Furthermore, justices in recent years are becoming more emboldened than ever to vote along personal party lines, resulting in greater political polarity within the Court (Thomson-DeVeaux & Bronner, 2022). Justices appointed a few decades ago often broke with party lines when making decisions. For example, Justice Kennedy, a swing judge appointed in 1975 by the Republican President Ford and leaned toward conservative, voted to legalize same-sex marriage in the *Obergefell v. Hodges* decision in 2015, along with the liberal justices at the time (Dwyer, 2022). The retirements of Supreme Court Justices Kennedy and O'Connor shifted the Court down the path towards the end of swing justices voting against their party's ideology in the Court (Epps & Sitaraman, 2019). Justices in recent years tend to vote primarily along party lines, as shown in the 2022 landmark case *Dobbs v. Jackson Womens' Health Organization*. The conservative justices Alito, Kavanaugh, Gorsuch, Thomas, and Barrett voted for *Dobbs*, signaling that abortions were not protected by the Constitution. All of the conservative justices were nominated and confirmed by Republican presidents. The anti-abortion sentiment was shared by Republican lawmakers specifically in Mississippi, who created the laws banning pre-viability abortions that the Supreme Court ruled Constitutional (Hassan, 2022). The liberal leaning Justices predictably voted against *Dobbs* in order to protect abortion rights. The lack of swing votes leaves the Supreme Court with judges whose votes are based on politically-endorsed positions rather than constitutional philosophy. The status quo promotes an absence of swing votes, allowing politicization in the Court to surge.

In the modern Supreme Court, opposition to a decision to come from judges representing only one political party has become alarmingly common. Before the 21st century, the standard was for Supreme Court justices to interpret the law based on legal precedents and relevant facts even if it meant defying their own political ideologies. One of the most pivotal Supreme Court decisions, *Roe v. Wade*, which ruled abortions constitutional, was written by Harry Blackmun, a Republican-nominated justice (Epps & Sitaraman, 2019). In the aftermath of the decision, disapproval came from many different groups, particularly the Justice's own Republican party (Epps & Sitaraman, 2019). Today, when a Supreme Court justice votes aligning with his or her own political ideology, the justices from the opposite ideology make up the vast majority of the dissension. For example, in *Bush v. Gore* in 2000, the 5 conservative Supreme Court justices all voted to elect Republican George W. Bush the President of the United States, despite Al Gore, the Democrat candidate, winning the popular vote (Toobin, 2008). The *Bush v. Gore* case established that the Supreme Court can decide who leads the nation, shrinking citizens' right to democracy where it counts the most. The implication is jarring: over 300 million registered voters live in America, but the political ideology of only 5 individuals can determine the presidency (Singh, 2021). Moreover, the one-sided opposition to decisions made by the Supreme Court speaks to the bias that is currently running rampant.

The landmark Supreme Court case *Students for Fair Admissions v. President and Fellows of Harvard College* challenged the legality of race-based college admissions. In June 2023, the Supreme Court ruled affirmative action in college admissions unconstitutional in a 6-3 vote (Totenberg, 2023). The decision meant that colleges are no longer constitutionally allowed to consider race as an admissions criterion. Justice Clarence Thomas, who voted in favor of ending affirmative action, argued in his concurring opinion that affirmative action imposes the inaccurate stereotype that minority communities are in need of the extra boost for admissions instead of letting their hard work reap the rewards: "While I am painfully aware of the social and economic ravages which have befallen my race and all who suffer discrimination, I hold our enduring hope that this country will live up to its principles that ... all men are created equal, are equal citizens, and must be treated equally before the law" (Totenberg, 2023). However, the decrease in the number of African American applicants in states where affirmative action was already banned means that the complete elimination of affirmative action programs will result in a wider decline of African American applicants across the nation. When the University of California Berkeley banned race consideration in their admission policy in 2016, the number of African Americans who

applied decreased significantly because of “African American students not wanting to go [to Berkeley] under those conditions” (Totenberg, 2023). The Supreme Court’s decision impacts the futures of millions of youths. The case led to fewer people of color choosing to attend educational institutions where race is not a considered factor for admission. The decisions of six people ended a policy intended to propel justice and fairness toward marginalized communities.

