THE TROUBLE WITH COURT-PACKING

NEIL S. SIEGEL†

ABSTRACT

Wide-ranging public discussion of U.S. Supreme Court reform implicates fundamental questions of constitutional policy, norms, and law. This Article focuses on the reform proposal that poses the greatest threat to judicial legitimacy and independence: Court-packing. This Article contends that there has likely been a constitutional convention against Court-packing for a long time now, although it is uncertain whether the convention continues to exist given Senate conduct since 2016. This Article also maintains that Court-packing is not as free from constitutional difficulty as the conventional wisdom holds, even if the arguments for its constitutionality are stronger on balance. Most importantly, this Article offers an analytical framework for thinking about Court-packing that rests upon a common-ground foundation: the Court performs critical functions that most Americans want it to perform; most of the time, it performs these functions better than the available governmental alternatives; and Court-packing would almost certainly damage, if not destroy, its ability to continue performing these functions by impairing its legitimacy and independence. Court-packing should therefore be reserved for extreme situations in which adding seats would: (1) respond proportionally to a previous instance of unjustified Court-packing; (2) restore the Court's legitimacy in the eyes

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† David W. Ichel Professor of Law and Professor of Political Science, Associate Dean for Intellectual Life, Duke University School of Law. This Article relates to issues addressed in my testimony before the Presidential Commission on the U.S. Supreme Court. *See generally* Neil S. Siegel, David W. Ichel Professor of L. and Professor of Pol. Sci., Duke Univ. Sch. of L., *Written Statement*, *before the* PRESIDENTIAL COMMISSION OF THE SUPREME COURT OF THE UNITED STATES (July 20, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/07/Siegel-Testimony.pdf [https://perma.cc/QQ48-J9M6]. For smart feedback, I thank Will Baude, Curtis Bradley, Noah Feldman, R. Craig Green, Tara Leigh Grove, Margaret Lemos, Richard Pildes, H. Jefferson Powell, Richard Primus, Chris Schroeder, Ilya Somin, Ernest Young, participants in the faculty workshops at Duke Law School and at the Antonin Scalia Law School at George Mason University, and the judges who attended my session on U.S. Supreme Court Reform at the 2021 New Jersey Judicial College. For help securing sources, I thank Jane Bahnson of Duke Law Library. For able research assistance, I thank Dana Sublett, Duke Law Class of 2023. For perceiving the potential longevity of this Article and for exquisite edits, I thank the editors of the *Duke Law Journal*, many of whom I am proud to call my students. I dedicate this Article to Walter E. Dellinger III, who inspired it—and who always encouraged and promoted me, like he did so many others.

of a large majority of Americans; or (3) meet a national crisis to which the Court was contributing. Moreover, even when an extreme situation exists, Congress should ask itself whether it can legislate in other ways to address pressing problems before packing the Court. Applying this framework, this Article cuts against the ideological grain of current debates. As many progressives advocate Court-packing and many conservatives oppose it, this Article shows there are principled reasons to resist Court-packing at this time, even if one believes that Senate Republicans violated an important convention requiring good-faith consideration of Supreme Court nominees and then added hypocrisy to their norm violation, and even if one is deeply concerned about the ideological orientation and methodological assertiveness of the current Court.

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INTRODUCTION

Justice Antonin Scalia died unexpectedly with nearly a year to go in Democratic President Barack Obama's second term. About an hour after Justice Scalia's death was publicly confirmed, Senate Majority Leader Mitch McConnell announced that Senate Republicans would not consider any Obama nominee to fill Justice Scalia's seat.[1] They subsequently made good on this promise.[2] The next president, Republican Donald Trump, made three appointments to the Court over the next four years. At some point during his presidency, Court-packing became the most thinkable that it had been for many progressives since the failed Court-packing plan of Democratic President Franklin Delano Roosevelt ("FDR") in 1937.[3] History suggests that the contemporary debate over Court-packing will not be the last one.

1. *See, e.g.*, *infra* notes 219–221 and accompanying text (documenting these facts); Burgess Everett & Glenn Thrush, *McConnell Throws Down the Gauntlet: No Scalia Replacement Under Obama*, POLITICO (Feb. 13, 2016, 9:56 PM), https://www.politico.com/story/2016/02/mitch-mcconnell-antonin-scalia-supreme-court-nomination-219248 [https://perma.cc/U7M3-2HYV] (noting "[t]he swiftness of McConnell's statement—coming about an hour after Scalia's death in Texas had been confirmed").

2. *See* 163 CONG. REC. S2442–43 (daily ed. Apr. 7, 2017) (recording the Senate's confirmation of Republican President Donald Trump's nominee, then-Judge Neil Gorsuch, to fill Justice Scalia's seat).

3. For examples of numerous calls for Court-packing on the ideological left in current times, see *infra* notes 7, 13, and accompanying text. For discussion of the 1937 episode, see *infra* Part II.A.

Wide-ranging public discussion of Supreme Court reform implicates fundamental questions of constitutional policy, norms, and law, as reflected in the work of the Presidential Commission on the Supreme Court of the United States. Although the proposals for reform range widely, this Article focuses on the one that poses the greatest threat to judicial legitimacy and independence: Court-packing. This Article's analytical framework for thinking about Court-packing and its arguments against it except in genuinely extreme circumstances rest upon a common-ground foundation: the Court performs functions that most Americans want it to perform; most of the time, it performs these functions better than the available governmental alternatives; and Court-packing would almost certainly damage, if not destroy, its ability to continue performing these functions.

Court expansion is increasing by statute the number of seats on the Supreme Court for any of several possible reasons. If those reasons sound genuinely in good government, then in principle Court expansion is unproblematic as far as constitutional politics, constitutional conventions, or constitutional law is concerned. Examples of good-government reasons for expanding the Court include enhancing its ability to handle a heavier workload and, until 1869, maintaining the link between the size of the Court and the structure of the circuit court system.[4] If and when there were good-government reasons for altering the size of the Court, one would hope that there would be bipartisan support for making such a change—and bipartisan participation in choosing the nominees.

Court expansion can also be accomplished for purposes of Court-packing. Court-packing can be defined specifically as increasing by statute the number of seats on the Court due to particular disagreements with the Court's decisions. This is what FDR attempted in 1937. Court-packing can be defined more generally—and more commonly—as increasing the Court's size for the purpose of influencing the Court's decision-making going forward. This purpose, among other objectives, is what motivated certain changes to the Court's size until 1869.[5]

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4. JOHN V. ORTH, HOW MANY JUDGES DOES IT TAKE TO MAKE A SUPREME COURT? 5 (2006). As discussed *infra* notes 139–146, in 1801, there was a brief interruption of the connection between the size of the Court and the structure of the circuit court system. *See* Act of Feb. 13, 1801, ch. 4, §§ 3, 7, 2 Stat. 89, 89–90.

5. Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 258, 269–72 (2017) [hereinafter Bradley &

This Article contends that there has likely been a non-legally-binding constitutional convention (or norm) against Court-packing for a long time now. Opponents of FDR's plan, including prominent Democrats, invoked (and thereby solidified) this convention in opposing the plan. Whether such a convention continues to exist in light of recent Senate conduct is, however, uncertain. This Article further argues that Court-packing is not as free from constitutional difficulty as the conventional wisdom holds, even if the arguments for its constitutionality are stronger on balance.[6]

Most importantly, this Article argues that Court-packing is an extreme act—a break-the-glass-and-pull-the-lever-only-in-case-of-emergency sort of act. Court-packing would significantly undermine the perception and reality of the Court's independence and, in almost all circumstances, risk its legal and public legitimacy. Undermining the Court's legitimacy would in turn impair its ability to perform critical functions that no other governmental institution in the United States, at this point in its history, is likely to perform more effectively. Court-packing should therefore be reserved for extreme situations in which adding seats would: (1) respond proportionally to a previous instance of unjustified Court-packing; (2) restore the Court's legitimacy in the eyes of a large majority of Americans when its legitimacy is threatened by the Court itself; or (3) meet a national crisis to which the Court was contributing. Moreover, even when an extreme situation exists, Congress should ask itself whether it can legislate in other ways to address pressing problems before packing the Court.

Most current proposals to add seats to the Court are not defended on good-government grounds. They are instead Court-packing plans. Although proponents champion such plans based in part on the

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Siegel, *Judicial Separation of Powers*]. Other reasons for changes to the Court's size prior to 1869 included the good-government concerns noted in the text and a congressional desire to affect the ability of a particular president to make a nomination. *Id.* at 271–72. For other discussions of the early practice, see *infra* Part III; PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., THE FINAL REPORT OF THE PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES 68–69 (2021) [hereinafter BIDEN COMM'N REPORT], https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf [https://perma.cc/2RSB-Z2BW].

6. As Part III.A discusses, the conventional wisdom is that Congress has broad power under the Necessary and Proper Clause, as understood from *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), to the present, to set and change the size of the Court regardless of its purpose in doing so—that is, regardless of whether Congress has good-government reasons or instead wants to seize ideological control of the Court. The conventional wisdom is based in part on the understanding that Congress's purpose is simply irrelevant to the scope of the Necessary and Proper Clause, just as its purpose is typically irrelevant when it uses other enumerated powers.

content of the Court's actual or anticipated decisions, a key rationale in favor of Court-packing now is that it is justified by the stark politicization of the Supreme Court confirmation process that began when Senate Republicans refused to consider the nomination of then-Chief Judge Merrick Garland in 2016 on the stated ground that it was an election year but then confirmed Justice Amy Coney Barrett in 2020.[7] The conduct of Senate Republicans was indeed problematic for many of the same reasons that Court-packing is almost always problematic. Senate Republicans significantly escalated previous troubling conduct by both parties with respect to judicial nominations.

It is not clear, however, why the conduct of Senate Republicans would potentially justify adding four seats (as current Court-packing

7. *See, e.g.*, BIDEN COMM'N REPORT, *supra* note 5, at 75 (reporting that "[s]ome proponents of Supreme Court expansion charge that Republican lawmakers since 2016 have disregarded institutional norms in order to secure a conservative supermajority on the Court," and that "[t]hey see expansion of the Court as particularly justified in light of Senate Republicans' handling of the election-year nominations of Judge Garland and Justice Barrett"); DAVID FARIS, IT'S TIME TO FIGHT DIRTY: HOW DEMOCRATS CAN BUILD A LASTING MAJORITY IN AMERICAN POLITICS 94 (2018) (arguing that the Democrats should exercise "the Neutron Option—the expansion of the Supreme Court to whatever number is necessary to secure a liberal majority"); MARK TUSHNET, TAKING BACK THE CONSTITUTION: ACTIVIST JUDGES AND THE NEXT AGE OF AMERICAN LAW 220–21 (2020) [hereinafter TUSHNET, TAKING BACK THE CONSTITUTION] (stating that "we can fairly wonder to what extent Court-packing would undermine judicial legitimacy" and that "in the event that the Court does start to obstruct progressive policy initiatives, Court-packing might do some good, as Democrats will see things"); *Reform the Supreme Court*, DEMAND JUST. [hereinafter DEMAND JUST.] https://demandjustice.org/priorities/supreme-court-reform [https://perma.cc/X4GW-7SDR] (advocating the addition of four seats to the Court because the "6–3 Republican supermajority . . . is too biased in favor of special interests and Republican politicians" and because "[o]ur democracy is at risk from decisions that suppress the right to vote"); Michael J. Klarman, Charles Warren Professor of L. Hist., Harvard L. Sch., *Court Expansion and Other Changes to the Court Composition*, *before the* PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, at 15 (July 20, 2021) [hereinafter Klarman, *Court Expansion*], https://www.whitehouse.gov/wp-content/uploads/2021/07/Klarman-Testimony.pdf [https://perma.cc/7GS6-883M] (contending that "Democrats today should expand the Court to provide a center-left country with a center-left Court that will defend democracy, resist voter suppression, permit reasonable regulation of campaign finance, and cease furthering a neo-Ayn Randian policy agenda that exacerbates economic inequality and fosters democratic degradation"); Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 10, 247–48 (2020) [hereinafter Klarman, *Foreword*] (asserting that the Democrats should pack the Court to undo the Republicans' theft of a seat in 2016); Michael J. Klarman, *Why Democrats Should Pack the Supreme Court*, TAKE CARE (Oct. 15, 2018), http://takecareblog.com/blog/why-democrats-should-pack-the-supreme-court [https://perma.cc/M9CD-C8TE] (arguing that the "*Republicans are already packing the courts*" and that the Democrats should "respond in kind" by expanding the size of the Supreme Court).

proposals in Congress urge[8]), as opposed to two. Moreover, it is not clear that adding even two seats would be a proportionate response to the actions of Senate Republicans given the different nature of Court-packing and the greater magnitude of the harm that it would likely do to the Court's ability to perform its functions. Proportionality limits the damage to the Court's legitimacy and efficacy while still enabling a political party to deter or punish misconduct by the other party, thereby permitting the responding party to safeguard its own democratic authority to affect the Court's composition through the regular appointments process.

In addition, other potential justifications for Court-packing do not currently appear compelling. At least so far, and notwithstanding the questions raised about the future by the Court's arresting decision in *Dobbs v. Jackson Women's Health Organization*,[9] the Court does not seem to be squandering its legitimacy in the view of a large majority of Americans such that packing the Court would likely restore it.[10] Nor, in all likelihood, is there a national crisis to which the Court is contributing—an emergency situation that stands apart from mainstream partisan disagreements—that might justify Court-packing. Even assuming such a crisis exists (the most likely candidate would be with respect to voting rights and access to the democratic process), Congress has not first resorted to means that would reduce judicial legitimacy less. That is, Congress has not legislated to advance its compelling interest and awaited the Court's response to the legislation. The greatest risk to democracy at present is that lies about voter fraud or other asserted "legal irregularities" will enable theft of the 2024 presidential election. But what seems most likely to prevent such a nightmare scenario is a broad-based political coalition that includes democracy-defending Republicans. Court-packing would be so incendiary that it might render it impossible to form such a coalition.

The recent conduct of Senate Republicans might justify the refusal of Senate Democrats to consider any Republican Supreme Court nominees in the years ahead. The conduct of Senate Republicans might also justify a decision of Senate Democrats to confirm a Democratic

8. *See* H.R. 2584, 117th Cong. (2021) (proposing to amend Title 28 of the United States Code to provide for twelve Associate Justices in addition to the Chief Justice); S. 1141, 117th Cong. (2021) (same).

9. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

10. For discussion, see *infra* Part V.B.2.

nominee just before a set of elections or even in the lame-duck session after them. Moreover, Republican "constitutional hardball" helps explain public consideration of Court-packing, including through the work of the Presidential Commission on the Supreme Court.[11] Finally, there would likely be value in having a credible threat of Court-packing if the Court were on the cusp of devastating its own legitimacy or deepening a national crisis.

But actually pulling the trigger and packing the Court with four Justices absent extreme circumstances would risk severe damage not just to the progressive Court that would presumably result but also to the progressive and conservative Courts of the future. It would also likely damage U.S. politics by injecting threats or promises of Court-packing into every election cycle and by unleashing subsequent rounds of Court-packing whenever the opportunity arose. Even before the first instance of retaliatory packing took place, there would be cause for concern about noncompliance with, or nonenforcement of, Supreme Court decisions. It is easy to forget that judicial review rests upon a precarious foundation in the United States.[12]

This Article cuts against the ideological grain of contemporary debates over Court-packing. There are many calls now by progressives to pack the Court.[13] The work of questioning the wisdom—and the

11. For the Commission's report, see *supra* note 5. Constitutional hardball refers partly to the violation of constitutional norms by politicians to achieve partisan goals. *See* Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004) (defining constitutional hardball as "political claims and practices . . . that are without much question within the bounds of existing constitutional doctrine and practice but that are nonetheless in some tension with existing *pre*-constitutional understandings").

