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SCOTUS wars and packing the Court: It's nothing new

By Steve Bakke  June 15, 2021



A 1937 political cartoon with the caption 'Do We Want A Ventriloquist Act In The Supreme Court?' which was a criticism of FDR's plans to pack the Court. It depicts President Franklin D. Roosevelt with new "puppet judges" likely to do his bidding by ruling in favor of his most radical New Deal programs.

Imagine Rip Van Winkle awakening from a decades-long nap. It's October 2020. He watches the nasty challenges of the nominee during Senate hearings to replace Associate Supreme Court Justice Ginsburg. "What's happened to my government whilst I slept?" wonders Rip.

Can you imagine Ol' Rip's further surprise as he watched 2021 unfold, with constant talk about democrats trying to "pack the court." He yawned, thought a bit, and exclaimed, "I think I remember something like that happening just before I took my nap." He's right. Let's recall some bitter Supreme Court politics and shenanigans from Franklin Delano Roosevelt's presidency.

It was 1937 and President Roosevelt felt down on his luck. He was pushing the envelope of executive and legislative authority to deploy his aggressive liberal economic "solutions." The Supreme Court had blocked several key components of his "New Deal" legislation. Roosevelt secretly planned to create a more liberal SCOTUS majority simply by adding several "friendly" new justices, as is technically allowed by our constitution.

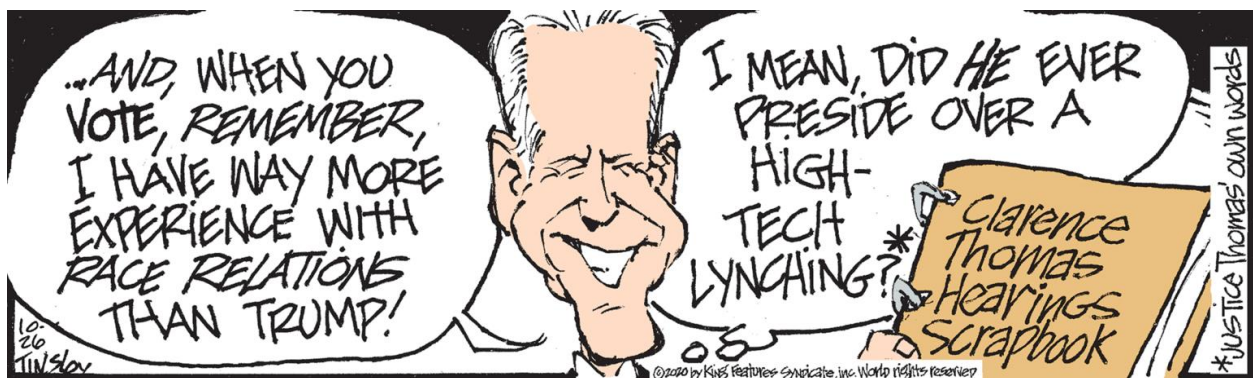
Opposition built and his project hit a dead end in the Senate after the Judiciary Committee thought ill of this "power-grab" proposal. The Committee's conclusion emphatically stated:

“It is a measure which should be so emphatically rejected that its parallel will never again be presented.....”

It’s now 2021, and the issue isn’t yet dead. President Trump’s success nominating conservative justices inspired democrats to consider court packing after defeating Trump in the 2020 election. Given the 50/50 status in the Senate, success at packing requires 100% democrat support, but Virginia democrat Senator Manchin, and possibly others, won’t support the effort, so perhaps this skirmish has ended.

