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European Languages

زبانهای اروپایی

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19.10.2020

Pack the Damn Court, Joe



Drawing by Nathaniel St. Clair

While strolling down “the center lane,” as *The Washington Post* calls it, picking up “suburban women” and other inveterate old school Republicans along the way, Joe Biden should bear in mind that once Trump is gone and the clear and present danger of the “ism” that bears the Trump name is significantly diminished, he will either have to allow himself to be dragged leftward by a public eager for “hope” and “change” — not the Barack Obama kind, but the real deal — or get the hell out of the way.

This of course assumes that Biden will not go the way of Hillary Clinton, losing the unlosable. He certainly has it in him; that possibility cannot be ignored.

If he does lose, many will “abandon all hope.” That would be entirely understandable. After all, there is something profoundly wrong with a universe in which Donald Trump could get

any votes at all, much less enough for the Electoral College to propel him into the White House — twice.

There was despair after Hillary blew it four years ago too, but not nearly enough to keep new organizing efforts from being set in motion. Those efforts kept hope for a better possible world alive.

By now, though, with the Trumpian menace looming so large, all that once seemed so promising has been, for the most part, put on hold; all the energy now is focused on Trump, and there is not much left to spare.

The pillars of the party have much to answer for on this account. They and their donors are as against Trump as anyone could be, but they are also guardians and beneficiaries of the status quo that made Trump or someone like him all but inevitable.

They are fine with mainstream Democrats and anti-Trump Republicans calling the shots but, as far as they are concerned, everyone to their left – that would probably be the majority of rank-and-file Democratic voters — had better keep their views to themselves.

Were Biden to blow it, perhaps there will be a way to resuscitate the movement Pelosiite-Bidenesque Democrats quashed earlier in the year. Perhaps activists unwilling to accept defeat will find a way, leaving Bernie Sanders behind, to transform what he and Elizabeth Warren got going to a more militant and radical level.

It could come to that; but, for now, the chances seem bleak. The Democratic Party establishment is riding high, making the Eisenhower era GOP look almost good.

However, with Donald Trump going batshit crazy in plain view, tweeting out nonsense even more incoherent than usual and holding super-spreader events that might as well have been contrived to sicken or even kill off his base, it is unlikely that even Biden could end up going Hillary's way. Still, one has to worry: Democrats are born losers, and anything could happen. Leaving that concern aside, it is clear that if all goes well, or not too badly, it will be necessary early on for Biden and his people to figure out what to do about the Supreme Court. To “pack” it or to let it be, that is the question.

By packing it, I mean expanding its size. Trump and Mitch McConnell have been packing it in a different, more nefarious way for as long as they could; they have been filling vacancies at all levels of the federal system, not just the Supreme Court, with retrograde, Federalist Society approved dunces and ideologues.

They don't call that “packing,” however. The word is plainly appropriate, but it gives off a bad vibe that they would prefer to deflect. This has been the case ever since Franklin Roosevelt, midway through his second term, tried to expand the Supreme Court's size – in order to thwart the efforts of “nine old men” hellbent on interfering with the New Deal.

Anyone alive now who was politically conscious back then would be at least a hundred years old today. However, if my own experience is typical, I can say that those of us, like Biden, who went to high school in the fifties, did hear about it. I don't remember how it was

presented, though, or even if it was deemed a bad thing. Like so much else we were told about in high school, it went in one ear and out the other.

Neither can I speak about how much play, if any, the FDR court-packing fiasco has gotten in schools or anywhere else from the sixties on. With civics classes nowadays going the way of, say, classes in penmanship, I'd venture not much.

Yet, that ill-fated, long ago escapade has somehow given rise to one of the silliest dogmas of American politics: that there must be nine and only nine Justices on the Supreme Court.

After declining to address the issue for a while, Biden now seems to be on board with that; I suppose he latched onto it while ambling down the center lane.

Why nine? The Supreme Court is not a baseball team. Would that it were; in baseball, they keep players in reserve on the bench and in the bullpen and they make active use of them when games are on; they also have entire farm systems of minor league teams. The Supremes just have themselves.

Even apart from the harm that the Trump presidency has done to the institution, and notwithstanding GOP efforts to pack not only the Supreme Court but the entire federal judiciary with troglodytes, there are sound, good government reasons to enlarge the Court. As matters now stand, it has too much business for nine Justices to handle properly and well.

That is why district appeals courts do much that the Supreme Court ought to deal with but cannot. Courts should be big enough to discharge their functions well; the Supreme Court is not.

There are also compelling (small-d) democratic reasons to pack (expand the size of) the Court. Were it just a court of last resort, a place where the judicial buck finally stops, it would hardly matter that the Supreme Court is effectively beyond democratic control.

The elites of the time, the southern planters and northern merchants who wrote our Constitution, probably thought that the Supreme Court would be nothing more than a court of last resort. But it didn't turn out that way. Ever since *Marbury versus Madison* (1803) – the “super precedent” of all precedents, according to Amy Coney Barrett, Trump's intended Supreme Court flunky, it has been an unelected super-legislature.

Marbury established the principle of judicial review, giving American courts the power to strike down whatever they find “unconstitutional.” This is supposedly in the spirit of the founders' dedication to the principle of “checks and balances.”

It is indeed, and it should go without saying that checks and balances can be golden; that they can and often do advance the public good. On the other hand, though they can and often do disempower the citizenry, to the detriment of the core democratic idea of government of, by, and for the people.