12. For discussion, see *infra* notes 34–36 and accompanying text.

13. *See, e.g.*, STEPHEN M. FELDMAN, PACK THE COURT! A DEFENSE OF SUPREME COURT EXPANSION 5 (2021); Nan Aron, President, All. for Just., *Testimony*, *before the* PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, at 11–16 (July 20, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/07/Aron-Testimony.pdf [https://perma.cc/QD3G-2QN4]; Christopher Kang, Co-Founder and Chief Couns., Demand Just., *Perspectives on Supreme Court Reform*, *before the* PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES (July 20, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/07/Kang-Testimony.pdf [https://perma.cc/8EFE-TVFK]; Nancy Gertner & Laurence H. Tribe, *The Supreme Court Isn't Well. The Only Hope for a Cure Is More Justices.*, WASH. POST (Dec. 9, 2021, 5:01 PM), https://www.washingtonpost.com/opinions/2021/12/09/expand-supreme-court-laurence-tribe-nancy-gertner [https://perma.cc/5UVP-X477]; Kermit Roosevelt III, *I Spent 7 Months Studying Supreme Court Reform. We Need To Pack the Court Now*, TIME (Dec. 10, 2021, 7:00 AM), https://time.com/6127193/supreme-court-reform-expansion [https://perma.cc/J998-2VTG]; *supra* note 7 and accompanying text (quoting progressive advocates

constitutionality—of Court-packing has largely been performed by conservatives, who are generally enthusiastic about the composition and decision-making of the Roberts Court.[14] This Article shows that there are principled reasons to oppose Court-packing at this time, even if one believes that Senate Republicans violated an important convention requiring good-faith consideration of Supreme Court nominees, and even if one is deeply concerned about the ideological orientation and methodological assertiveness of the current Court.

This Article offers a framework for determining whether and when Court-packing would be justified that people of different ideologies and party affiliations could apply in any political era, even if they disagree about how it should apply in situations such as the past several years of confirmation politics. Although this framework will not settle deep ideological or partisan disagreements, it holds the potential to channel such disagreements into debates that are more tractable and honest. The framework is offered in the conviction that the basic stability of U.S. constitutional democracy is of immense social value; restraints on partisanship, including self-restraints, are essential to maintaining the stability of this regime; and extraordinary actions that undermine core structural values and institutions of government threaten its stability.

Part I explains why Court-packing would likely undermine the ability, and might undermine the willingness, of the Justices to perform

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of Court-packing); *supra* note 8 and accompanying text (citing Court-packing bills supported by congressional Democrats).

14. *See, e.g.*, William Baude, Reflections of a Supreme Court Commissioner 3–9 (Dec. 10, 2021) [hereinafter Baude, Reflections] (unpublished manuscript), https://ssrn.com/abstract=3982144 [https://perma.cc/P5BL-BCQK]; Philip Hamburger, *Court Packing Is a Dangerous Game*, WALL ST. J. (Apr. 15, 2021, 12:44 PM), https://www.wsj.com/articles/court-packing-is-a-dangerous-game-11618505061 [https://perma.cc/29DA-MBR5]; M. Todd Henderson, *Court-Packing Is Unconstitutional*, NEWSWEEK (Oct. 30, 2020, 6:30 AM), https://www.newsweek.com/court-packing-unconstitutional-opinion-1543290 [https://perma.cc/2WA7-5J9T]; Michael W. McConnell, Richard & Frances Mallery Professor, Stanford L. Sch., *Written Testimony*, *before the* PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, at 1–3 (June 30, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/McConnell-SCOTUS-Commission-Testimony.pdf [https://perma.cc/ABS3-3J2C]; Stephen E. Sachs, Antonin Scalia Professor of L., Harvard L. Sch., *Closing Reflections on the Supreme Court and Constitutional Governance*, *before the* PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, at 6, 16 (July 20, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/07/Sachs-Testimony.pdf [https://perma.cc/UG6Z-52DA]; *infra* notes 154–156, 168–173, and accompanying text (discussing the Commission testimony of Professor Randy Barnett and a blog post by Professor Michael Rappaport). Congressional Republicans have introduced numerous joint resolutions calling for a constitutional amendment that would fix the number of Justices at nine. *See, e.g.*, H.R.J. Res. 11, 117th Cong. (2021); S.J. Res. 9, 117th Cong. (2021).

critical tasks. Part II argues that Court-packing has likely been prohibited by a constitutional convention, but that it is uncertain whether this norm still stands. Part III contends that Court-packing is not entirely free from constitutional difficulty. Part IV maintains that Court-packing is justified in three extreme situations. Part V argues that current circumstances do not justify Court-packing.

I. COURT-PACKING AND THE FUNCTIONS OF THE COURT

This initial Part accomplishes three purposes. It first argues that packing the Court would almost certainly undermine the *ability* of the Justices to execute responsibilities that no other governmental institution is likely to execute better. It next contends that packing the Court might also undermine the *willingness* of the Justices to execute their responsibilities. It then examines who can potentially be persuaded by the arguments offered here—specifically, it argues that not only defenders of judicial review can potentially be persuaded, but some opponents as well. It also observes that certain advocates of Court-packing who critique judicial review appear to agree that packing the Court could damage it.

A. Court-Packing and Judicial Ability to Perform Key Functions

1. *Functions*. The Supreme Court, regardless of its membership at a particular time, performs vital functions in the U.S. constitutional system. It ensures the supremacy of federal law over state law,[15] brings uniformity to the interpretation of federal law,[16] and settles interstate disputes.[17] It polices certain aspects of the constitutional relationship between Congress and the executive,[18] and it protects a meaningful

15. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 7 (1958) (insisting on desegregation of the public schools in Arkansas without delay).

16. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 681 (2015) (resolving a circuit split over the constitutionality of state prohibitions on same-sex marriage).

17. *See, e.g.*, Mississippi v. Tennessee, 142 S. Ct. 31, 33 (2021) (holding that the waters of the Middle Claiborne Aquifer are subject to the judicial remedy of equitable apportionment and dismissing Mississippi's complaint without leave to amend).

18. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring) (identifying three zones into which presidential action may fall and describing presidential "power [a]s at its lowest ebb" when the president acts in the face of a congressional prohibition).

measure of state regulatory autonomy.[19] The Court provides a check against the dramatic expansion of executive power since the start of the twentieth century, a development that poses a risk of authoritarianism if a would-be authoritarian ascends to the presidency.[20] The Justices are expected to vindicate constitutional rights to liberty and equality and to help preserve democracy by maintaining the structure of democratic politics and by protecting process rights such as speech, association, and voting. The Court's exercise of judicial review satisfies the demands of Americans for constitutional change more frequently than the formal Article V process permits. Constitutional adjudication is also one crucial way in which U.S. society settles conflicts over fundamental values for the time being—whether over abortion restrictions, gay rights, or gun rights—without resorting to violence. And the Court plays a central role in sustaining the rule of law—the ideal, too often taken for granted in this country, that both the government and governed are restrained by law.[21]

To be sure, the Court is not the only governmental institution responsible for accomplishing these constitutional objectives. For example, institution building by Congress also produces significant constitutional change (see, for example, the modern Justice Department and the administrative state), and congressional legislation also protects significant individual rights (see, for example, the Civil Rights Act of 1964 and the Voting Rights Act of 1965).[22] This was especially so when Congress was less dysfunctional than it is in the modern era of polarized politics, but Congress still passes major

19. *See, e.g.*, Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1481 (2018) (reaffirming the Court's anticommandeering doctrine, which has been invoked by both liberal and conservative states to refuse participation in the enforcement of certain federal laws).

20. *See* Trump v. Vance, 140 S. Ct. 2412, 2431 (2020) (holding 7–2 that Article II and the Supremacy Clause do not categorically preclude, or require a heightened standard for, the issuance of a state criminal subpoena to a sitting president); *see also* Trump v. Mazars USA, 140 S. Ct. 2019, 2036 (2020) (holding 7–2 that although congressional subpoenas for the president's information may be enforceable, the court below did not take adequate account of the significant separation of powers concerns implicated by subpoenas from the House of Representatives seeking President Trump's financial records).

21. *See, e.g.*, Martin Krygier, *Marxism and the Rule of Law: Reflections After the Collapse of Communism*, 15 L. & SOC. INQUIRY 633, 642 (1990) (describing the rule of law as "a crucial and historically rare mode of restraint on power by law").

22. JACK M. BALKIN, LIVING ORIGINALISM 5–6, 33 (2011).

legislation today.[23] Legislation also manages value conflict nonviolently.

In addition, the Court does not execute each of its responsibilities well all or even most of the time. In the contemporary United States, however, the Court has proven itself to be the most effective governmental institution in performing most of the above functions. For instance, the Court is more likely to hold governmental institutions accountable for violations of the constitutional rights of individuals and groups that lack political power than are legislatures or executives.

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23. For a nonexhaustive list of significant federal legislation enacted since 2000, see Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified as amended at 50 U.S.C. § 1541 note); No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C. and other titles); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 18 U.S.C. and other titles); Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2 U.S.C., 8 U.S.C., 18 U.S.C., 28 U.S.C., 36 U.S.C., and 47 U.S.C.); Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of 5 U.S.C. and other titles); Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001–1006, 119 Stat. 2680, 2739–2744 (codified as amended at 10 U.S.C. § 801 and 42 U.S.C. § 2000dd); Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (codified as amended in scattered sections of 15 U.S.C., 30 U.S.C., 42 U.S.C., and other titles); Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10 U.S.C., 18 U.S.C., 28 U.S.C., and 42 U.S.C.); Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492 (codified as amended in scattered sections of 42 U.S.C. and other titles); Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (codified as amended in scattered sections of 12 U.S.C. and other titles); American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (codified as amended in scattered sections of 19 U.S.C., 42 U.S.C., and other titles); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 12 U.S.C., 15 U.S.C., 42 U.S.C., and other titles); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 42 U.S.C. and other titles); Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015) (codified as amended in scattered sections of 20 U.S.C., 42 U.S.C., and other titles); Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017) (codified as amended in scattered sections of 12 U.S.C., 15 U.S.C., 16 U.S.C., 30 U.S.C., 37 U.S.C., 42 U.S.C., and 43 U.S.C.); America's Water Infrastructure Act of 2018, Pub. L. No. 115-270, 132 Stat. 3765 (to be codified in scattered sections of 33 U.S.C., 42 U.S.C., and other titles); Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020) (to be codified in scattered sections of 12 U.S.C., 20 U.S.C., 42 U.S.C., and other titles); Paycheck Protection Program and Health Care Enhancement Act, Pub. L. No. 116-139, 134 Stat. 620 (2020) (to be codified at 2 U.S.C. § 933 and scattered sections of 12 U.S.C. and 15 U.S.C.); American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4 (to be codified in scattered sections of 42 U.S.C. and other titles); and Bipartisan Safer Communities Act, Pub. L. No. 117-159, 136 Stat. 1313 (2022) (to be codified in scattered sections of 42 U.S.C. and other titles); Inflation Reduction Act of 2022, Pub. L. No. 117-169 (to be codified in scattered sections of 42 U.S.C. and other titles).

Prisoners, criminal defendants, racial minorities, and political minorities are likely to fare better before even a very conservative Court than they are before most state legislatures or Congress, and out-of-staters are more likely to fare better before such a Court than they are before state legislatures.[24] The Court is also more likely to police the democratic process for blatant attempts by the political parties to unconstitutionally entrench themselves in power than are the parties in government themselves. For example, as discussed further below, the Court had little use for the Trump Campaign's bogus claims of election fraud after the 2020 election.[25] Often, critics of the Court focus on its failings without asking whether the political branches or state governments are generally likely to do better.[26] For example, forceful and eloquent critiques of the Court's historic racism and bias in favor of the wealthy do not tend to emphasize the horrific racism and socioeconomic bias of past presidents and members of Congress—who, after all, were responsible for putting every Justice on the Court.[27]

There are likely several reasons why the Court is generally best able to perform the above functions. For example, differences in professional socialization and role morality between politicians and judges likely matter, as does the difference between the law-making function of politicians (which is awash in the exercise of discretion) and

24. ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT 276–84 (2014) (forcefully critiquing the Court's historic exercise of the power of judicial review but nonetheless defending the continued existence of the institution because "those without political power have nowhere to turn except the judiciary for the protection of their constitutional rights," and, in particular, naming prisoners, criminal defendants, racial and political minorities, out-of-staters, and urban dwellers before the Court's reapportionment decisions). For a recent example of Chemerinsky's point, see *Taylor v. Riojas*, 141 S. Ct. 52 (2020) (per curiam), denying qualified immunity to prison officers who were sued by an inmate after being held for several days in two shockingly unsanitary prison cells. *Id.* at 53. The vote was 7–1, with Justice Clarence Thomas dissenting and Justice Amy Coney Barrett not participating. *Id.*

25. For discussion, see *infra* note 68 and accompanying text.

26. *See* Noah Feldman, Felix Frankfurter Professor of L., Harvard L. Sch., *Written Statement*, *before the* PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, at 2 (June 30, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Feldman-Presidential-Commission-6-25-21.pdf [https://perma.cc/YU3Q-DAQJ] ("The strongest opposing view, which sees the court in its current role as fundamentally counter-majoritarian and even anti-democratic, depends on the hope (or fantasy) that some other abstract entity—perhaps 'the people'—would somehow fulfill the Court's functions if the Court no longer did so.").

27. For one such critique of judicial review, see Nikolas Bowie, Assistant Professor of L., Harvard L. Sch., *Written Statement*, *before the* PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, at 2–12 (June 30, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony-1.pdf [https://perma.cc/4RQR-CDHA].

the law-interpreting and applying functions of judges (which is not supposed to be).[28] But the primary reason why the Court is best able to perform these functions is that the Court is generally more distant from partisan politics than the available alternatives. Not needing to be re-elected to stay in office, the Justices need not fear the electoral ramifications of casting votes that disappoint powerful politicians—or the base—of the political party that appointed them. State governments and citizens may strongly prefer state law to federal law. Presidents may seek to exceed the bounds of executive power. Majorities may seek to squelch unpopular speech and violate other rights of outvoted minorities. The government and the governed alike may not wish to be bound by law. The Justices can push back against each of these groups without losing their jobs. By contrast, the current occupants of Congress, the White House, and state governments can lose their jobs if they take politically unpopular actions to vindicate the most important of values.

To say that the Court is generally more distant from partisan politics than the available alternatives is not to say that the Justices never succumb to the temptation of partisanship. Sometimes, they do. Nor is it to say that the Justices are apolitical in the sense of not exercising interpretive discretion. They often exercise discretion, which leaves room for ideological commitments, values, beliefs, priors, and life experiences that inform their decision-making. The notion that "[c]ourts are the mere instruments of the law, and can will nothing"[29] is as untenable as the insistence of the attitudinalists that only ideology

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28. For discussion of professional socialization and role morality in the judicial and political contexts, see generally Neil S. Siegel, *After the Trump Era: A Constitutional Role Morality for Presidents and Members of Congress*, 107 GEO. L.J. 109 (2018) [hereinafter Siegel, *After the Trump Era*].

29. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 866 (1824) ("Courts are the mere instruments of the law, and can will nothing."). Soon-to-be Chief Justice John Roberts asserted during his confirmation hearings that Justices are like baseball umpires:

> Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.

Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States Before the S. Comm. On the Judiciary, 109th Cong. 55 (2005) (statement of Judge John G. Roberts, Jr.). For problems with the umpire analogy, see generally Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701 (2007), explaining judges cannot simply apply rules like umpires because they usually cannot agree on what the rules are when adjudicating the most important cases.

determines outcomes—that law is just a fig leaf.[30] There is much truth to the basic position of the historical institutionalist school of political science that "judges and others try to make the best decision from a value or policy perspective that is permitted by legal text, history, and precedent"[31] as well as other interpretive modalities, including inferences from the constitutional structure.[32]

To claim that the Court is less partisan than the alternatives is to suggest that, notwithstanding all of the Court's arguably partisan warts, there are meaningful differences in how the Justices generally execute their responsibilities and how members of Congress do. It is to argue that Chief Justice John Roberts is not political in the same way, and to the same extent, as Senator Mitch McConnell; nor is Justice Elena Kagan political in the same way, and to the same extent, as Senator Chuck Schumer. It is to observe that the Republican appointees on the Court were far less beholden to President Trump and the Trump administration than were the Republicans in Congress.[33] And it is to maintain that politicians may permissibly seek to advance the fortunes of their political party, while Justices may not permissibly act with a partisan motivation. A Justice with profoundly different ideological commitments from the evaluator need not be deemed a failure as a jurist. A Justice who behaves as a partisan is a failed judge.

In trying to perform its functions, the Court faces a potentially significant impediment: powerful politicians and the general public may not be willing to abide the Court's decisions.[34] Although it may

30. According to the attitudinalist model of judicial decision-making in political science, "justices make decisions by considering the facts of the case in light of their ideological attitudes and values." JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 110 (2002).

31. HOWARD GILLMAN, MARK A. GRABER & KEITH E. WHITTINGTON, AMERICAN CONSTITUTIONALISM, VOLUME ONE: STRUCTURES OF GOVERNMENT 17 (3d ed. 2022). The category of history can be further subdivided into originalist argumentation, historical governmental practice, American tradition, and American antitradition.