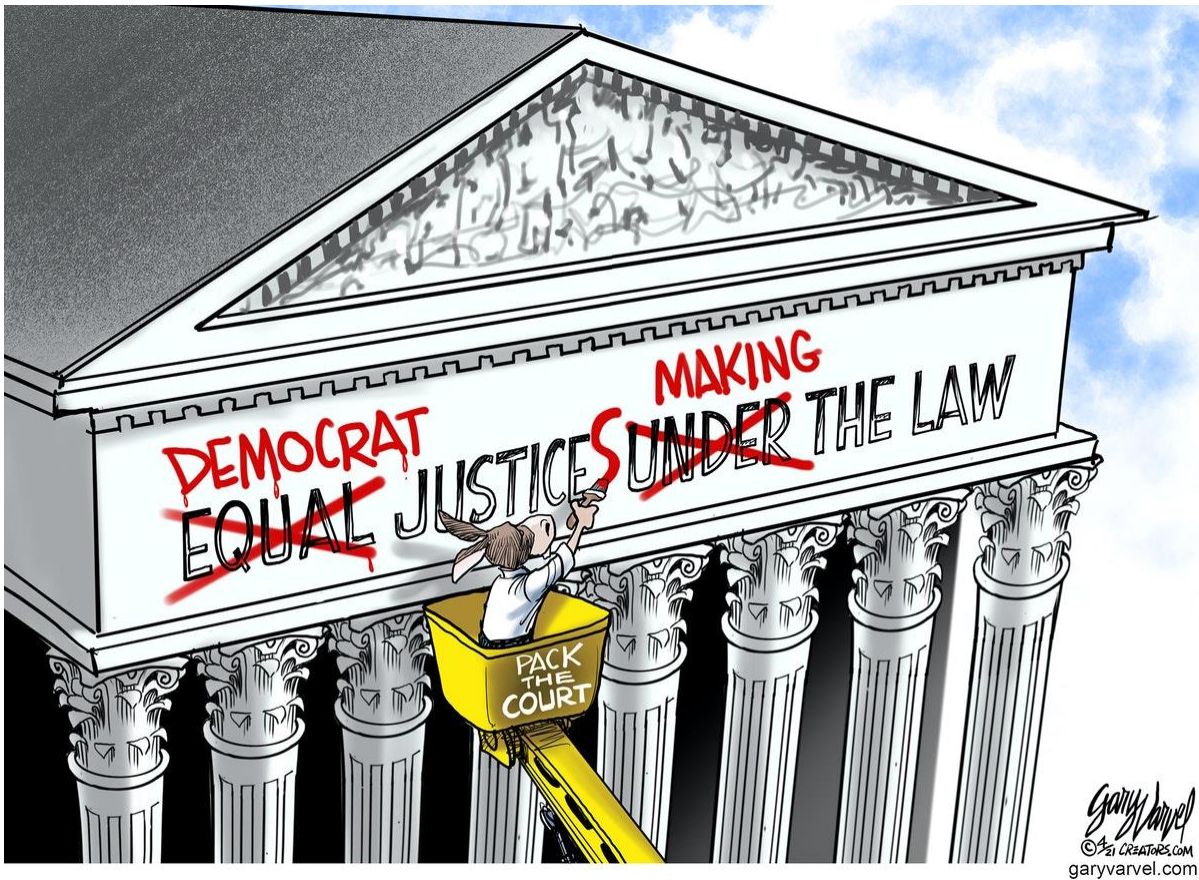
Here are some other interesting “SCOTUS wars”:

- 1805: Republican President Thomas Jefferson successfully “arranged” the impeachment Federalist Justice Samuel Chase. Republican Senators weren’t convinced, and Chase was acquitted.
- 1987: Robert Bork, a Reagan nominee, was denied confirmation. His reputation was brutally pilloried by Ted Kennedy and others. Being “borked,” became a popular term.
- 1991: Clarence Thomas was “borked” by Joe Biden, Judiciary Committee Chair. Referring to unsubstantiated sexual harassment charges, Thomas called it a “high-tech lynching.” He was confirmed.



Mallard Fillmore by Bruce Tinsley – A clever cartoon from the 2020 presidential election

- 1992: Biden declared that the Senate wouldn’t consider a “Bush 41” court nomination during his entire last year as President. This became “The Biden Rule.”
- 2006: Then-Senator Obama publicly supported a filibuster to block confirmation of Justice Alito.
- 2007: 19 months before the end of “Bush 43’s” term, Senator Schumer declared that the lame-duck President would likely get no nominees approved by the Senate.
- 2016: Applying the Biden Rule, Republicans blocked the nomination of Merrick Garland to fill Justice Scalia’s chair.
- 2017: The Garland strategy paid off when Trump successfully appointed Neil Gorsuch after employing the “nuclear option” to break a democrat filibuster.
- 2018: Trump’s nomination of Bret Kavanaugh turned into days of brutal attempts at character assassination. The accusations were discredited. Kavanaugh was confirmed.
- 2020: Amy Coney Barrett replaced ionic Ruth Bader Ginsberg despite foolish attacks implying Barrett was disingenuous and dangerous. Eventually, churlish democrats boycotted the Judicial Committee vote.



The Supreme Court has become an ever-increasing object of political maneuvering. Some legislators have concluded it's easier to get things done through Supreme Court cases or challenges, than through a deliberative legislative process.

If one party plays the game of character assassination during confirmation hearings or attempts to employ a strategy of court-packing, the other party is likely to follow suit. A dismal never-ending process would be inevitable.

Very recently, almost foretelling a future "SCOTUS" skirmish, Senate Minority Leader Mitch McConnell declared that if Republicans take control of the Senate in 2022, "it's highly unlikely" he would allow a Biden appointee to fill a Supreme Court vacancy in 2024. Many SCOTUS wars are in our future.

Let's heed the sound advice spoken in 1983 during a discussion about Franklin Roosevelt's unsuccessful attempt to pack the court. Senator Joe Biden stated that FDR "was legalistically, absolutely correct – but it was a bonehead idea. It was a terrible mistake to make."

Let's listen to our President's good advice and deny both parties any attempt to besmirch the image, or to compromise the independence, of judges or the entire judiciary.