



Supreme Court

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Guests : Samuel Moyn professor of law and history at Yale University.

Making the Supreme Court Safe for Democracy: Samuel Moyn on Reforming an Undemocratic Institution



<https://publish.dvllabs.com/democracynow/360/dn2020-1014.mp4>

As Republicans race to confirm President Trump's Supreme Court nominee Amy Coney Barrett prior to Election Day and cement a conservative majority on the top court for a generation or more, calls are growing for Joe Biden to increase the number of justices on the Supreme Court if elected president. But Yale legal scholar Samuel Moyn argues that beyond "packing the court" and other measures commonly proposed to rebalance the Supreme Court's ideological makeup, the institution as a whole must be weakened in order to safeguard democracy. "This country was founded on minority rule and the rejection of democracy, and the Supreme Court has long been a part of that picture," says Moyn. "Now that the right is on the brink of establishing control, it's a dangerous institution."

❑ This is a rush transcript. Copy may not be in its final form.

AMY GOODMAN: This is *Democracy Now! The Quarantine Report*. I'm Amy Goodman, with Juan González, as we continue to look at the Republican race to confirm President Trump's Supreme Court nominee Judge Amy Coney Barrett prior to Election Day.

If confirmed to fill Ruth Bader Ginsburg's seat, Barrett will give conservatives a 6-to-3 advantage on the court. It would also mean the majority of the justices on the court were selected by presidents that did not win the popular vote.

We're joined now by legal scholar Samuel Moyn, who has a new piece¹ in *The New Republic* headlined "Making the Supreme Court Safe for Democracy: Beyond packing schemes, we need to diminish the high court's power." He's a professor of jurisprudence at Yale Law School, a professor of history at Yale University, as well.

Well, if you can talk about the history of the Supreme Court — you talk about it as a reactionary one in U.S. history — and what needs to be done, Professor Moyn?

➤ **SAMUEL MOYN:** *It's nice to be with you. You know, this country was founded on majority — on minority rule and the rejection of democracy, and the Supreme Court has long been a part of that picture. And now that the right is on the brink of establishing control, it's a dangerous institution. And that's long been the case. We're seeing the charade, the familiar drill in Washington. The reason it's happening is because immense power to control the future of the country has been placed in the hands of nine elected justices in the first place. And so, no wonder there's Armageddon every time someone dies or retires. Maybe that's what we ought to think about changing.*

JUAN GONZÁLEZ: Well, Professor, I wanted to ask you — in terms of this history, there is a series of court decisions that involved basically sanctioning conquest and the imperial — the grabbing of imperial territories, whether it's the Insular Cases in the early 1900s or the — under the Justice John Marshall court, a series of decisions, the Marshall Trilogy, on the relationship of Native Americans to the federal government, as wards, essentially, of the federal government. None of this, however, is ever really discussed in these hearings in terms — this is settled, supposedly, decisions that are clearly unjust but have never really been raised to new Supreme Court nominees. Could you expound a little bit more about this historic reactionary nature of the court?

➤ **SAMUEL MOYN:** *So, really, from the beginning of the republic, the court has been on board with the expulsion or extermination of Native peoples, as you pointed out, with American Empire at the end of the 19th and the early 20th century. The striking legacy, even after the abolition of slavery — which, of course, the Supreme Court also supported before the Civil War — was the court's complicity with the rule of the wealthy, especially in the first Gilded Age during that same later 19th and early 20th century. And Franklin Roosevelt had to face down the court, confront it, precisely for the reason that it was an institution of minority rule. Thomas Jefferson actually warned at the very beginning of our republic that his enemies were fleeing into the judiciary and treating it as a stronghold from which they could rule, no matter what the people wanted.*

And now in our second Gilded Age, we've been seeing that same phenomenon for a decade. Even before the current confirmation battle, even before Mitch McConnell's hijinks, even when Ruth Bader Ginsburg was a justice, the court was the most business-friendly court in a century. And so, we have to understand that, as you point out, long-term role of this court in our history.

JUAN GONZÁLEZ: So, in essence, what you're saying is that period, let's say, of the Warren Court was really an anomaly in terms of at least liberalism on social and racial issues, but that the court essentially has been the trump card of the corporate elite of America in terms of maintaining its power.

¹ <https://newrepublic.com/article/159710/supreme-court-reform-court-packing-diminish-power>

➤ **SAMUEL MOYN:** That's largely right. Earl Warren's court was anomalous and brief, and, sadly, it didn't get a lot done, especially after decades of pushback and reaction. We should also remember that some of the basic work that cases like *Brown v. Board* did was sort of undoing the Supreme Court's collusion with the end of Reconstruction in 1877 and the unholy deal to let the South return to apartheid. And so, it did do some valuable work.