Contemporary political controversies signify that the Court may be headed toward more egregious politicization. On March 24, 2022, twenty-nine text messages between Justice Clarence Thomas’s wife, Ginni Thomas, and Donald Trump’s former Chief of Staff, Mark Meadows were released (Jenkins, 2022). Despite collusion being strictly illegal between the Supreme Court and the White house, Ginni Thomas texted Meadows, telling him to overturn the 2020 Presidential election results in favor of President Trump, arguing that election fraud undermined the legitimacy of the election results. Upon learning about the text messages, the Women’s March Movement called for the impeachment of Justice Clarence Thomas, suspecting his involvement in the January 6 insurrection, which saw Pro-Trump supporters attacking the Capitol (Jenkins, 2022). Ginni Thomas wrote in one text, referring to Donald Trump, ““Help This Great President stand firm, Mark!!!” (Jenkins, 2022). Ginni Thomas, wife to a supposedly non-biased Supreme Court justice, implored Mark Meadows to keep Donald Trump in power, signaling that she supports keeping a Republican president in power, despite the citizens voting for a Democrat (Hakim, et al., 2022). A Supreme Court Justice’s wife participating in political lobbying demonstrates deep politicization within the judicial branch. This incident upends the independence of the judicial branch, compromising the checks and balances of governmental power.

Moreover, the Supreme Court’s underlying gender biases influence the way the Court operates by giving certain lawyers unequal chances of their cases being seen. The Supreme Court has a shortlist of lawyers whose cases are more likely to be heard (Russell, 2018). According to a report from Reuters, sixty-six lawyers are six times more likely to have their cases heard by the Supreme Court. Of those sixty-six lawyers, sixty-three are white, and fifty-eight are male (Russell, 2018). The Court gives an unfair advantage to certain white, male lawyers by being more likely to hear their cases.

The Supreme Court has displayed gender norms since its inception. Men dominated the Court for the first eighty years of its existence, with women barred from representing Supreme Court cases as lawyers or sitting on the Court itself until the late 1800s and early 1900s. Arabella Mansfield became the first woman to practice law in 1869, but in the 1872 *Bradwell v. Illinois* case, the Supreme Court voted to prohibit Myra Blackwell from becoming a lawyer despite passing the Illinois bar exam (Lewis, 2019). The nine Justices at the time ruled that Blackwell was not constitutionally allowed to practice law because she was married. The Supreme Court’s decision set the precedent that the right to practice law in front of the Supreme Court was not reserved for all women. The right for all women to be admitted to the bar was deemed unconstitutional until 1919 with the 19th Amendment, which accorded women the right to vote. The first female Supreme Court Justice, Sandra Day O’Connor was not confirmed until 1981, almost 200 years after the creation of the Supreme Court. Justice O’Connor, after her Supreme Court confirmation, reflects on her experience as a female state lawyer, highlighting the hiring inequality she faced, even after graduating from Stanford Law School, one of the foremost law schools in America:

“I graduated from Stanford Law School a year ahead of my husband and I got a job in California as a deputy county attorney in San Mateo County, California, which is just north of Stanford. I did civil work for the county attorney’s office. Incidentally, I had interviewed when I had got out of Stanford Law School with various law firms in California, among them Gibson, Dunn, and Crutcher in Los Angeles, a distinguished firm. I had graduated high in my law school class, and had been on the board of editors of the Stanford Law Review and had done all the things that today would qualify one for a very good position in a law firm. And, it did in those days too, if you were a man. And I did not receive an offer from one of the good law firms with whom I had interviewed because not one of them at that time had ever or expected to ever hire a woman. Gibson, Dunham and Cratcher offered me a position as a legal secretary and I declined that” (O’Connor, 1981).

Despite significant progress on gender inclusivity, today's court only consists of three women, and only two are women of color.

Another challenge for the Supreme Court is its inability to hear a sufficient case volume. The Supreme Court only takes a small fraction of the cases presented to the Court, and the number of cases taken has decreased over time. In 2020, 300,000 petitions were filed to the Supreme Court in 2020. The Court heard only seventy-three of those cases (Jacobi & Sag, 2021). In the 1980s, the Supreme Court saw 180 cases on average (Jacobi & Sag, 2021). Fewer cases mean fewer opportunities to move America forward and create change. The low case volume can lead to a delay in laws reflecting the views of the American masses. Additionally, the Supreme Court has been operating with the same, unchanging number of justices for 155 years (Jacobi & Sag, 2021). Dr. Jacob Hale Russell of Rutgers Law School remarks on the influx in the population of the United States over time, "The U.S. was roughly a tenth of its current size, laws and government institutions were far smaller and less complex, and the volume of cases was vastly lower." The Court at its current headcount is unable to adequately address today's society. The system with nine justices was not built for hundreds of millions of people. More people live in California alone today than in the entire country in 1869, when the number of Supreme Court justices was first changed to nine (Russell, 2018). The most effective way to bring the Supreme Court up to meet productivity demands and tackle case complexity seems to be to increase the number of justices. As the population of the United States grew, the number of Supreme Court justices also grew. The era of circuit riding decreased the efficacy of the six justices serving, which resulted in an increase in the number of Supreme Court justices to nine. Efficacious Courts can manage the complexities of cases that reflect the intricacies of the evolving society. Increasing the number of justices solves the currently inadequate performance of the Supreme Court.