32. For discussions of structural reasoning, see generally CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969) and PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION ch. 6 (1982).

33. *See infra* notes 63, 68, 285, and accompanying text (discussing Supreme Court decisions or nondecisions that went against Trump or his administration).

34. In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), Chief Justice John Marshall rebuked Jacksonian attempts to remove Native Americans by holding that the federal government had the authority to conclude treaties with tribes and that states lacked sovereignty over land given to the tribes by such treaties. *Id.* at 579–96. In response to the decision, President Andrew Jackson may or may not have said, "John Marshall has made his decision, now let him enforce it." Jackson

not seem like it anymore given the authority of the modern Court, judicial review rests upon an insecure footing in the U.S. democratic system; nine unelected, unrepresentative, and relatively unaccountable individuals are empowered to override decisions made by elected officials—federal, state, and local. This "countermajoritarian difficulty," which concerns the legitimacy of having unelected judges override the choices of today's legislative majorities based on judicial interpretations of the Constitution, has long dominated much theorizing in constitutional law. Professor Alexander Bickel coined this phrase less than a decade after the Court risked its public legitimacy by deciding *Brown v. Board of Education*[35] against powerful forces of racial subordination. "The root difficulty," Bickel wrote, "is that judicial review is a counter-majoritarian force in our system."[36]

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definitely did say, however, that "[t]he decision of the [S]upreme [C]ourt has fell stillborn, and they find that it cannot coerce Georgia to yield to its mandate." *See* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 33–34 (2007) (quoting ANDREW JACKSON, THE CORRESPONDENCE OF ANDREW JACKSON 430 (John Bassett ed., 1929)). Jackson did not endeavor to enforce the decision, *id.*, and Georgia ignored it with impunity. Stephen Breyer, *The Cherokee Indians and the Supreme Court*, 25 J. SUP. CT. HIST. 215, 224 (2000).

35. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

36. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962). Much scholarship in law and political science questions Bickel's claim that the Court is a countermajoritarian institution, at least in any long-term sense. *See generally, e.g.*, BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009) [hereinafter FRIEDMAN, THE WILL OF THE PEOPLE] ("It is the meaning of the Constitution itself that is up for grabs, and judicial power is nothing more than a pawn in that battle."). Much other scholarship disagrees, emphasizing that between the present and the long term, the Court can issue many important decisions that lack majority support in the country:

> To see the persistence of the countermajoritarian difficulty, consider all the qualifications that Friedman builds into the most careful (and most defensible) version of his central claim: "[T]he Court's decisions on *salient* issues have tended to *come into line over time* with popular preferences." It is not all of the Court's decisions that he has in mind, but only those on salient issues. The Court decides many issues that are consequential but not especially salient. Moreover, Friedman argues that the Court's decisions on salient issues *tend* to be accountable to the popular will, not that they always align with popular preferences. Still further, he maintains that this alignment, to the extent that it occurs, happens over time—which is to say, in the long run, in the end. The problem, of course, is that we will all be dead in the end, and in the meantime we may have to live with some judicial decisions that possess substantial staying power. All of Friedman's qualifications are well conceived, but each pays tribute to the very difficulty he means to deny.

Neil S. Siegel, *A Coase Theorem for Constitutional Theory*, 2010 MICH. ST. L. REV. 583, 594–95 (footnote omitted) (reviewing FRIEDMAN, THE WILL OF THE PEOPLE, *supra*); *see generally* Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103 (identifying six problems with the majoritarian thesis and arguing that the longer average tenure

2. *Legitimacy*. Accordingly, to perform the functions set forth above, the Court requires a relatively high level of legitimacy. Legitimacy always exists in the minds of an audience. Legal legitimacy is legitimacy in the eyes of legal professionals, and public legitimacy is legitimacy in the eyes of the general public.[37] The Court requires both forms of legitimacy.[38] (Note that the legitimation of the Court is not an end in itself but a means to the accomplishment of the important constitutional ends described above.) The Court has no actual power of its own to coerce presidents, police officers, and public and private parties. For enforcement, it depends on the executive. For compliance, it depends on both the enforcement efforts of the executive and the willingness of litigants and similarly situated people to abide decisions they may vigorously oppose. Enforcement and compliance have not always existed in this country (consider, for example, massive resistance to *Brown*[39]), and they may not always exist.[40] They endure only insofar as presidents, Congresses, state officials, and private litigants continue to accept the legitimacy of the Court—only insofar as they continue to enforce or comply with decisions with which they may strongly disagree.[41]

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of Justices today renders even more random any connection between the appointment of Justices and the outcomes of elections).

37. Richard Fallon observes:

> When legitimacy functions as a legal concept, legitimacy and illegitimacy are gauged by legal norms. As measured by sociological criteria, the Constitution or a claim of legal authority is legitimate insofar as it is accepted (as a matter of fact) as deserving of respect or obedience—or, in a weaker usage . . . insofar as it is otherwise acquiesced in.

Richard H. Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1790–91 (2005).

38. Professor Barry Friedman emphasizes the importance of both forms of legitimacy:

> [T]he work of constitutional judges must have both "legal" and "social" legitimacy. Social legitimacy, as distinguished from legal legitimacy, looks beyond jurisprudential antecedents of constitutional decisions and asks whether those decisions are widely understood to be the correct ones given the social and economic milieu in which they are rendered.

Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383, 1387 (2001) (footnote omitted).

39. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 4 (1958) (stating that the case "raises questions of the highest importance to the maintenance of our federal system of government" because "it involves actions by the Governor and Legislature of Arkansas upon the premise that they are not bound by our holding in *Brown*").

40. With respect to nonenforcement of Supreme Court decisions by the executive, see FRIEDMAN, THE WILL OF THE PEOPLE, *supra* note 36, at 91–95 (discussing President Andrew Jackson's lack of support for the Supreme Court's decision in *Worcester v. Georgia*, which ruled in favor of the Cherokee) and *supra* note 34 and accompanying text (same).

41. *See* JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY 118 (1995) ("[I]nstitutions survive on acceptance."); Tom R. Tyler, *Procedural Justice, Legitimacy, and the*

Politicians have long had a number of reasons for supporting the institution of judicial review.[42] One main reason in the contemporary United States is that the American people as a whole—the voters that these politicians face—generally support the Court as an institution and approve of the power that it possesses.[43] Americans support the Court in significant part because they believe that it is not as partisan as the political branches are. They believe that, to a greater extent than politicians, the Justices make decisions according to law as best they understand the law and in light of their special knowledge of the law, regardless of the consequences for the party that appointed them.[44] If the Justices fail to satisfy these broadly shared expectations,[45] they will reduce, and eventually lose, the significant amount of diffuse support they retain,[46] even if there is less support than there used to be.[47]

Effective Rule of Law, 30 CRIME & JUST. 283, 307 (2003) ("Legitimacy is the property that a rule or an authority has when others feel obligated to defer voluntarily.").

42. A large literature in political science examines why courts possess authority. Answers tend to focus on governing elites—such as presidents and leaders of Congress—and the needs of their political regime. Some of the conclusions are that politicians support judicial authority because courts limit the power of local majorities; spread the values of the governing regime; decide controversial questions that governing elites would prefer not to decide themselves because the questions fracture their coalitions; and protect the interests of these elites when they are out of power. For a prominent example of such work, see generally WHITTINGTON, *supra* note 34. For a brief summary of the literature, see GILLMAN ET AL., *supra* note 31, at 22.

43. *See* Jamal Greene, *Giving the Constitution to the Courts*, 117 YALE L.J. 886, 911 (2008) (reviewing WHITTINGTON, *supra* note 34) (suggesting that "members of the public, more than institutional political actors, have laid the foundations for judicial supremacy"). Among Democrats, however, support for the Court has recently plummeted, resulting in the largest gulf to date between the parties with respect to their views of the Court. *See* Mohamed Younis, *Democrats' Approval of Supreme Court at Record-Low 13%*, GALLUP (Aug. 2, 2022), https://news.gallup.com/poll/395387/democrats-approval-supreme-court-record-low.aspx [https://perma.cc/UPV9-LGR8].

44. Evidence of these beliefs can be found in the fact that Justices and Supreme Court nominees appeal to them in overstated ways, sometimes to great effect. *See, e.g.*, *supra* note 29 and accompanying text (quoting Chief Justice Marshall in *Osborn v. Bank of the United States* and Chief Justice Roberts); *cf. infra* notes 52–53 and accompanying text (quoting Professors Robert Post and Reva Siegel's description of what Americans believe about the legal authority of the Constitution).

45. *Cf.* Martin Shapiro, *The Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles*, 31 GEO. WASH. L. REV. 587, 604 (1963) ("Political institutions survive and prosper to the extent that they satisfy widely held expectations about them.").

46. Diffuse support is "a reservoir of favorable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed or the effect of which they see as damaging to their wants." DAVID EASTON, A SYSTEMS ANALYSIS OF POLITICAL LIFE 273 (1965).

47. *See, e.g.*, Maya Sen, Professor of Pub. Pol'y, John F. Kennedy Sch. of Gov't, Harvard Univ., *Written Testimony*, *before the* PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, at 2 (June 30, 2021), https://www.whitehouse.gov/wp-content/uploads/

In seeking to satisfy public expectations, the Justices cannot simply don robes, sit in a building adorned with columns, and rely on fooling Americans. In making periodic judgments about whether the Court remains worthy of respect, members of the public rely in part on the judgments of legal experts, who read, convey to the media, and opine publicly on the contents of the Court's decisions. Legal experts are not easily foolable, and, unless they are acting as partisans themselves, they are unlikely to defend the Court's decisions if they view them as partisan.[48]

To be clear, this account is compatible with the truth that the Court's public legitimacy is also a function of the public's basic agreement—or lack of vehement disagreement—with the results of many of its decisions.[49] Indeed, to maintain its legal and public legitimacy, the Court must balance its regular commitment to legal analysis, free of partisan taint, against its occasional practice of statesmanship—that is, its occasional modifications of its legal judgments for the sake of diffusing conflict and maintaining the public legitimacy of the Court.[50] Legal legitimacy requires devotion to legal norms, and public legitimacy requires both devotion to legal norms and attention to popular beliefs about the Constitution. Americans tend to want judicial umpires who need not always call the game their way, but who do not always call the game the other way.

2021/06/Sen-Written-Testimony.pdf [https://perma.cc/SF37-W7AT] (noting "a steady increase in disapproval of the Court and skepticism about its potential rulings").

48. For suggestive (but limited) evidence that members of the public are affected by the judgments of law professors, see Michael J. Nelson & James L. Gibson, *Has Trump Trumped the Courts?*, 93 N.Y.U. L. REV. 32, 32, 38–39 (2018), reporting that, in an experiment embedded in a nationally representative survey of Americans, the greatest decline in support for the Court resulted from exposure to criticism by law professors that the Court's decisions are politicized, not from exposure to the same criticism by President Trump. For a critique of this study and others like it, see David Fontana, *How Do People Think About the Supreme Court When They Care?*, 93 N.Y.U. L. REV. 50, 51–52 (2018), observing that "[s]cholars have not sufficiently measured . . . how people think about the Supreme Court when they *care* about the Court," even though "it is harder to believe in the Court" when it "has done something that one knows of and dislikes," and "[i]t is also in that situation where predictions are most important to make because the Court is most threatened."

49. *See* Friedman, *supra* note 38 ("The proper lesson of *Lochner* instructs us that, even where it is possible to identify a jurisprudential basis for judicial decisions, if those familiar with the Court's decisions do not believe those decisions to be socially correct, the work of judges will be seen as illegitimate.").

50. *See generally, e.g.*, Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959 (2008) (defining judicial statesmanship and arguing that it defines a virtue in the role of a judge).

Professors Robert Post and Reva Siegel have coined the phrase "democratic constitutionalism" to "express the paradox that constitutional authority depends on *both* its democratic responsiveness *and* its legitimacy as law."[51] "Americans," they observe, "want their Constitution to have the authority of law, and they understand law to be distinct from politics."[52] In addition, they write, Americans "understand that the rule of law is rooted in professional practices that are distinct from popular politics and that will often require divergences between the Court's judgments about the Constitution and their own."[53] Post and Siegel insist, however, that if Americans come to view the Supreme Court's interpretation of the Constitution as "wholly unresponsive" to their own, then they "will in time come to regard it as illegitimate and oppressive, and they will act to repudiate it as they did during the New Deal."[54]

For the Court to maintain its broad legal and public legitimacy, Americans must perceive it as enjoying a significant measure of independence from the political branches. Because the president nominates individuals to serve as Justices, and because senators often engage in partisan fights over their confirmations,[55] Americans surely understand that the political branches influence the Court's decision-making as vacancies arise. This knowledge has proven compatible with the perception of the public and the legal community that the Justices are generally less partisan than the politicians who put them on the Court. Also compatible with this perception is the Court's occasional practice of statesmanship, which, like the nomination and confirmation process, can increase the Court's public legitimacy by reducing the distance between the Court's view of the Constitution and the public's. But unless the public comes to believe that the Court has gone off the rails or some other crisis situation exists, it is another matter entirely for Congress to regulate the Court in such a way that the public regards

51. *See* Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, *in* THE CONSTITUTION IN 2020, at 25, 27 (Jack M. Balkin & Reva B. Siegel eds., 2009).

52. *Id.* at 27.

53. *Id.* at 27–28.

54. *Id.* at 28. For fuller development of the theory, see generally Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007). For a similar view, see BALKIN, *supra* note 22, at 71.

55. *See* U.S. CONST. art. II, § 2, cl. 2.

it as having been utterly politicized.[56] If the public concludes that the Justices are no longer exercising independent judgment, a successor president or a defiant state governor might gamble and refuse to enforce or comply with a closely divided, controversial Supreme Court decision. Such a refusal could succeed in the court of public opinion.[57]

The final link in this chain of reasoning from constitutional functions to legal and public legitimacy to the perception of judicial independence is that Court-packing severely undermines the perception of judicial independence. As noted, Court-packing is not motivated by genuine good-government reasons, whether sounding in increases in caseload or the creation of new circuits. Rather, the primary purpose of packing the Court is to alter its substantive decision-making all at once by appointing Justices who are likely to cast votes that are aligned with the wishes of the president and Congress. (Part II explains the significance of this formulation, which distinguishes Court-packing from ideological uses of the regular appointments process.) To be sure, it does not strictly follow as a logical matter that politicizing the Court through packing will undermine public perceptions of judicial independence. Public perceptions are empirical facts of the matter, not the result of analytical reasoning. But the foregoing prediction appears sound. For example, as discussed in Part II.A, FDR's Court-packing plan encountered fierce opposition within his own political party precisely because it undermined the perception of judicial independence.

Court-packing not only damages the perceived independence of the Court—it also threatens its actual independence. Once the Court is seriously threatened with packing (or has been packed), the Justices will have good cause to decide cases in a manner that is subservient to the wishes of the political party in power, at least during periods of unified government, for fear of the cascading consequences of Court-

56. For some experimental evidence that public beliefs about the Court are negatively affected by the perception that it has been politicized, see Nelson & Gibson, *supra* note 48, at 39, reporting that the greatest decline in support for the Court resulted from exposure to criticism by law professors that the Court's decisions are politicized, not that they are legally incorrect.

57. Bickel wrote that southern leaders who resisted *Brown* "understood and acted upon an essential truth, which we do not often have occasion to observe," which is that:

> The Supreme Court's law . . . could not in our system prevail—not merely in the very long run, but within the decade—if it ran counter to deeply felt popular needs or convictions, or even if it was opposed by a determined and substantial minority and received with indifference by the rest of the country.

BICKEL, *supra* note 36, at 258.

packing (or further packing). These consequences are likely to include an increased risk of nonenforcement of the Court's decisions, of noncompliance with its decisions, and of diminution of each Justice's voting power. Court-packing is a strategy commonly used in other countries to undermine liberal democracy—including Venezuela, Bolivia, Hungary, Poland, and Turkey—precisely because it erodes barriers to the concentration of power in the hands of the ruling party.[58] Anyone who worries that there are authoritarian tendencies present in contemporary U.S. politics should give serious consideration to this risk of Court-packing.[59]

B. Court-Packing and Judicial Willingness to Perform Key Functions

In addition to compromising the ability of the Court to execute responsibilities that it is best situated to execute, Court-packing risks undermining the *willingness* of the Justices to do so. One should be as concerned about what is going on in the minds of the Justices as one is about what is going on in the minds of the public. To reiterate, there are meaningful differences in how the Justices generally do their jobs and how members of Congress do. It is in everyone's best interests to try to preserve these differences. For example, we would not be better off as a nation if a Court majority—appointed by presidents of the same party—were willing to push back against presidents of that party only as often as a Congress of the same party were willing to push back. Severely politicized courts in other countries are not the envy of the world.