It's not clear we should be depending on a high court to do our democratic work for us. And so, the basic rights we care about, we ultimately need to depend on convincing fellow citizens and entrenching our progressive ideals. And for that, only a mass movement suffices, not getting our friends in high places.

JUAN GONZÁLEZ: And when the Republicans talk now, they've already created the narrative that if Democrats come to power in the White House and the Senate, they will seek to pack the court, when, in reality, I guess what you're saying is that the court is already packed. The question is — and under Mitch McConnell, it's become even more packed. The question is: How can it be unpacked or democratized? And I'm wondering if you could talk about what you would see as the most achievable — not necessarily the reforms that you would prefer the most, but which would be the ones most achievable — given that Democrats themselves, if they do come to power, will be fighting among themselves about the best type of reform.

➤ **SAMUEL MOYN:** So, progressives have a menu of options, and they can order lots of things off the menu to press the Democrats, especially if Joe Biden wins and the Senate changes hands. Court packing isn't out of the question. It depends on, you know, what's done. If you put two new liberal justices up there, though, you're just restoring the status quo ante-Neil Gorsuch, which was already intolerable.

So, our proposal is that you think about ways of limiting the court's power to interfere with Democratic legislation, as is happening with the Affordable Care Act once again. We shouldn't allow an institution that can mess, over a decade, in cooperation with the dark money-funded conservative litigants, with some of our most progressive laws. So, if an H.R. 1 is passed, if a Green New Deal statute is passed, we can do things like insulate those laws from scrutiny by the federal judiciary. You know, if we dream big, we can do things like insist that judges can only invalidate federal legislation by supermajorities, so that it's not up to five conservatives, now six, to invalidate laws that millions support at very high levels of popularity. So, what if we required a 7-to-2 or 8-to-1 or unanimous decision from the Supreme Court, which would make sure it's only finding values in the Constitution that everyone agrees about?

AMY GOODMAN: Samuel Moyn, if you could talk about the solution that Harvard Law School professor James Bradley Thayer offered to the problems posed by the Supreme Court, how he attempted to make judicial powers safe for democratic self-rule?

➤ **SAMUEL MOYN:** So, Thayer was responding to the end of Reconstruction, when the Supreme Court gutted the attempt after the Civil War to help African Americans, not just release them from chattel slavery but give them equal citizenship. And he saw the court, in a case called the Civil Rights Cases, destroy some of Congress's attempts to create freedom and equality in this country. And when he saw that, he said that the justices should not be allowed to invalidate legislation unless it's really clear that it violates the Constitution. And so he called for self-restraint. And in particular, he said that there has to be a clear error. It's not that the judges get to second-guess the Legislature, because the Legislature also has a view about what

the Constitution allows and what's compatible with it. Rather, it's that judges should only invalidate laws when they're just crazy.

Now, for a while, once FDR faced down the court in 1937, the Supreme Court adopted Thayer's rule and engaged in self-restraint. But that's eroded over time, actually in part because of liberal justices, but also, in more recent times, conservative justices. So, I think we need to retrieve Thayer's idea that the court has to be made safe for democracy, but not just rely on self-restraint, the judges' promises never to interfere again. And so, if we do have to confront the court once again, we should be inspired by the old example that Thayer provides, but make sure and learn from his mistakes. We have to change the institution so that it's not up to judges to engage in self-restraint. We should restrain the judges so that they can't act.

JUAN GONZÁLEZ: And one of the things that you've noted is, obviously, as people live longer today than they did back in the 19th or early 20th century, and the justices that get on the court stay longer — what about this issue of limiting the terms of Supreme Court justices?

➤ **SAMUEL MOYN:** Term limitation is a great idea. It's a kind of basic reform that a lot of people agree about. Ro Khanna introduced a bill. The trouble with most of the forms of term limitation that we've seen are that they're prospective, so the current justices will be grandfathered or, in Barrett's case, grandmothered in. And I just don't think we can wait that long. The country is on fire. And the best hope for progressive change is from the Congress, not from the judiciary, which will not save us.

And so, just limiting terms is an obvious fix, but it's not enough of a fix, not least because, in the end, the problem is not who is serving on the court or how long they get to stay; it's the power they have. And we need to curtail it.

AMY GOODMAN: We want to thank you so much, Samuel Moyn, professor of jurisprudence at Yale Law School and professor of history at Yale University.

Links

- ["Making the Supreme Court Safe for Democracy"](#)
- ["Socialists Have Long Fought to Disempower the Supreme Court. That's More Urgent Than Ever Now."](#)
- ["Not Enough: Human Rights in an Unequal World," by Samuel Moyn](#)