While the size of the Supreme Court has exacerbated the challenges that the Court faces, it also presents an effective solution. Increasing the size of the Supreme Court is one way to minimize politicization, curb gender biases, and expand the case load. Modern radical suggestions by scholars studying the Supreme Court have been made for the number of Supreme Court justices to be increased to twenty-seven (Russell, 2018). Increasing the number of Supreme Court justices must be for the welfare of the American citizen, not political incentive. President Roosevelt's 1937 court-packing proposal is an example of motivating changes based on political "wants," not what is best for democracy and the people (Wheeler, 2020). The conservative justices were ruling his policies unconstitutional, prompting the proposal to have things "FDR's way" (Wheeler, 2020). Raising the number of justices to twenty-seven would increase the number of cases taken for the good of the people, not for checking off a President's agenda (Russell, 2018). The new justices would be phased in slowly, with two being appointed each year (Russell, 2018). Thus, scholars argue, no single President can appoint all new justices, which avoids the dilemma of court-packing. With twenty-seven justices, the Supreme Court can split into panels of three to five justices to hear smaller cases, but also gather to hear more important cases (Russell, 2018). Therefore, more justices effectuates less dependence on swing votes. However, having twenty-seven justices in the Court transforms the Court into an institution similar to Congress. In an interview with a Supreme Court scholar, they argued, "[with 27 justices] that's just a very different institution that you're creating. That's not really one Court." The Supreme Court was not built to function with twenty-seven justices. In fact, one of the defining traits of the Supreme Court is the small group format. While an increase in the number of Supreme Court is necessary, it is clear that such a drastic change to twenty-seven justices is not the ideal tactic to increase Court efficacy. Creating a twenty-seven justice Court would make its operation more similar to the Legislative Branch than the Supreme Court itself.

Hence, increasing the number of justices to fifteen can maximize its efficiency and efficacy while maintaining and forwarding the institution's apolitical identity. A fifteen-justice Court is able to split into three panels of five justices, which can increase its overall case load (Jacobi & Sag, 2021). Panels boost efficiency by allowing more cases to be heard through a divide and conquer tactic. Currently, the Supreme Court is only "taking about less than seventy cases a year, and there are nine of them, and so they each write on average only about twelve majority opinions a year... there are so many big, important questions that the Court isn't addressing" (Anonymous, 2022). Enacting a quota requirement for the number of cases seen through Congress can guarantee greater efficiency in the Court (Wheeler, 2020). A Supreme Court of fifteen justices is large enough to split into sub-panels yet small enough to gather en banc, where all justices preside over a case (Anonymous, 2022). The key to finding the optimal number of Supreme Court justices is "having enough justices to have panels ... but also not too many that they

couldn't really all get together” (Anonymous, 2022). The evidence and data strongly show that fifteen is the optimal number of justices to increase efficacy and resist biases and politicization while retaining the foundational ideals and independence of the highest judicial branch.

A possible argument against raising the number of justices to fifteen is that the increase may lead to a cycle of justice implementation. That is, if one party succeeds in appointing new justices, the opposing party may increase the number of justices to above fifteen in an effort to balance out majorities. However, this scenario is unlikely. Increasing the number of justices does not equate to increasing politicization. “We've seen [politicization] happen already,” the Supreme Court scholar states. “We've seen the Court change in the number of justices. But not just that, we've seen, even with nine justices, raw political move ... this idea that we can't change the number of justices because that will make the Court political is ridiculous because the Court is already very political” (Anonymous, 2022). That is, focusing on unlikely “what if” scenarios rather than implementing solutions will not resolve the myriad of issues barraging the status quo. Emphasis on future reform can.

Ultimately, though the Supreme Court upholds the foundational checks and balances of our democracy, the current size of the Court enables inefficiency, politicization and personal biases. Justices predictably vote along their own political ideology, stemming from the fraught nomination and confirmation process. The number of cases heard has decreased over the years, unable to keep up with demand and unable to address legal and social issues that require timely resolve. Further, the Court favors a handful of white, male lawyers above others in their accepted cases, which biases the cases that are rendered decisions. To rectify these challenges while staying true to the wishes of the Founding Fathers, fifteen justices can be the optimal number of Supreme Court. President and Chief Justice William Taft once declared, “Presidents come and go, but the Supreme Court goes on forever.” The decisions made by the Supreme Court affect every single person living in the United States of America, from the Patriots of the newly formed America to future generations in years to come. The phrase “We The People” is the most easily recognizable phrase from the United States Constitution because our Founding Fathers valued the representation of everyday citizens. The United States was built on the idea that the government was made to serve the people. To do so, fifteen may be the prime number for the Supreme Court.

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