Especially during the current era of partisan hyper-polarization and mutual distrust,[60] the most difficult challenge for the Justices—each of whom has survived a partisan and possibly bitter confirmation process—is to avoid taking partisan sides. The challenge is to vote and otherwise act like their robes are black, not red or blue. This means, for example, that the fact that the party that appointed certain Justices

58. A recent article reports that "court-packing has flourished all over the world" and that "Bolivian, Hungarian, Polish, and Turkish as well as Venezuelan political leaders have recently employed various strategies to stack their courts with loyal judges." David Kosa & Katarína Šipulová, *How To Fight Court-Packing?*, 6 CONST. STUD. 133, 133 (2020).

59. For two books that emphasize the relationship between Court-packing and democratic backsliding, see generally TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY (2019) and STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018).

60. For definitions of these and related terms, see *infra* note 293.

wants them to vote a certain way in a case should have no bearing on how they approach the case. It also means that the Justices should take no account of the effects of their decisions on the electoral fortunes of the party that appointed them. To repeat an earlier point, elected officials are not expected to be similarly constrained. (The importance of trying to meet this challenge, by the way, counts against reform proposals that would designate a certain number of seats on the Court for each political party.[61]) Critics of the Court may be quick to dismiss this aspiration as naïve, but their criticism of the Court or individual Justices for being partisan (in contrast to being profoundly wrong) implies that it is both possible and desirable for the Justices not to be partisan—or to be less so.[62] Given the nature and magnitude of the partisan impact on the Court that Court-packing would likely have, the Justices on a packed Court might be less willing to try to meet this challenge than they would be on a Court that had not been packed.

To put the point more concretely, at least some Republican-appointed Justices might become politically radicalized if four Democratic appointees were added to the Court overnight. Although these Democratic appointees (depending upon who they were) might try to blunt this effect and shore up the Court's legitimacy by voting and writing less ambitiously than they otherwise would, it is difficult to imagine that they would agree to restrict voting rights and abortion rights, expand gun rights, etc. Moreover, these Democratic appointees might themselves become radicalized once unified Republican government resulted in further mass-packing.

This concern about radicalization of the Justices remains real even if one believes that certain Justices will not meet the challenge of nonpartisanship regardless of whether the Court is packed. It is unduly cynical to believe that most of the Justices will not meet this challenge most of the time—or that the level of partisanship displayed by most of the Justices cannot become appreciably worse. There is important evidence to the contrary, including the conclusion of four Republican appointees that the plaintiffs lacked standing to bring a constitutional

61. For two such proposals, see Daniel Epps & Ganesh Sitaraman, *How To Save the Supreme Court*, 129 YALE L.J. 148, 181–205 (2019).

62. For an example of such criticism, see DEMAND JUST., *supra* note 7, insisting that "[t]he Supreme Court has been captured by partisan, Republican interests," that "[w]e need structural court reform to depoliticize the Court once and for all," and that "[a]dding four seats is the solution."

challenge to the Affordable Care Act ("ACA"),[63] notwithstanding the relentless opposition of the Republican Party to the ACA since it was enacted in 2010.[64] Another example is the Court's monumental holding the term prior—in a majority opinion written or joined by two Republican appointees—that Title VII prohibits employment discrimination on the basis of sexual orientation or gender identity.[65] Although the reaction to this decision among Republican senators was mixed,[66] Title VII was not previously amended to include express prohibitions on sexual-orientation and gender-identity discrimination due to Republican opposition, not Democratic opposition.[67] Moreover, by most accounts, the federal courts—and the Justices—performed well during the controversies surrounding the 2020 presidential elections, regardless of the political affiliations of the judges.[68] One can,

63. California v. Texas, 141 S. Ct. 2104, 2112 (2021).

64. *See, e.g.*, Abbe R. Gluck & Thomas Scott-Railton, *Affordable Care Act Entrenchment*, 108 GEO. L.J. 495, 518 (2020) ("The Republican Party . . . quickly made ACA opposition a 'loyalty litmus test.'" (quoting Abbe R. Gluck & Nicole Huberfeld, *What Is Federalism in Healthcare for?*, 70 STAN. L. REV. 1689, 1759 (2018))).

65. Bostock v. Clayton County, 140 S. Ct. 1731 (2020).

66. *See, e.g.*, Ted Barrett, Manu Raju & Lauren Fox, *Key GOP Senators Have No Qualms with Supreme Court's Decision To Ban LGBTQ Discrimination in the Workplace*, CNN (June 15, 2020, 7:29 PM), https://www.cnn.com/2020/06/15/politics/gop-senators-reaction-supreme-court-ruling/index.html [https://perma.cc/J8X9-KXAY] (describing the different reactions of different Republican senators, many of whom were positive about the decision, some of whom were negative, and some of whom expressed no opinion).

67. *See, e.g.*, Katelyn Burns, *Where LGBTQ Equality Legislation Goes To Die*, NEW REPUBLIC (June 30, 2021), https://newrepublic.com/article/162861/lgbtq-equality-act-joe-manchin-compromise-betrayal [https://perma.cc/KLP3-WNYH] (documenting "near-complete Republican opposition" in Congress to equality protections for members of the LGBTQ community since the 1990s).

68. *See, e.g.*, William Cummings, Joey Garrison & Jim Sergent, *By the Numbers: President Donald Trump's Failed Efforts To Overturn the Election*, USA TODAY (Jan. 6, 2021, 10:00 AM), https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001 [https://perma.cc/UF7H-ENB5] (discussing the overwhelming failures of suits challenging the 2020 presidential election and noting that the decisions came from both "Democratic-appointed and Republican-appointed judges—including federal judges appointed by Trump"); Colleen Long & Ed White, *Trump Thought Courts Were Key To Winning. Judges Disagreed.*, AP NEWS (Dec. 8, 2020), https://apnews.com/article/94onald-trump-courts-election-results-e1297d874f45d2b14bc99c403abd0457 [https://perma.cc/6TQA-27M7] (noting that judges, both Republican and Democratic appointees, "have been among the harshest critics of the legal arguments put forth by Trump's legal team, often dismissing them with scathing language of repudiation"); Nina Totenberg & Barbara Sprunt, *Supreme Court Shuts Door on Texas Suit Seeking to Overturn Election*, NPR (Dec. 11, 2020, 6:38 PM), https://www.npr.org/2020/12/11/945617913/supreme-court-shuts-door-on-trump-election-prospects [https://perma.cc/XEX2-A3BF] (discussing the Supreme Court's refusal to hear cases challenging the results of the 2020 presidential election).

of course, dismiss this piece of evidence by observing that the legal and factual arguments presented by the legal team supporting former President Trump were baseless. In a more politicized judicial system, however, the strength of the arguments might not matter, just as they sometimes seem not to matter in Congress. A Court packed with Republican appointees might well have accepted Trump's claims.

Similarly, in *Trump v. Thompson*,[69] eight Justices concluded that the National Archives was required to turn over former President Trump's presidential papers to the United States House Select Committee to Investigate the January 6th Attack on the United States Capitol.[70] Professor Laurence Tribe, an advocate of Court-packing, dismisses this piece of evidence as "reveal[ing] only that the [J]ustices are, in the end, masters of their craft and know that their power requires them to act as lawyers."[71] One difficulty with such dismissals is that they can always be invoked. Another difficulty is that they fail to register the restraining effect on the Justices of their need to act like lawyers. Presidents and members of Congress are not similarly constrained.

C. The Relationship Between Views on Court-Packing and Views on Judicial Review

Defenders and some opponents of judicial review alike can potentially be persuaded by the arguments against Court-packing offered here. These arguments build significantly from the premise that the Court generally, and judicial review specifically, is mostly a valuable institution in U.S. constitutional democracy. Although this Part has offered some arguments in support of this premise, it seeks mainly to convince those who agree that the Court can, and often does, serve vital functions. This is the common-ground foundation upon which this Article rests. Common ground is not, however, unanimous ground. It must be acknowledged that this Article will not speak to all opponents of judicial review, some of whom will dispute the claim that the Court has proven itself to be the most effective governmental institution in achieving most of the goals described at the beginning of

69. Trump v. Thompson, 142 S. Ct. 680 (2022).

70. *Id.* at 680.

71. Laurence H. Tribe, *Politicians in Robes*, N.Y. REV. BOOKS (Mar. 10, 2022) https://www.nybooks.com/articles/2022/03/10/politicians-in-robes-justice-breyer-tribe [https://perma.cc/D5AT-4695].

this Part.[72] It must also be acknowledged that the argument offered here has not done nearly enough to refute the case against judicial review.

Note, however, that the functions of the Court are not limited to judicial review. The Court plays a critical role in interpreting federal statutes and in reviewing the consistency of administrative action with federal statutes.[73] Note as well that some opponents of judicial review of acts of Congress may defend judicial review of executive action, whether national or state. They may also defend judicial review of state legislation. Accordingly, this Article's common-ground foundation is broader than it may seem if one focuses on opponents of judicial review of federal legislation.

As for the Court's harshest critics, it seems fair to observe that they have less logical reason to worry that Court-packing would damage the Court. Notably, some (although by no means all) of the strongest academic proponents of Court-packing are also some of the most committed believers in legal indeterminacy and some of the greatest skeptics of judicial review. For example, Professor Michael Klarman characterizes the meaning of the Constitution as typically indeterminate in cases that come before the Supreme Court,[74] and he voiced skepticism about judicial review during his testimony before the

72. For a critique of judicial review as antidemocratic historically and theoretically, see generally Bowie, *supra* note 27. For another prominent critique of judicial review, see generally Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006), arguing that judicial review is democratically illegitimate and does not better protect rights than legislatures, at least in societies with well-functioning democratic institutions and a populace that takes rights seriously.

73. *See, e.g.*, Bostock v. Clayton County, 140 S. Ct. 1731, 1741 (2020) (holding that Title VII's prohibition on sex discrimination includes prohibitions on sexual-orientation and gender-identity discrimination); Biden v. Missouri, 142 S. Ct. 647, 650 (2022) (granting the applications to stay the two injunctions that barred the regulation issued by the Secretary of Health and Human Services, which requires facilities participating in Medicare and Medicaid to ensure that their employees are vaccinated against COVID–19, unless they are eligible for a medical or religious exemption); Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin., 142 S. Ct. 661, 662–63 (2022) (per curiam) (granting the applications to stay the challenged rule of the Occupational Safety & Health Administration mandating that employers with at least 100 employees require covered workers to receive a COVID–19 vaccine, unless workers wear a mask each workday and obtain a medical test each week); West Virginia v. EPA, 142 S. Ct. 2584, 2615–16 (2022) (holding that in Section 111(d) of the Clean Air Act, Congress did not grant the Environmental Protection Agency the authority to devise emissions caps based on the generation-shifting approach that the Agency took in the Obama administration's Clean Power Plan).

74. Klarman, *Foreword*, *supra* note 7, at 224–31.

Biden Commission.[75] Similarly, Professor Mark Tushnet, another academic proponent of Court-packing,[76] has long been hostile both to judicial review[77] and to the idea that "law" meaningfully constrains interpretive discretion.[78] At least some skeptics of judicial review who advocate Court-packing appear to understand the risk that packing the Court would damage its legitimacy and functioning, and for some of them, this risk seems to count as a benefit of packing it.[79] Their views about the effects of Court-packing conflict with, and are likely more accurate than, the views of advocates of Court-packing who argue that packing the Court would restore its legitimacy by increasing its ideological balance or by depoliticizing it.[80]

II. COURT-PACKING HAS LIKELY BEEN PROHIBITED BY A CONSTITUTIONAL CONVENTION

This Part argues that Court-packing is likely prohibited by an important constitutional norm or convention. This norm matters, even if violating it does not contravene the Constitution, and even if other norms are arguably being ignored by politicians, precisely because of

75. Professor Klarman said that judicial review "basically takes nine unelected, elderly people and says, you go and make abortion policy, you make affirmative action policy, you decide on school prayer, you decide on campaign finance reform. That's not a very sensible position and it doesn't have much to do with law." *Presidential Comm'n on the Sup. Ct. of the U.S.: Third Public Meeting* 380–82 (July 20, 2021) (statement of Michael Klarman, Charles Warren Professor of L. Hist., Harvard L. Sch.), https://www.whitehouse.gov/wp-content/uploads/2021/09/Transcript-PCSCOTUS-07-20-21.pdf [https://perma.cc/8HDJ-4ZFN].

76. *See* TUSHNET, TAKING BACK THE CONSTITUTION, *supra* note 7, at 214–22 (appearing to suggest that Court-packing is constitutional, would not violate a constitutional convention, and would likely not further erode the Court's legitimacy, which progressives should not try to preserve anyway).

77. For his most famous book on this subject, see generally MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999), arguing for a "populist" constitutional law according to which the People, rather than the judiciary, have the ultimate say over the Constitution's meaning.

78. *See, e.g.*, Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 819 & n.119 (1983) (writing that "in any interesting case any reasonably skilled lawyer can reach whatever result he or she wants" and "the claim holds even if an 'interesting' case is defined as one that some lawyer finds worthwhile to pursue").

79. *See, e.g.*, TUSHNET, TAKING BACK THE CONSTITUTION, *supra* note 7, at 221–22 (advising progressives to "think about what they lose from preserving the Court's legitimacy," because "[t]he conservative Court has already ruled in favor of such oppressed minorities as Big Pharma, and against minorities such as Muslims and African Americans," and "[t]he idea that on balance a conservative Court will promote progressive goals seems wildly mistaken").

80. *See, e.g.*, *supra* note 62 and accompanying text.

the structural dangers described in Part I. After offering evidence for a convention against Court-packing, this Part explains why such a norm is consistent with even ideologically aggressive uses of the appointments process. It concludes by expressing some uncertainty about the current status of the convention against Court-packing given the increasing politicization of the Supreme Court confirmation process.

A. The Constitutional Convention Against Court-Packing

The constitutional text and historical practice recognize the link between judicial efficacy and judicial legitimacy and between judicial legitimacy and judicial independence. Article III requires the existence of "one supreme Court"; it does not leave the matter to Congress's discretion, as it does for other federal courts.[81] The text also provides salary protection for federal judges and job security in the form of guaranteed service during "good Behaviour."[82] Alexander Hamilton wrote in *Federalist 78* that "nothing can contribute so much to [the federal judiciary's] firmness and independence as permanency in office,"[83] and Article III's "good Behaviour" language has also been glossed by historical practice to mean life tenure absent impeachment and conviction, which cannot be used just because of disagreement with a judge's decisions.[84] No Justice has ever been impeached and convicted, and no federal judge has ever been impeached and convicted based upon disagreements with their decisions.[85] In addition, although partisan considerations did inform occasional changes in the size of the Court up until 1869, good-government reasons did as well,[86] and Congress has not since changed the size of the Court, notwithstanding vehement disagreements with many of its decisions.

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81. U.S. CONST. art. III, § 1.

82. *Id.*

83. THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

84. U.S. CONST. art. III, § 1. For discussion of the role of historical practice in informing beliefs about the proper bases for removing federal judges, see Bradley & Siegel, *Judicial Separation of Powers*, *supra* note 5, at 319–20.

85. *See List of Individuals Impeached by the House of Representatives*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, https://history.house.gov/Institution/Impeachment/Impeachment-List/ [https://perma.cc/U26U-8GU3] (cataloguing impeachments and charges by the House of Representatives).

86. *See supra* note 5 and accompanying text (discussing the early historical practice); *infra* notes 139–146 and accompanying text (same); Bradley & Siegel, *Judicial Separation of Powers*, *supra* note 5, at 271–73 (same).

One hundred fifty years of customary political branch practice, including (as discussed below) an explicit rejection by Congress (and the public) of FDR's Court-packing effort in 1937, should not be casually dismissed.