Many of our political institutions — the Senate and the Electoral College, for example – are only very tenuously constrained by (small-d) democratic concerns. The federal judicial system generally is constrained even less; and the Supreme Court is constrained least of all.

Even with the super precedents we have, it doesn't have to be quite as bad as that. Expanding the court ("packing" it in the way FDR intended) would help; so would imposing term limits on Justices. There probably are other outside-the-box remedies that could be helpful and that would pass constitutional muster, even with a Supreme Court already well packed in the nefarious McConnell way.

If establishment Democrats like Biden and his cohort don't see the value of that, they should be made to see it, as soon as possible.

"We, the people" should do all in our power to force them to pack that damn Court.

How did our federal judiciary, the Supreme Court especially, arrive at such a sorry state?

The recipe is clear: combine shameless Republican obduracy with Democratic pusillanimity and *voilà* — a federal judiciary, not just a Supreme Court, chock full of the kinds of "conservatives" that go in big time for later day versions of pre-Enlightenment religiosity and classical (early nineteenth century) liberal political economy.

That accords well with the thinking of the muddleheaded and hypocritical, and it serves the interests of the rich and heinous, but all to the detriment of everyone else.

Thus we find ourselves in a situation in which contempt — of the Supreme Court obviously, but also of the entire judicial system — is justified and timely; not contempt according to the legal meaning of the term, but in its literal sense.

There is perhaps some chance, if there is any sanity left in mainstream Democratic quarters, that the appointment of that rightwing Trump stooge and Catholic paragon to the Supreme Court could bring this long festering situation to a head; not because Barrett is worse than other so-called conservative judges, she is probably less odious than most of them, but because ramming her nomination through, at this time and place, is an outrage too far.

I wouldn't count though on democracy surging forward on her account: first because Democrats are too spineless to do much court packing themselves, and then because with Joe Biden calling the shots, the party is more likely to acquiesce than to try, however feebly, to move forward.

The widespread yearning for pre-Trumpian "normalcy" that now seems to be on everyone's mind doesn't help either. This is not to deny that it is entirely understandable; who does not want relief from having to see that face or hear that voice?

But thanks mainly to the malfeasance and ineptitude of the man behind that face and voice, especially in the midst of a pandemic that he has made so much worse, there are historical opportunities out there begging to be seized.

Getting beyond the nine and nine only rule for the Supreme Court would be a step in that direction.

It is not as if FDR-style court packing would systemically dilute the soundness of the Supreme Court's judgments. With or without Ruth Bader Ginsburg on it, the Supreme Court

has never exactly been a fountain of wisdom. Quite to the contrary, the situation there is, and long has been, so bad that it would be fair to say that any change would be for the better.

How much wisdom is there, after all, in a place where “icon” status is conferred on the likes of Antonin Scalia or, as I call him, “Tony Two Vote?” Vote number two was the one that inflicted George W. Bush, now only the second worst president in modern times and the second most lethal in this century, upon us.

Like Trump in 2016, Bush lost the popular vote in 2000; had Scalia and his cohort not stopped vote counting, Bush would also, very likely, have lost Florida too, thus losing the election to Al Gore. Scalia’s reasons were so feeble that even he thought they should not establish a precedent; he went out of his way to make that clear.

Scalia was a doctrinaire Catholic social conservative who, thinking like an old school Protestant, effectively regarded the Constitution as inerrant Holy Writ, to be taken literally or, when that proves impossible, as it generally does, as a text requiring interpretation inspired by what Barry Goldwater called “the conscience of a conservative.”

Now, thanks to the God-fearing retrogrades and ruling class warriors at the Federalist Society and the Judicial Crisis Network, and to the dark money they have raised, Amy Coney Barrett, mother of many (as her Republican boosters keep reminding us), good (Handmaidenly?) wife, and rightwing Catholic paragon will be the one chosen to fill his shoes.

She seems neither cruel nor vile, like the Leader whose stooge she was picked to become, and unlike, say, Kamala Harris or, for that matter, Tony Two Vote himself, there seems to be nothing Torquemada-like in her nature.

How ironic that the originalism good Catholic conservatives nowadays champion is more grounded in the anti-clerical, anti-Catholic Enlightenment tradition of the gentlemen gathered in Philadelphia in 1787 than in, say, the very Catholic ethos of the then still contemporaneous Spanish Inquisition of 1478-1834.

However that may be, at this point in time, the last thing we need is another “originalist” super-legislator.

I doubt whether Barrett really is the kinder-gentler conservative she appears to be; given the views she holds, she must have a darker side. But this is immaterial, as it were, to the case at hand.

Trump and McConnell have packed the Court – in as bad a way as could be. The point therefore is to bring their work down, not to reinforce it.

If we must have an Amy Coney Barrett serving the interests of the unenlightened and the venal, causing grievous harm in the process, then what we need all the more are three or four additional Supreme Court Justices, equipped with defensible, or at least not outrageously preposterous Scalia-like views, whose presence on the Court would help to turn the federal judiciary away from clerical and corporate darkness, at least to where it was before Trump

and McConnell took charge, and perhaps someday to a better, more democratic place altogether.

But for as long as we remain bound by the non- and sometimes anti-democratic framework our Founding Fathers bequeathed us, we need Justices intent on providing our institutions with as much of a human face as they are “constitutionally” able to bear.

For that to happen, we need to stop fetishizing the number Nine. Franklin Roosevelt figured that out a long time ago; the time is past due, Joe, for Democrats to rejoin him.

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OCTOBER 16, 2020

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