Having studied the historical practice regarding issues of judicial legitimacy, independence, and power, a number of constitutional law and federal courts scholars have suggested that there exists a "constitutional convention" (also called a "constitutional norm") against Court-packing.[87] Constitutional conventions are "maxims, beliefs, and principles that guide officials in how they exercise political discretion."[88] Constitutional conventions are not required by the letter of the U.S. Constitution, but they impose obligations of compliance on government officials, and they are appropriately denominated "constitutional" because they help vindicate "the spirit"—or the purposes—of the Constitution.[89] Violating a constitutional convention without a sufficient justification is not *un*constitutional, but it "is *anti*constitutional."[90] Conventions, among other things, help preserve democracy, enable legislatures to function, constrain the growth of

87. *See, e.g.*, Bradley & Siegel, *Judicial Separation of Powers*, *supra* note 5, at 274–83; Michael C. Dorf, *How the Written Constitution Crowds Out the Extraconstitutional Rule of Recognition*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 69, 78–79 (Matthew D. Adler & Kenneth Einar Himma eds., 2009); Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 505 (2018); Vicki C. Jackson, Laurence H. Tribe Professor of Const. L., Harvard L. Sch., *Submission*, *before the* PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, at 20 (July 20, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/07/Jackson-Testimony.pdf [https://perma.cc/A34U-SQ28]; Ronald J. Krotoszynski, Jr., *The Unitary Executive and the Plural Judiciary: On the Potential Virtues of Decentralized Judicial Power*, 89 NOTRE DAME L. REV. 1021, 1063–64 (2014); David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 15 n.50, 34, 69 (2014); *see infra* note 113 and accompanying text (quoting most of the foregoing scholars). Political scientists Steven Levitsky and Daniel Ziblatt have similarly argued that a norm of institutional forbearance prohibits Court-packing. LEVITSKY & ZIBLATT, *supra* note 59, at 130–33; *cf.* Richard Primus, *Rulebooks, Playgrounds, and Endgames: A Constitutional Analysis of the Calabresi-Hirji Judgeship Proposal*, HARV. L. REV. BLOG (Nov. 24, 2017), https://blog.harvardlawreview.org/rulebooks-playgrounds-and-endgames-a-constitutional-analysis-of-the-calabresi-hirji-judgeship-proposal [https://perma.cc/GAJ9-956M] (concluding that a proposal to pack the lower federal courts with Republican appointees "threatens the permanent unraveling of a settlement that has made legitimate judicial review possible for a century and a half" and "departs from long-settled norms and understandings about how American government is conducted").

88. Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. ILL. L. REV. 1847, 1860.

89. *Id.* at 1852.

90. Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 IND. L.J. 177, 182 (2018).

executive power, prevent the politicization of federal criminal law enforcement, and protect judicial legitimacy and independence.[91]

In calling attention to a potential convention against Court-packing, scholars have pointed to a variety of evidence, including the reasons that the Senate Judiciary Committee offered in 1937 in opposing FDR's Court-packing plan. Seven of the ten members of this committee were prominent Democrats.[92] Like a number of the witnesses who appeared before it,[93] the Committee tacked back and forth between the language of constitutional conventions and the language of constitutional law, appearing to argue that FDR's plan was both an anticonstitutional and an unconstitutional attack on judicial independence. The report declared that the plan was "contrary to the spirit of the Constitution" and that "[u]nder the form of the Constitution it seeks to do that which is unconstitutional."[94] The Committee expanded upon the "constitutional impropriety" of the bill by describing how the U.S. constitutional system functions, and is supposed to function, in practice:

> For the protection of the people, for the preservation of the rights of the individual, for the maintenance of the liberties of minorities, for maintaining the checks and balances of our dual system, the three branches of the Government were so constituted that the independent expression of honest difference of opinion could never be restrained in the people's servants and no one branch could overawe or subjugate the others. That is the American system.[95]

The Committee concluded that "[c]onstitutionally, the bill can have no sanction."[96] It "[was] in violation of the organic law."[97]

Other progressive Democrats shared FDR's objective of enlarging the Court but opined that amending the Constitution was the constitutionally appropriate means of achieving it.[98] This process

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91. For discussion of these conventions, see generally *id.*

92. *See* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 146 (1996).

93. *See, e.g.*, *infra* note 99 and accompanying text (quoting Erwin Griswold).

94. S. REP. NO. 75-711, at 9, 23 (1937).

95. *Id.* at 8.

96. *Id.* at 9.

97. *Id.*

98. MARIAN C. MCKENNA, FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937, at 303–04 (2002) (quoting letters to Congress making this point); *see also Reorganization of the Fed. Judiciary: Hearings Before the Comm. on*

concern seems difficult to dismiss as mere politics. Also hard to disregard as ordinary politics is Erwin Griswold's testimony: "Despite the assertion that the bill raises no constitutional problem, it is obvious that it presents the deepest sort of constitutional issue, an issue of a system of government. Our system would in fact be changed if this bill goes through."[99] This point was perhaps put best by an elderly woman, who complained that "[i]f nine judges were enough for George Washington, they should be enough for President Roosevelt."[100] To correct her account of history is to miss the deeper point she was conveying.[101] Indeed, in some ways, the historical inaccuracy of her remark makes it even stronger.

Professor Richard Pildes has pointed out two aspects of the 1937 episode that are not widely appreciated today. First, "the Court's challenge to the political branches was far more breathtaking than many recall."[102] It was substantially more sweeping than anything the

the Judiciary, 75th Cong. 719–20 (1937) [hereinafter *1937 Hearings*] (testimony of Young B. Smith, Dean, Columbia Law School) (arguing that the only proper way to address the Court's resistance to the New Deal was to "submit[] the question to the people" through a proposed constitutional amendment); S. REP. NO. 75-711, at 7, 10 (1937) (emphasizing that amendment is "the course defined by the framers of the Constitution" and "the rule laid down by the Constitution itself").

99. *1937 Hearings*, *supra* note 98, at 767 (testimony of Erwin Griswold, Professor, Harvard Law School).

100. *See* LEUCHTENBURG, *supra* note 92, at 139.

101. FDR himself understood that Court-packing violated a "taboo." *See id.* at 118–19 ("Both the Attorney General and the President had been attracted to 'Court-packing' for a long time, but they recognized that the proposition violated a taboo and that some principle would have to be found to legitimate it."); JOSEPH ALSOP & TURNER CATLEDGE, THE 168 DAYS 29 (1938) ("[FDR and his Attorney General] realized that [Court-packing] offended against what they privately called a 'taboo,' but they believed that the taboo had been greatly weakened by the Court's own behavior.").

102. Pildes, *supra* note 36, at 129. Professor Pildes details the carnage:

> We are all aware of the major highlights—the Court's invalidation of the National Industrial Recovery Act (NIRA) and the Agricultural Adjustment Act (AAA). But consider the range of national and state legislation and presidential action the Court held unconstitutional in one seventeen-month period starting in January 1935: the NIRA, both its Codes of Fair Competition and the President's power to control the flow of contraband oil across state lines; the Railroad Retirement Act; the Frazier-Lemke Farm Mortgage Moratorium Act; the effort of the President to get the administrative agencies to reflect his political vision (*Humphrey's Executor*); the Home Owners' Loan Act; a federal tax on liquor dealers; the AAA; the new SEC's attempts to subpoena records to enforce the securities laws; the Bituminous Coal Conservation Act; the Municipal Bankruptcy Act, which Congress passed to enable local governments to use the bankruptcy process; and, perhaps most dramatically, in *Morehead v Tipaldo*, minimum-wage laws on the books in a third of the states, in some cases, for decades.

current Supreme Court has done to date. Second, "here was the most popular president in history, with a Congress his party controlled overwhelmingly, confronted by the most aggressive Court in American history," yet "FDR's legislative assault on the Court destroyed his political coalition, in Congress and nationally, and ended his ability to enact major domestic policy legislation, despite his huge electoral triumph in 1936."[103] These causes and effects of FDR's Court-packing plan speak to "how deep the cultural and political support was for the Court's institutional authority, even as the Court issued one unpopular decision after another."[104]

Since 1937, there has often been intense displeasure with the Supreme Court for various decisions or lines of decisions. Even so, in the decades following the failure of FDR's plan, no serious talk of Court-packing—or bills that would expand the size of the Court—were proposed by members of Congress or by presidents.[105] On the contrary, the very term "Court-packing" became an epithet that both parties used to express their condemnation of FDR's plan and the great value they placed on judicial independence.[106] For example, when various jurisdiction-stripping measures were proposed in Congress in the late 1950s or debated within the executive branch in the early 1980s, the negative precedent of 1937 was cited in response.[107] This history seems to suggest that Court-packing has not been a matter of ordinary substantive disagreements in U.S. politics. Court-packing also appears to have been at least anticonstitutional, a violation of a constitutional convention. Further evidence of the existence of this convention can

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Id. at 129–30 (footnotes omitted) (citing Humphrey's Executor v. United States, 295 U.S. 602 (1935) and Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936)); *id.* at 130 (noting that "[i]n the summer of 1935, more than 100 district judges held acts of Congress unconstitutional, issuing more than 1,600 injunctions against New Deal legislation").

103. *Id.* at 132.

104. *Id.*

105. Starting in 1946 and lasting a decade, with FDR's Court-packing plan plainly in mind, certain leaders of the American bar campaigned to protect the Court through a constitutional amendment. Senator John Marshall Butler of Maryland introduced an amendment that would have frozen the Court's size at nine, ensured its appellate jurisdiction in all constitutional cases, and imposed a retirement age of seventy-five on the Justices. For a discussion of this episode, including of why it is challenging to draw inferences from it regarding the status of a constitutional norm against Court-packing, see Bradley & Siegel, *Judicial Separation of Powers*, *supra* note 5, at 284–87.

106. For discussion, see Grove, *supra* note 87, at 512–17.

107. For discussion, see Bradley & Siegel, *Judicial Separation of Powers*, *supra* note 5, at 295–312.

be found in the present moment, in which there are politicians, scholars, lawyers, and public commentators who continue to oppose Court-packing even as they condemn both the recent conduct of Senate Republicans regarding Supreme Court nominations and the ideological assertiveness of the Roberts Court in key areas of constitutional law.[108]

This Part uses qualifications such as "likely" and "appears to" in describing the existence of a constitutional convention against Court-packing, not only because it has not exhaustively examined all of the relevant historical practice, but also—and more importantly—because "[t]here is no precise metric for knowing what constitutes qualifying practice or how long it must be followed in order to be credited."[109] Moreover, there are "inevitably questions about the proper level of generality at which to describe the past practice."[110] Relatedly, some of the asserted reasons for packing the Court now "are specific to our time" and so may fall outside the scope of any relevant constitutional convention.[111] Part IV identifies extraordinary circumstances in which Court-packing would be beyond the scope of the likely, longstanding convention against it and would be justified. All of that said, the historical practice, especially since 1869, best supports the view of scholars who have stated that Court-packing, at least under almost all imaginable circumstances, violates a constitutional convention protecting the perception and reality of judicial independence.[112] As Professor Michael Dorf wrote in 2009, constitutionality aside, we "have very good reasons to think that Court packing is something that Congress and the President *just cannot do*."[113] The best evidence of a

108. *See, e.g.*, Ruth Marcus, *Court-Packing Is Not the Answer to This Problem*, WASH. POST (Dec. 17, 2021, 4:37 PM), https://www.washingtonpost.com/opinions/2021/12/17/marcus-supreme-court-packing-not-the-answer [https://perma.cc/VU79-ZKXF].

109. Bradley & Siegel, *Judicial Separation of Powers*, *supra* note 5, at 262.

110. *Id.*

111. BIDEN COMM'N REPORT, *supra* note 5, at 73.

112. *See supra* note 87 (citing these scholars).

113. Dorf, *supra* note 87, at 74 (emphasis in original); *see* Grove, *supra* note 87 ("There is a strong norm today against 'packing' the Supreme Court—that is, modifying the Court's size in order to alter the future course of its decisions."); Jackson, *supra* note 87 ("A strong norm has developed that the political branches do not threaten or change the Court's membership because of unhappiness with its decisions."); Krotoszynski, *supra* note 87 (observing that "[C]ourt packing is essentially considered a wholly illegitimate means of seeking to alter existing Supreme Court doctrine"); Pozen, *supra* note 87, at 34 (noting that "'Court packing' is especially out of bounds" and that "[t]his is part of the convention of judicial independence").

normative practice exists where a deviation is proposed or attempted and is defeated on grounds of impropriety. Such evidence does not always exist, but it does for Court-packing, and—as noted just above—there is evidence of its existence today, not just in 1937.

B. Court-Packing versus Court-Appointing

One objection to the conclusion that Court-packing violates a constitutional convention is that it proves too much by also condemning ideologically aggressive uses of the regular appointments process, which can be called "Court-appointing." During his long time in office, FDR was able to appoint eight Justices, all committed New Dealers, using this process.[114] It may reasonably be asked why this sort of ideological influence on the Court does not violate a constitutional convention akin to the one invoked in 1937. This is a deeply interesting question, and there are at least three answers to it. First, unlike the direct control over the Court entailed by changing the number of Justices, Congress and the president do not control when a vacancy occurs. As a result, the regular appointments process compromises the perception and reality of judicial independence to a lesser extent than does Court-packing. Court-packing confers control over not just the selection of the Court's personnel but also the occasion for selecting them.

Second, there are virtues to potentially slowing down the process through which politicians affect the ideological orientation of the Court. Requiring one appointment at a time increases the likelihood (although it does not guarantee) that a political party will need to win multiple elections to make several appointments.[115] Increasing this likelihood in turn increases the chances that a party making several appointments has earned the democratic authority to do so. There may not be a difference in this regard between a one-term president who appoints two Justices through the regular appointments process and one who does so through a Court-packing plan. But a one-term president will almost never be able to appoint four or six Justices through the regular appointments process; they can always do so

114. Bradley & Siegel, *Judicial Separation of Powers*, *supra* note 5, at 283 n.163.

115. *Cf.* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1082 (2001) (emphasizing that "cumulative acts of partisan entrenchment" in the courts, through judicial appointments, can produce "constitutional change . . . quickly or slowly, depending on how the forces of politics operate").

through a Court-packing plan.[116] In sum, relative to Court-packing, the regular appointments process impacts the perception and reality of judicial independence less significantly and better justifies the impact on democratic grounds.

These two explanations, which identify differences in fact between Court-packing and the use of the regular appointments process, help account for the third, ultimate difference between the two. Constitutional conventions that limit and structure partisan influence upon the Court do so to protect judicial legitimacy. Assessments of judicial legitimacy are, in turn, ultimately based on what people believe, not on theories of what they should believe. And most Americans—presidents, members of Congress, lawyers, and nonlawyers alike—have long believed that Court-packing is different from, and more threatening to, judicial legitimacy and independence than even ideologically aggressive uses of the regular appointments process. As a sociopolitical matter, adding four or six Justices in a day is likely to be viewed as outside what is normal and appropriate; it is likely to be regarded as aberrant and disturbing, including by many Americans who want the ideological orientation of the Court to change.[117] These beliefs are not set in stone; the Court is certainly capable of changing them by issuing a series of extreme decisions, as Part IV discusses. But Court-packing has generally been viewed as out of bounds for a long time now—evidenced, among other things, by the absence of much Court-packing talk in public discourse until recently.[118]

To be sure, one cannot predict with certainty how Americans would respond if Court-packing actually occurred. But it is risky—it threatens the system—to roll the dice and find out. If the Court were to be packed, and if its legitimacy were to become significantly

116. Remarkably, President William Howard Taft—himself a future Chief Justice—appointed six Justices in one term. *Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/3U99-ULV2].

117. *See, e.g.*, Sen, *supra* note 47, at 7–8 (reporting that "simply expanding the size of the Supreme Court is unpopular among the public" and noting polls indicating fewer than one-third of Americans support increasing the size of the Court); *see also* TUSHNET, TAKING BACK THE CONSTITUTION, *supra* note 7, at 217–18 (acknowledging that "[s]urveys do suggest that the public is nervous about changing the Court's size for political reasons, though not for good-government ones," and candidly observing that "[t]he difficulty for Democrats is that they can't really come up with decent good-government reasons for adding two justices to the Supreme Court"). Professor Tushnet wrote these words before Justice Ginsburg's passing, when the addition of two Democratic appointees would have created a Democratic-appointed majority on the Court.

118. BIDEN COMM'N REPORT, *supra* note 5, at 73, 80–81.

impaired as a result, the political party responsible, and its enablers, would not be able to fairly say that they were not warned—that they could not have reasonably perceived the risk. They are currently being warned about the risk. Moreover, it is unpersuasive to suggest that there are equally substantial risks associated with not packing the Court. There presently appears to exist a considerable risk that a very conservative Court will render some very conservative decisions for a decade or more, but few people believe that this by itself justifies Court-packing any more than if a very liberal Court were to render some very liberal decisions for a decade or more. As Parts IV and V argue, if the current Court were to imperil its own legitimacy or cause (or deepen) a national crisis, Court-packing would be on the table. One need not be highly risk-averse to believe that uncertainty favors the status quo when one is deciding whether to change the longstanding structure of the head of an entire branch of government.

Whether there remains a constitutional convention against Court-packing is somewhat uncertain in light of the increasing politicization of the Supreme Court confirmation process. Constitutional conventions require bipartisan support, so if one political party no longer feels bound by the convention against Court-packing, then it no longer exists. Although the Democrats' hands have not been clean on the subject of judicial appointments, so far, at least, the convention against Court-packing is surviving unified Democratic government. But given the conduct of Senate Republicans in recent years that is examined in Part V, as well as the threats some Republican senators made to leave seats on the Court open for four years if Democratic candidate Hillary Clinton were elected in 2016,[119] one cannot say with complete confidence that a Republican president and Congress would respect the convention if they were persistently unhappy with the Court's decisions. Part V, however, offers reasons why it might harm the Republicans if they were to pack, and thereby degrade, the Court. The prospect of such self-inflicted harm might well dissuade them from packing the Court even if they felt the need and had the power to do it.

119. *See, e.g.*, LEVITSKY & ZIBLATT, *supra* note 59, at 166 ("[W]hen it was widely believed that Hillary Clinton would win, several Republican senators, including Ted Cruz, John McCain, and Richard Burr, vowed to block all of Clinton's Supreme Court nominations for the next four years, effectively reducing the Court's size to eight.").

III. THE UNCERTAIN CONSTITUTIONALITY OF COURT-PACKING

If there is no longer a constitutional convention against Court-packing that protects judicial independence, or if the convention is likely to be ignored or violated, then much turns on whether Court-packing is constitutional. This Part therefore considers the constitutionality of Court-packing, which would need to take the form of a federal statute adding seats to the Court.[120] The dominant view is that such a statute would be clearly and obviously constitutional.[121] This Part explains why the arguments in favor of the constitutionality of Court-packing have force, but it disagrees that the question is easily disposed of. There are arguments against the constitutionality of Court-packing that warrant serious consideration, even if these arguments may ultimately be too vulnerable to carry the day. Still, the question of constitutionality is close enough that it cautions against the use of Court-packing except in extreme situations.

A. Arguments in Favor of the Constitutionality of Court-Packing

Article III requires the existence of "one supreme Court" and grants it "[t]he judicial Power of the United States," but Article III does not specify its size.[122] The Necessary and Proper Clause authorizes Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[123] Under a straightforward reading of the Necessary and Proper Clause as interpreted by the Court since *McCulloch v.*

120. In principle, a constitutional amendment is another possibility. In practice, however, an amendment would almost certainly prove impossible as long as the Court retained at least some support, because Article V makes it extraordinarily difficult to amend the Constitution. *See* U.S. CONST. art. V.

121. *See, e.g.*, AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 354–55 (2012) (contending that Congress has the authority to change the size of the Court not only if it has "a sincere good-government reason for altering the Court's size," but "[e]ven if, in a given instance of resizing the Court, Congress was retaliating against what it perceived as Court abuses—say, a string of dubious rulings and judicial overreaches"); Dorf, *supra* note 87, at 79 ("If, say, Congress were to increase the size of the Supreme Court to eleven Justices, neither the Court itself, nor any member of Congress, could plausibly claim that in so doing it was acting unconstitutionally."); *see also* BIDEN COMM'N REPORT, *supra* note 5, at 98 n.70 ("Most scholars who have considered the issue . . . have concluded that Congress has broad power to modify the Court's size.").

122. U.S. CONST. art. III, § 1.

123. U.S. CONST. art. I, § 8, cl. 18.

Maryland,[124] Congress can set the size of the Court as a necessary (that is, reasonable) way of carrying the powers of the Court into execution. After all, the Court cannot function without having a set number of Justices at a particular time.[125] Moreover, setting the size of the Court is not improper on the ground that it is a "great substantive and independent power" akin to the powers to tax or regulate interstate commerce, such that this power would need to be listed separately in the Constitution for Congress to possess it.[126] On the contrary, whether to have five or ten Justices (the actual historical range to date) would seem to be exactly the sort of discretionary judgment that falls within the implied powers of Congress; the decision is part of "that vast mass of incidental powers which must be involved in the constitution."[127] Finally, Congress's motive in using the Necessary and Proper Clause has not been thought to matter in assessing the constitutionality of legislation passed under this clause,[128] just as Congress's motive has not been thought to matter when Congress exercises its other powers under Article I, Section 8.[129]

In addition, it is not clear that Congress must rely on the Necessary and Proper Clause to set the size of the Court. To repeat, the first section of Article III sets forth a constitutional requirement that there exist "one supreme Court."[130] If the Necessary and Proper Clause had been left out of the Constitution, Congress would still be under a constitutional obligation—it would still possess the nondiscretionary

124. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

125. *See, e.g.*, United States v. Comstock, 560 U.S. 126, 133–34 (2010) ("[T]he Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.'" (quoting *McCulloch*, 17 U.S. at 413, 418)).

126. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 559–61 (2012) (opinion of Roberts, C.J.) (concluding that a requirement to buy health insurance was a great substantive and independent power akin to taxing or declaring war and thus was beyond the scope of the Necessary and Proper Clause).

127. *McCulloch*, 17 U.S. at 421.

128. *See, e.g.*, United States v. Comstock, 560 U.S. 126, 134 (2010) ("We have since made clear that, in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." (citing Sabri v. United States, 541 U.S. 600, 605 (2004) and Gonzales v. Raich, 541 U.S. 1, 22 (2005))).

129. *See* United States v. Darby, 312 U.S. 100, 115 (1941) ("The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction, and over which the courts are given no control.").

130. U.S. CONST. art. III, § 1.

power—to establish the Court. Moreover, Congress has, for good reason, apparently never believed that it can establish the Court without setting the number of Justices who will serve on it.[131] And because Congress set the number of Justices initially, it is not clear why a distinct source of congressional power is required to change the size of the Court subsequently. Again, if there were no Necessary and Proper Clause, it would be implausible to argue that the size of the Court was set in constitutional stone in 1789—when Congress passed the first Judiciary Act—no matter how sensible on good-government grounds it might later become to change the Court's size in response to profound changes in the country. The Biden Commission Report did not consider this structural argument.[132]

Furthermore, the Appointments Clause,[133] the Exceptions Clause,[134] and the clause subjecting "all civil Officers" to removal via impeachment and conviction[135] all indicate that the Constitution empowers the political branches to ensure judicial accountability; it does not just provide for judicial legitimacy and independence. Court-packing is a highly potent method of ensuring judicial accountability. This instrument contradicts nothing in the constitutional text unless one reads a great deal into the under-determinate semantic meaning of the word "proper" in the Necessary and Proper Clause,[136] which

131. Perhaps Congress could establish the Court without setting the number of Justices. If Congress did not fix the Court's size by statute, perhaps each president would be free to nominate as many Justices as that president wanted, and perhaps the Senate would be free to confirm or deny confirmation to as many nominees as the Senate wanted. *Cf.* James Durling & E. Garrett West, *Appointments Without Law*, 105 VA. L. REV. 1281, 1282 (2019) (arguing that the president has the authority to appoint both diplomats and Supreme Court Justices without congressional authorization). The historical practice is, however, uniformly to the contrary. This is fortunate: a Court with a floating size would risk becoming the plaything of the political parties whenever one party controlled both the White House and the Senate.

132. *See* BIDEN COMM'N REPORT, *supra* note 5, at 73–74 (analyzing the legality of Court expansion).

133. U.S. CONST. art. II, § 2, cl. 2.

134. U.S. CONST. art. III, § 2, cl. 2.

135. U.S. CONST. art. II, § 4.

136. U.S. CONST. art. I, § 8, cl. 18. The argument that the term "proper" is a significant limitation on the scope of the power granted in the Necessary and Proper Clause had skeptics in the Founding era. *See, e.g.*, H. JEFFERSON POWELL, THE CONSTITUTION AND THE ATTORNEYS GENERAL 7 (1999) (quoting the view of the first Attorney General, Edmund Randolph, that both the friends and the enemies to the first bank bill ought to regard the term "proper" in the Necessary and Proper Clause "as among the surplusage which as often proceeds from inattention as caution"); *cf.* McCulloch v. Maryland, 17 U.S. 316, 418–19 (1819) (arguing that the meaning of the word "proper" has a qualifying effect on the meaning of the word "necessary").

(notwithstanding the above structural argument) is typically viewed as the only source of legislative authority to change the size of the Court. Moreover, when the Constitution does protect judicial legitimacy and independence, it arguably says so. Specifically, the tenure and salary protections of Article III are designed to insulate the Justices from partisan politics.[137] These textual protections may suggest some caution in reading other unspecified protections of the Court into the Constitution.

Turning from the constitutional text to the constitutional structure, the Constitution establishes not only a system of separation of powers but also a system of checks and balances. Judicial legitimacy and independence are not absolute constitutional values in the U.S. system any more than judicial accountability is. Court-packing can be viewed as a constitutionally permissible check against a branch that has far exceeded the limits of its own authority in the eyes of the nation as represented in the political branches. To be sure, Court-packing holds the potential to severely compromise the legitimacy and independence of the Supreme Court.[138] As the next Part demonstrates, however, Court-packing also holds the potential to restore the Court's legitimacy when it has been damaged by a political party or by the Justices themselves, and packing can help the nation respond effectively to a national crisis partially of the Court's own making. Perhaps the Constitution should not be interpreted as always choosing one set of concerns over the other.

At least some of the early historical practice—which likely involved instances of Court-packing or unpacking—supports these textual and structural arguments. For example, in 1801, the lame-duck Federalist Congress provided via statute that, upon the next vacancy on the Court, its membership would be reduced from the original six seats to five, apparently to deny incoming President Thomas Jefferson an appointment.[139] A year later, and before there was a vacancy, the Democratic-Republicans restored the size of the Court to six seats.[140] The fact that the Federalists' act of Court-unpacking was speedily undone by the Jeffersonians does not necessarily mean, as one scholar

137. *See* U.S. CONST. art. III, § 1; THE FEDERALIST NO. 78, *supra* note 83, at 465 (Alexander Hamilton).

138. *See supra* Part I.

139. *See* Act of Feb. 13, 1801, ch. 4, § 3, 2 Stat. 89, 89.

140. *See* Act of Mar. 8, 1802, ch. 8, 2 Stat. 132.

has suggested,[141] that it does not "count" as an instance of Court-packing in an assessment of the historical practice. It seems straightforward to suggest that the Federalists passed an unpacking statute and the Jeffersonians responded proportionally by enacting a law that restored the original number of seats. In any event, two other instances of changing the Court's size arguably to affect its decision-making were not undone by the political opposition. When President Abraham Lincoln was assassinated and Vice President Andrew Johnson became president, the Republicans reduced the size of the Court from ten seats to seven, possibly to deny Johnson appointments—the motive has been disputed.[142] In 1869, however, after Ulysses S. Grant was elected president, the Republicans increased the size of the Court to nine—where it has remained ever since.[143]

Examining the early history, the Biden Commission Report concludes that "[e]ach reform seems to have been motivated by a mix of institutional and political concerns."[144] Although the Report is wise to caution against casually concluding that it is always easy to distinguish Court-packing from good-government reasons for Court expansion, the Report's formulation risks unduly blurring the distinction between the two. For example, the Report acknowledges that the 1801 "reduction in size was also likely attributable to the Federalists' desire to prevent their incoming political rival—President-elect Thomas Jefferson—from filling a Supreme Court vacancy," but it suggests that "[i]n 1801, the Federalist Congress temporarily ended circuit riding, and so its reduction of the Court to five Justices could have been justified by the fact that the Court could now function effectively with only five members."[145] The Report cites no authority

141. *See* Joshua Braver, *Court-Packing: An American Tradition?*, 61 B.C. L. REV. 2747, 2751 (2020) ("President John Adams and the Federalists' 1801 efforts to block President-elect Thomas Jefferson's future Supreme Court appointment ultimately failed and serves as no type of precedent."). Professor Braver appears correct, however, that Court-packing was rarer in early American history than the conventional view maintains. *See generally id.* (recounting the history of changes to the size of the Supreme Court).

142. *Compare* ORTH, *supra* note 4, at 6 (arguing that the reduction was designed to deny Johnson appointments), *with* Charles Fairman, *Reconstruction and Reunion, 1864–1888: Part One*, *in* VI THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 166–70 (Paul A. Freund ed., 1971) (documenting that Chief Justice Salmon P. Chase had recommended the reduction to persuade Congress to increase the Justices' salaries).

143. *See* Act of Apr. 10, 1869, ch. 22, 16 Stat. 44 (codified at 28 U.S.C. § 1).

144. BIDEN COMM'N REPORT, *supra* note 5, at 68.

145. *Id.*

for this good-government interpretation of what the Federalist Congress was seeking to accomplish, nor does it seem plausible given all of the other partisan shenanigans in which the Federalists were engaged during the transition from the Adams administration to the Jefferson administration.[146]

Some of the modern practice also supports the conclusion that Court-packing is constitutional. Most importantly, FDR's Justice Department concluded that Court-packing was clearly constitutional,[147] and FDR's plan was defeated—in part—for political reasons, which were present alongside claims about constitutional law and conventions.[148] The historical practice may be too debatable to provide a basis for the imposition of constitutional limits on Court-packing. Moreover, as the next Part discusses, it is questionable as a prudential matter to infer that the Constitution prohibits Court-packing no matter what life-tenured Justices do with the enormous power they have exercised since at least the late nineteenth century.

B. Arguments Against the Constitutionality of Court-Packing

So, the conventional view that Court-packing is constitutionally permissible has force. Still, there is more to be said than has been said to date. One could go farther than the argument developed in the previous Part by suggesting that Court-packing is not only anticonstitutional—that is, violative of a constitutional convention—but also unconstitutional. Again, few commentators would take this

146. For discussion of these shenanigans, which included expanding federal jurisdiction and staffing all sixteen of the new circuit judgeships with Federalists, see DANIEL A. FARBER & NEIL S. SIEGEL, UNITED STATES CONSTITUTIONAL LAW 17–20 (2019). The first national political transition under the Constitution—from the hitherto dominant Federalists to the ascendant Democratic-Republicans—was rocky in part because the Founders lacked many of the constitutional norms that manage (or are supposed to manage) political transitions today. And so when one side created judgeships at the last minute, the other side terminated them in likely contravention of Article III and canceled a Supreme Court term to postpone judicial resolution of the matter. For discussion of the crisis of 1800–1803, see generally BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY (2005).

147. *See, e.g.*, Memorandum from Warner W. Gardner, Dep't of Just., to the Solic. Gen. 55, 57 (Dec. 10, 1936) (stating that, of the ways of combatting the Court's invalidations of New Deal legislation—including jurisdiction stripping, which was rejected as constitutionally too problematic—Court-packing was "the only [option that] is certainly constitutional" because "Congress has on numerous occasions changed the membership of the Court").

148. Bradley & Siegel, *Judicial Separation of Powers*, *supra* note 5, at 283 (documenting those political reasons).

claim seriously, but it is worth considering whether the provisions of Article III protecting judicial legitimacy and independence, combined with the potential for Court-packing to devastate the Court as an institution and 150 years of stability in the Court's composition, might support a structural inference that Court-packing violates the Constitution.[149]

With respect to the constitutional text, life tenure and the associated protection against salary reductions (but not cost-of-living increases) distinguishes the Justices from all other high-ranking government officials in the constitutional scheme.[150] As the previous Section notes, one could infer that these are the only protections for judicial legitimacy and independence that the Constitution provides, but one could also plausibly infer that the political branches may not permissibly act against the Court in ways that significantly undermine the purpose of giving the Justices life tenure and salary protection in the first place. This purpose is to enable the Justices to stand apart from partisan politics—and to be perceived as standing apart—so that they can perform functions that partisan institutions are unlikely to perform as well. For the reasons offered in Part I, Court-packing is highly likely to erode judicial legitimacy and the perception and reality of judicial independence.

With respect to the constitutional structure, if Court-packing were likely to severely damage or destroy the very institution whose existence the Constitution compels,[151] then there is a reasonable structural argument against it. Consider the emphasis of the 1937 Senate Judiciary Committee on how the constitutional system is supposed to function.[152] On this view, Court-packing severely

149. Curtis Bradley and this Author have argued that, to appropriately credit historical practice in constitutional interpretation, three requirements must be met: (1) governmental practice, (2) longstanding duration, and (3) acquiescence, which requires at least reasonable stability in the practice. The third requirement demands that the practice have existed for a significant number of years without producing continued inter-branch contestation, but it does not necessarily demand inter-branch constitutional agreement. Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1, 17–31 (2020).

150. For example, the president serves a four-year term, may not receive pay raises while in office, and can be re-elected only once. U.S. CONST. art II, § 1, cl. 1 & cl. 7; *id.* amend. XXII, § 1.

151. *See id.* art. III, § 1.

152. *See supra* note 95 and accompanying text (quoting the report of the Senate Judiciary Committee); *cf.* BALKIN, *supra* note 22, at 142 (observing that structural arguments and principles "explain how the Constitution works in practice and how it should work").

compromises judicial legitimacy and independence—it significantly undermines the constitutional structure and therefore violates the separation of powers. There is at least some force to the argument that the power of Congress to set the size of the Court should not be interpreted as the power to severely damage or destroy it.[153] Severe damage or destruction would not take the form of a Court building that no longer exists or Justices who no longer have jobs. Rather, as explained, it would take the form of a significant threat or reality of defiance of Supreme Court decisions or refusals by the executive to enforce them.

If one rejects structural reasoning and insists on finding a textual provision that Court-packing would violate, one could invoke Professor Randy Barnett's argument against the constitutionality of Court-packing, which he conveyed in his testimony before the Biden Commission.[154] He maintains that Court-packing is not "proper" within the meaning of the Necessary and Proper Clause because it undermines the separation of powers and the independence of the judiciary.[155] Professor Michael Rappaport previously developed a version of this argument, although he expressed uncertainty about whether it is correct.[156] It is not clear, however, that anything of substance turns on whether one houses what is ultimately structural reasoning in the text of the Necessary and Proper Clause.

With respect to the historical practice, the early practice contained at most only a small number of relatively clear instances of Court-packing, as the discussion in the previous Section suggests. As for the modern practice, some objections to Court-packing in 1937 appeared to use the language of both law and conventions. "What may be most significant about objections to FDR's Court-packing plan is their ambiguity," Professor Curtis Bradley and this Author have observed. "Reading the Senate Hearing Transcript and Report, it is not always

153. *Cf. generally* Robert D. Cooter & Neil S. Siegel, *Not the Power to Destroy: An Effects Theory of the Tax Power*, 98 VA. L. REV. 1195 (2012) (arguing that Congress's power to tax is not the power to destroy assessed conduct).

154. *See* Randy E. Barnett, Patrick Hotung Professor of Const. L., Georgetown Univ. L. Ctr., *Written Statement*, *before the* PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, at 2 (July 20, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/07/Barnett-Testimony.pdf [https://perma.cc/24PS-7JKK].

155. *Id.* at 9–10.

156. Michael Rappaport, *Is Court Packing Unconstitutional?*, LAW & LIBERTY (Nov. 6, 2020), https://lawliberty.org/is-court-packing-constitutional [https://perma.cc/3FF7-PWF3].

clear whether the objection was that Court-packing would be normatively improper but legally permissible, or would be normatively improper *and* legally impermissible. References to the 'spirit' of the Constitution were at times similarly ambiguous."[157] If the historical practice is too debatable to provide a basis for the imposition of constitutional limits on Court-packing, it is also more debatable than many advocates of Court-packing may want to acknowledge.

Finally, the consensus that Court-packing presents no constitutional difficulties at all seems questionable given the dissensus concerning the constitutionality of stripping the Court's appellate jurisdiction ("Court-stripping").[158] The constitutional arguments against Court-stripping do not appear stronger than the constitutional arguments against Court-packing; indeed, in some ways, the constitutional arguments against Court-stripping are weaker than those against Court-packing.[159] For example, Court-stripping seems better justified textually by the relative specificity of the Exceptions Clause (which has long been understood to permit Congress to make exceptions to the Court's appellate jurisdiction[160]) than Court-packing seems textually warranted by the relative generality of the Necessary and Proper Clause.[161] Similarly, *Ex parte McCardle*[162] is judicial precedent that can be invoked to support the constitutionality of Court-stripping (even if it can be distinguished).[163] By contrast, there is

157. Bradley & Siegel, *Judicial Separation of Powers*, *supra* note 5, at 279.

158. *Compare, e.g.*, BIDEN COMM'N REPORT, *supra* note 5, at 67 (observing that "there is widespread agreement among legal scholars that Congress has the constitutional authority to expand the Court's size"), *with, e.g.*, *id.* at 163 (observing that "[d]ebates about the constitutional limits on Congress's power to restrict the jurisdiction of the Supreme Court, the lower federal courts, and the state courts have generated an enormous literature").

159. For discussion of the academic debates over Court-stripping, see Bradley & Siegel, *Judicial Separation of Powers*, *supra* note 5, at 287–92. For discussion of modern debates over Court-stripping in Congress and the Executive Branch, see *id.* at 295–311.

160. U.S. CONST. art. III, § 2, cl. 2 (providing that in all cases not falling within the Court's original jurisdiction, it shall have appellate jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make").

161. U.S. CONST. art. I, § 8, cl. 18. This is not to say that the Exceptions Clause grants Congress plenary power to strip the Court's appellate jurisdiction. The textual reference to "Exceptions" may presuppose a rule that such exceptions may not swallow. *See infra* note 166 and accompanying text. The point is not that Court-stripping is constitutionally unproblematic; the point, rather, is that Court-stripping is not obviously more problematic than Court-packing.

162. *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868).

163. This decision can be read narrowly, especially given the Court's assumption of jurisdiction a few months later in *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868). *See* Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1078 (2010) (writing that

no judicial precedent even arguably supporting the constitutionality of Court-packing that needs to be distinguished.

One could respond that Court-packing, unlike Court-stripping, merely adds Justices to the Court; it does not prevent the Court from addressing any questions of federal law. This is true, but to put the comparison that way is to ignore the risk that Court-packing would trigger politicians' noncompliance with, and the executive's nonenforcement of, Supreme Court decisions—no matter the textual requirement that the Court exist.[164] Given this risk, Court-packing raises concerns at least as severe as the worry that Court-stripping would encourage defiance of Supreme Court precedent by state or federal officials or judges (because they could not be reversed by the Court).[165]

It would also be easier for a subsequent Congress to undo the effects of Court-stripping than of Court-packing; Congress could simply repeal the statute stripping the Court's jurisdiction but could not undo the appointments, which come with life tenure. This difference might be dismissed as one not of constitutional magnitude, but the greater entrenchment of Court-packing against ordinary legislative change may suggest that it poses a greater structural threat to judicial legitimacy and independence. Notwithstanding the vulnerability of constitutional arguments against Court-stripping relative to those against Court-packing, a fair number of commentators—including some quite famous ones—believe that the essential functions of the Court in the constitutional scheme provide a constitutional limit on Court-stripping.[166] So did President Ronald

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"*McCardle* would be an easily distinguishable precedent for a Supreme Court that wanted to distinguish it" because, "[a]s the Court pointedly noted in its decision, the repealer statute left open an alternative avenue by which the petitioner could seek appellate review").

164. U.S. CONST. art. III, § 1.

165. *See infra* notes 176–178 and accompanying text (discussing this concern with Court-stripping).

166. For seminal works, see Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364–65 (1953), insisting that the Constitution does not "authoriz[e] exceptions which engulf the rule" of appellate jurisdiction, and "the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan," and Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 201–02 (1960), attempting to render Hart's "essential role" idea less indeterminate by articulating the structural standard that "exceptions" to the Court's appellate jurisdiction not "negate" the Court's "essential constitutional functions of maintaining the uniformity and supremacy of federal law" and deeming unconstitutional "legislation that precludes Supreme Court review in every case

Reagan's Attorney General, William French Smith.[167] One could argue that the same conclusion follows for Court-packing.

The foregoing constitutional arguments are distinct from another emerging argument against the constitutionality of Court-packing. Professor Randy Barnett contends that changing the size of the Court for the purpose of affecting its decision-making is an illegitimate legislative end and so is beyond the scope of the Necessary and Proper Clause, which he assumes is the only source of congressional power to set the size of the Court.[168] As authority for this proposition, he invokes the rule of law governing the scope of Congress's power under this clause that was laid down in *McCulloch v. Maryland*: "*Let the end be legitimate*, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[169]

It does not appear correct, however, that statutes that are malintentioned (in any set of ways) are beyond the scope of the Necessary and Proper Clause. Among other examples, it was not thought that Congress was acting unconstitutionally when it passed a statute with the purpose of affecting the Court's decision-making by encouraging sitting Justices to retire through the offer of full pay during

involving a particular subject." For Professor Ratner's later formulation of his standard, see generally Leonard G. Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929 (1992). For an argument that review by either the Supreme Court or a lower federal court is required for constitutional (and perhaps other federal) claims, see generally Lawrence Sager, *Foreword: Constitutional Limitations on Congress's Authority To Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981).

167. Constitutionality of Legis. Withdrawing Supreme Court Jurisdiction to Consider Cases Relating to Voluntary Prayer, 6 Op. O.L.C. 13, 14 (1982) (concluding that Congress has some power under the Exceptions Clause to regulate the appellate jurisdiction of the Supreme Court (and has significantly more authority to regulate the jurisdiction of the lower federal courts), but that Congress may not, "consistent with the Constitution, make 'exceptions' to Supreme Court jurisdiction which would intrude upon the core functions of the Supreme Court as an independent and equal branch in our system of separation of powers"). For an account of how General Smith ultimately agreed with the constitutional concerns expressed by Theodore Olson, then-head of the Office of Legal Counsel, notwithstanding the rejection of Olson's concerns by another Justice Department Attorney, a young John Roberts, who was then a special assistant to Smith, see Bradley & Siegel, *Judicial Separation of Powers*, *supra* note 5, at 302–11.

168. *See* Barnett, *supra* note 154, at 2–8.

169. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) (emphasis added).

retirement.[170] Marshall's reference to a "legitimate end" means—and has long been understood to mean—an enumerated power like the Taxing Clause[171] or the Interstate Commerce Clause,[172] not a proper purpose for using the Necessary and Proper Clause (however such a purpose is determined).

More generally, Barnett's argument proves too much insofar as it is not persuasively limited to the Necessary and Proper Clause. A good deal of governmental conduct that has long been understood to be constitutional has been aimed at affecting the Court's decision-making, including ideological judicial nominations by presidents; constitutional hardball by senators in responding to such nominations; and strong criticisms of the Court—even threats to impeach individual Justices—by members of the political branches. In terms of the purpose of government action, there is nothing unique about Court-packing. It is not clear why an objective to affect the Court's decision-making should be of no constitutional significance in all contexts, except that of Court-packing, when Barnett's claim is that such an objective is illegitimate and indeed contrary to the "spirit of the Constitution."[173]

Professor Will Baude rejects purpose-based limits on the Necessary and Proper Clause, but he suggests that not all nonformalists can readily reject such limits given the belief of some of them in purpose-based limits on partisan gerrymandering and jurisdiction stripping.[174] At least three responses are appropriate. First, the legal effect of a purpose inquiry depends upon the constitutional clause or structural principle at issue. A belief in purpose-based limits on partisan gerrymandering under the Equal Protection Clause[175] does not

170. FRIEDMAN, THE WILL OF THE PEOPLE, *supra* note 36, at 224 ("Seeking to forestall trouble, Representative Hatton Sumners saw to it that the House quickly passed and Roosevelt signed a measure ensuring that Supreme Court justices could retire at full pay; the sense was that some [J]ustices had delayed retirement because they were concerned about what it would mean financially."). One could argue that Congress did not have the purpose of trying to affect the Court's decision-making because certain Justices already wanted to retire and Congress merely freed them up to decide for themselves by taking financial constraints off the table. But this seems like too fine-grained a distinction to matter. If Congress had not wanted the Justices in question off the Court, it presumably would not have been as likely to give them the financial incentive to retire.

171. U.S. CONST. art I, § 8, cl. 1.

172. U.S. CONST. art I, § 8, cl. 3.

173. Barnett, *supra* note 154; *see also id.* at 8, 9, 13 (making this claim).

174. Baude, Reflections, *supra* note 14, at 3–6.

175. U.S. CONST. amend. XIV, § 1, cl. 4.

a fortiori commit one to purpose-based limits on the Necessary and Proper Clause. For example, state or federal legislation with a racist purpose obviously violates equal protection principles, but such a purpose does not obviously render federal legislation beyond the scope of the Necessary and Proper Clause.

Second, even if Court-stripping is unconstitutional because of its purpose, it does not necessarily follow that Court-packing is unconstitutional because of its purpose. To the extent that Court-stripping is beyond the scope of the Exceptions Clause because of its purpose, it is likely a congressional purpose to encourage defiance of Supreme Court precedent. As Professor Baude acknowledges,[176] Professor Richard Fallon has argued that Court-stripping is unconstitutional if it has the "constitutionally forbidden purpose of encouraging defiance of applicable Supreme Court precedent."[177] This is because, Fallon plausibly reasons, "it is almost always reprehensible for government officials—including judges—to engage in lawbreaking," and so "Congress's power over jurisdiction should not be interpreted as a license to encourage lawbreaking by either state or federal officials or by state court judges."[178] Court-packing does not, however, have this purpose. Rather, as the outset of this Article explains, it has the purpose of affecting the Supreme Court's decision-making going forward—the same purpose shared by statutes conferring generous pensions to persuade Justices to retire and by aggressive uses of the nomination and confirmation powers.

This is a distinction with a relevant difference from a rule-of-law perspective, even if the practical result is similar to the result of Court-stripping. Much governmental action may have the purpose of trying to persuade the Court to change its governing precedents. If successful, such action would have the consequence that previously unlawful conduct is now lawful (or vice versa). It is another matter entirely for governmental action to leave Supreme Court precedent unchanged and to have the purpose of enabling government officials and judges to contravene this precedent with impunity. To reject this distinction is to

176. Baude, Reflections, *supra* note 14, at 6 n.8.

177. Fallon, *supra* note 163, at 1083.

178. *Id.*

reject the difference between trying to produce legal change and getting away with legal violations.[179]

Third, and alternatively, Court-stripping may be constitutionally problematic even if one makes no inquiry at all into congressional purpose. For example, if a Court-stripping statute is objectively likely to encourage deviations from Supreme Court precedent by lower federal courts or by state courts, or to otherwise compromise the essential functions of the Court in the constitutional scheme, then it may not matter what Congress's purpose is. An inquiry into the probable effects of the statute at issue would have the virtue of being potentially easier to conduct than a purpose inquiry. This is another possible reason why one can conclude that Court-stripping is unconstitutional without accepting the proposition that the purpose of Court-packing renders it unconstitutional.

In sum, one can be concerned about the constitutionality of partisan gerrymandering and Court-stripping without being committed to the view that the purpose of Court-packing takes it outside the scope of the Necessary and Proper Clause. There are more compelling reasons to worry about the constitutionality of Court-packing.

C. Summary and Implications for the Advisability of Court-Packing

The constitutionality of Court-packing presents more difficult issues than commonly recognized. On one hand, the arguments in favor of the conventional view are relatively strong. On the other hand, there is a reasonable argument that many admired constitutional law decisions—legal commentators will disagree about which ones—have had no more to work with than the textual, structural, practice-based, and analogical arguments brought to bear above in arguing against the constitutionality of Court-packing. The dominant view notwithstanding, Court-packing is not entirely free from constitutional difficulty.

Prudential considerations of the highest order also cut both ways. Understanding the Constitution to categorically prohibit Court-packing no matter what the Court does, and no matter what the crisis

179. It is possible that Court-packing would result in some short-term defiance of Supreme Court precedent because violators might be confident that the expanded Court would change the precedent to validate their behavior. One can readily support Court-packing, however, without having the purpose of encouraging such defiance. One could just as easily want all individuals and institutions that are bound by Supreme Court precedent to respect the Court's decisions until the Court changes them.

is, could have such disastrous consequences that constitutional arguments stronger than the ones mustered here might be required to compel such a result. At the same time, one reason there is some uncertainty about the constitutionality of Court-packing is precisely due to the potentially devastating impact that packing the Court would have on the institution. Maybe the best legal answer, if one needs to be given in the abstract, is that Court-packing is probably constitutional: the text does not ostensibly prohibit it, the historical practice is mixed and debatable, structural inferences cut in opposite directions, and prudential considerations do as well. But the fact that there is some uncertainty about this conclusion provides another reason to be extraordinarily cautious about packing the Court—to do so only in extreme situations.

IV. COURT-PACKING IS JUSTIFIED IN EXTREME SITUATIONS

Assuming that Court-packing is ultimately consistent with the Constitution, this Part identifies three extreme scenarios in which it would be justified, notwithstanding the arguments offered in Parts I through III. After identifying these justifications, this Part offers a framework for considering them that generally advocates the enactment of legislation protecting the democratic process or substantive rights before the passage of legislation packing the Court. Finally, this Part responds to criticisms from opposite directions: that its framework inadequately considers the costs of delaying or declining the opportunity to pack the Court, and that it would be better to shut the door completely on Court-packing than to permit it in extraordinary circumstances.

A. Three Justifications for Court-Packing

"Never" is a long time. Although Court-packing is almost always a bad idea that may still violate a constitutional convention, it would be overstated to say that Court-packing would never be justified, for at least three reasons. Court-packing could be a proportional response to a previous instance of unjustified Court-packing or similarly extreme partisan behavior. Court-packing could also restore the Court's legitimacy in the eyes of a large majority of Americans if the Court were to squander its legitimacy by rendering a series of decisions that these Americans viewed as extreme and damaging. And packing the Court might be needed to meet a national crisis to which the Court was contributing.

First, packing the Court with *n* more Justices would be a justified response to a previous decision of the other political party to pack the Court with *n* more Justices if the other party's prior decision was itself unjustified under the framework offered in this Section. (If the initial packing were justified for either of the two reasons offered below, then the framework would be self-undermining if it justified packing in response.) Packing the Court proportionally in response to unjustified Court-packing by the other political party can be called "counter-packing." For example, counter-packing by a political party would be justified if the other party were to pack the Court simply to seize control of it.

Under this first rationale, it is possible that Court-packing would be justified by partisan conduct other than an initial act of unjustified packing. For example, if the majority party in the Senate were able to confirm a nominee only through bribery of wavering senators, then the other party might be justified in adding up to two Justices at a later date as the only way to undo the possibly decades-long impact of the corrupt appointment—to "free the taint," so to speak.[180] Court-packing would not be justified, however, merely because the other party violated a constitutional norm governing the confirmation process. Packing would be justified in that situation only if it were a proportionate response to the norm violation.

Proportionality is a vitally important concept when the majority party in the political branches is considering how to respond after the other party has violated a constitutional norm to affect the Court's composition.[181] Proportionality does not mean an identical response to the other party's norm violation, but it does mean not responding in a way that is substantially out of proportion to the underlying violation. Proportionality is relevant to assessing both the motivation for a particular response and the genuineness of the expressed concern about the violation of the underlying norm. Even more importantly, proportionality cabins the harm to the Court's legitimacy and efficacy

180. Whether the addition of one Justice or two would be potentially justified would depend upon the circumstances. For example, if no Justice would have been appointed absent the bribery, or if a more moderate Justice would have been appointed absent the bribery, then the addition of two Justices could constitute a proportionate response. By contrast, if a different Justice of similar ideology would have been appointed absent the bribery, then the addition of no more than one Justice could be potentially justified. Of course, in the real world, it may be impossible to know for certain what would have happened absent the bribery. Principled politicians must nonetheless muddle through and do the best they can.

181. Siegel, *After the Trump Era*, *supra* note 28, at 169 (discussing the value of proportionality in disputes over judicial appointments and in international law).

while still enabling a political party to deter and punish misconduct by the other party, thereby protecting the responding party's own democratic authority to affect the Court's composition through the regular appointments process. Proportionality is a limit on all three of the justifications for Court-packing discussed in this Section.

Second, there might be extraordinary circumstances in which Court-packing would restore the Court's legitimacy when its legitimacy is threatened by the Court's own behavior. Court-packing might be legitimacy improving if the Justices were to issue decisions that a large majority of Americans viewed as extreme and damaging—as a radical lurch in a particular ideological or interpretive direction that decimated basic institutions or tore at the fabric of constitutional law. These triggers are unavoidably vague, but the general ideas they capture are indispensable if one cares about the Court's legitimacy and functioning. Possible examples might include invalidating the modern administrative state, Social Security, Medicare, or paper money on purportedly originalist grounds.

Or imagine that a conservative Court or a progressive Court simply stopped trying to do constitutional law. Imagine that the Court majority instead decided every case based upon its perception of what would benefit the political party that appointed its members. Further imagine that we knew this was going on because the Justices told us in their opinions. In such a situation, Court-packing would be justified to restore the Court's legitimacy and proper functioning. Moreover, to return to the prior discussion about the constitutionality of Court-packing, it seems problematic to suggest that Court-packing would be unconstitutional even in this situation and that the only constitutionally permissible recourse would be the impeachment process.[182] Given the partisan intent and consequences of the Court's decision-making, the two-thirds requirement to obtain a conviction in the Senate might be impossible to satisfy.[183] Such a scenario appears quite unrealistic, but realism is not the point of some hypotheticals. The very possibility of an unhinged, expressly partisan Court, however remote, means it is wrong to assert that Court-packing could never be justified.

Court-packing might also be justified in extreme circumstances to restore judicial legitimacy in response to the corrupt behavior of an individual Justice. If a Justice were to take bribes, or to hold political

182. U.S. CONST. art. II, § 4 (subjecting "all civil Officers," which includes federal judges, to removal via impeachment and conviction).

183. U.S. CONST. art. I, § 3, cl. 6.

strategy sessions with partisan political actors, or to repeatedly refuse to recuse themself in cases in which their impartiality could obviously be questioned due to a personal conflict of interest (and then to vote in ways that validated the skepticism), adding a seat or two to the Court might be a way to offset their voting power.[184] Impeachment and removal would be the preferred way to deal with such a Justice, particularly because adding a seat or two would not always succeed in diluting their voting power—it would depend upon whether and how the Court was divided in the cases in which their votes were corrupt. To reiterate, however, satisfying the two-thirds requirement to convict in the Senate might not be possible in hyperpolarized eras, and Court-packing might be the only option available.

Third, there might arise national crises to which the Court was contributing without devastating its own legitimacy in the eyes of a large majority of Americans, in which case it would be more important to respond effectively to the crisis by controlling seats on the Court than to mind the Court's legitimacy. Of course, the president and congressional majorities would need to want to respond to the crisis; if they caused or condoned the crisis, Court-packing would be politically impossible.[185] Perhaps the struggle to create a reconstructed Union that was less savagely racist in the wake of an epic civil war and the assassination of the president counted as such a crisis. As discussed earlier,[186] congressional Republicans reduced the size of the Court to prevent President Andrew Johnson from making appointments and then increased its size when he was no longer president. The Court had contributed to the crisis of the Civil War by delivering the remarkable

184. *See* 28 U.S.C. § 455 (describing the circumstances in which a federal "[J]ustice, judge, or magistrate judge" must disqualify themselves, including where their "impartiality might reasonably be questioned," where "[they] ha[ve] a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding," or where they, their spouse, or their minor child has an "interest that could be substantially affected by the outcome of the proceeding"). The point is obviously not that the Court should be packed if a Justice violates § 455. The point, rather, is that there may come a point at which a Justice has revealed themself to be so corrupt that adding a seat or two would be justified to protect the Court's legitimacy.

185. There may be a broader lesson here about the perils of relying upon Court-packing as a failsafe protection of U.S. constitutional democracy in a crisis, even during the rare circumstances in which packing would be justified. Indeed, Part V argues that a packed Court might well be defied by a populist president. *See infra* text following note 271.

186. *See supra* notes 142–143 and accompanying text.

conclusion in *Scott v. Sandford*[187] that Congress lacked the power to ban slavery in the territories.[188]

To offer another potential example, perhaps the Court should be packed while there is still time if it refuses to halt increasingly successful efforts by one political party to entrench itself in power by antidemocratic means.[189] And perhaps a Court that tried to enable a president to steal an election—to seriously damage U.S. democracy—should be packed. Some things matter more than the Court's legitimacy and efficacy. If the Court is contributing to a crisis, then packing it can be a way of cutting it off at its knees.

Two necessary conditions bind the foregoing examples together and might form standards or criteria for determining when Court-packing would be justified in response to a crisis. First, the examples involve high stakes for profoundly important constitutional or other human values. Second, and most critically, there is something about the examples that persuasively sets them apart from politics as usual—from mainstream partisan disagreements. Animating this second proposed criterion is the conviction that the damage to the Court's functioning, and so to the country, of packing the Court is more costly than the benefit of temporarily seizing control of it to try to better address issues of deep contemporary disagreement. Some people who believe, for example, that there is currently a crisis over voting rights

187. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend XIV. *Scott* arose when Dred and Harriet Scott sued for legal recognition of their freedom. *Dred Scott v. Sandford (1857)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/dred-scott-v-sandford [https://perma.cc/67W2-5BVB]. The Court denied the Scotts their freedom in part on the ground that enslaved persons and their descendants, even those legally free, were not citizens and so could not invoke the diversity jurisdiction of the federal courts. *Id.*

188. *Scott*, 60 U.S. (19 How.) at 432–42; *see, e.g.*, Ariela Gross, *Slavery, Anti-Slavery, and the Coming of the Civil War*, *in* II CAMBRIDGE HISTORY OF LAW IN AMERICA: THE LONG NINETEENTH CENTURY (1789-1920), at 280, 311 (Michael Grossberg & Christopher Tomlins eds., 2008) ("*Dred Scott* almost certainly contributed to the election of Abraham Lincoln in 1860 and the onset of the Civil War the following year.").

189. The Court refused to do anything about massive race-based disenfranchisements by authoritarian Democratic regimes in the American South for the better part of a century. *See, e.g.*, Giles v. Harris, 189 U.S. 475 (1903). The political branches did not deem the situation a national crisis to which the Court was contributing. On the contrary, the Court did nothing, in part because the political branches refused to intervene:

> Unless we are prepared to supervise the voting in that State by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States.

Id. at 488.

or abortion rights or that climate change poses an existential threat to humanity may weigh the costs and benefits differently. But these same people must grapple with the fact that, on the same theory, other people may conclude, for example, that invalidating the Affordable Care Act, excluding gay and transgender Americans from marriage or the workplace, or prohibiting abortion nationally justifies packing the Court.

B. A Framework for Analyzing Legislative Means

Circumstances may arise in which people reasonably disagree regarding what proportionality entails, when Court-packing would likely restore judicial legitimacy, and when a crisis exists to which the Court is contributing. They may disagree about whether some of the above hypotheticals fall within one of these three categories. And they may disagree about whether the requirements for invoking an exception to the bar on Court-packing have already been satisfied, a topic analyzed in the next Part. The promise of the framework offered here is not to end such disagreements but to channel them into constructive debates over whether a particular exception is implicated. It would ultimately be for Congress and the president to answer such questions for themselves.

A sensible way to proceed—one that would both improve the analytical framework and potentially reduce the level of disagreement regarding how to apply it—would be to use a less-legitimacy-reducing means analysis. In addition to asking whether a compelling interest justified Court-packing (that is, counter-packing, restoration of judicial legitimacy, or national crisis to which the Court was contributing), the political branches would ask themselves whether Court-packing was necessary to advance one of these interests, or whether a legislative alternative existed that would advance the compelling interest about as much while damaging judicial legitimacy less. For example, members of Congress might disagree about whether one political party was seeking to entrench itself in power by antidemocratic means—say, by passing a series of measures state-by-state that made it more difficult for voters of the other political party to vote. Members might further disagree about whether the situation amounted to a crisis that imperiled U.S. democracy. They might nonetheless be able to agree that Court-packing should be the last resort, not the first. The first resort would be for the other party, when it controlled the political branches, to pass strong voting rights protections preempting the state

measures.[190] If Congress and the president lacked the political will to enact such legislation (which would likely require terminating the legislative filibuster in the Senate), then they would also lack the will to pack the Court (which would also likely require terminating the filibuster).[191] If the political branches possessed the will to pass such legislation, then they should await the Court's response to it before passing legislation to pack the Court.[192]

C. The Costs of Delaying or Declining the Chance to Pack the Court

One objection to this approach is that it might be too late to pack the Court if the party in control of the political branches were to wait to learn whether the Court would invalidate the legislation. At this point, unified government might no longer exist, so Court-packing might not remain politically possible. Although there is some force to this argument, the difficulty with it is that it would not be politically feasible to pack the Court if the U.S. public broadly opposed it. And if the public broadly supported it, then a crisis point would likely have been reached, in which case the party seeking to pack the Court would probably be able to run effectively on a platform of Court-packing.[193] Put differently, if the situation truly is pack now or pack never, then Court-packing is likely not a politically viable idea to begin with.

No doubt, the democratic costs associated with limiting Court-packing to extreme situations—to asking whether a Court-packing plan meets the equivalent of strict scrutiny—can sometimes be high. In

190. *See, e.g.*, Freedom To Vote Act, S. 2747, 117th Cong. (2021); John R. Lewis Voting Rights Advancement Act of 2021, H.R. 4, 117th Cong.

191. Under Senate Rule 22.2, a motion to end debate "shall be decided . . . by three-fifths of the Senators duly chosen and sworn—except on a measure or motion to amend the Senate rules, in which case the necessary affirmative vote shall be two-thirds of the Senators duly present and voting." S. Doc. No. 116-1, at 21 (2020).

192. Congress could also pass legislation protecting abortion rights by using the Interstate Commerce Clause. *E.g.*, Women's Health Protection Act of 2021, S. 1975, 117th Cong.; Women's Health Protection Act of 2021, H.R. 3755, 117th Cong. Unlike the scope of congressional power under Section Five of the Fourteenth Amendment, the scope of Congress's authority under the Interstate Commerce Clause does not depend upon whether the Court recognizes a constitutional right to abortion. *See* City of Boerne v. Flores, 521 U.S. 507, 520 (1997) (articulating the "congruence and proportionality" test for Section Five legislation only); *cf., e.g.*, Partial-Birth Abortion Ban Act, 18 U.S.C. § 1531(a) ("Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both.").

193. The objection that antidemocratic measures may render it impossible to win future elections is discussed *infra* Part V.B.2.

Marbury v. Madison,[194] Chief Justice Marshall, like Alexander Hamilton before him,[195] suppressed the reality of often deep disagreements about the meaning of the Constitution.[196] When such disagreements exist, the Court may prevent democratic majorities, including congressional majorities, from governing for reasons that are constitutionally questionable. It may take a long time for such majorities to change either the Court's view through litigation or its composition through the regular appointments process. Alexander Bickel saw through Hamilton and Marshall in coining the phrase, "The Counter-Majoritarian Difficulty."[197]

These costs are real, and those who oppose Court-packing in all but extreme situations cannot responsibly wish them away. But there is more to be said about the Court's relationship to democratic values and about the significance of constitutional values other than democratic ones. The Court, like the Constitution itself, plays an important role in enabling democratic politics by structuring how those politics occur—for example, by enforcing constitutional rules regarding how a bill becomes a law or who gets to make which appointments. With rules like these in place, participants in democratic politics may more easily debate and temporarily decide matters of substance. Moreover, as already noted, the Court is charged with playing a prominent part in protecting the integrity of the democratic process from attempts by current majorities or powerful politicians to entrench themselves in power. The Court does so, for example, when it rejects bogus claims of election fraud and protects political speech and rights of association and voting.[198]And the Court protects the fundamental rights of outvoted minorities from being infringed through the democratic process, which few would argue is improper. In other words, insulating the institution of judicial review from Court-packing can be democracy enhancing, not just democracy reducing, and it can vindicate constitutional values as important as the

194. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

195. THE FEDERALIST NO. 78, *supra* note 83, at 467–68 (Alexander Hamilton) (arguing that judicial review does not "by any means suppose a superiority of the judicial to the legislative power," but "only supposes that the power of the people is superior to both").

196. *Marbury*, 5 U.S. (1 Cranch) at 175–78 (defending judicial review in a manner that begs the question of who decides the meaning of the Constitution amidst disagreements about its meaning).

197. BICKEL, *supra* note 36.

198. For the classic "participation-oriented, representation-reinforcing approach to judicial review" that rests upon this insight, see generally JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87 (1980).

democratic values with which they may trade off. Bickel's purpose was to shore up judicial review, not to degrade it.

D. Why Not Close the Door Completely?

A standard providing that Court-packing is off the table except in extraordinary circumstances leaves the door open for both political parties and their supporters to routinely claim that such circumstances exist. For example, it is relatively common now for supporters of Court-packing to insist that there is a crisis given, among other things, the Court's willingness to uphold voting restrictions passed by Republican-led state legislatures.[199] The Court's June 2022 decision in *Dobbs v. Jackson Women's Health Organization*,[200] which overruled *Roe v. Wade*[201] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[202] will almost certainly increase declarations that such a crisis exists; it may become an article of faith among many Democrats to pack the Court as soon as they have the votes.[203] Given the potential for constant invocations of a crisis situation, a better approach might be to defend a rule that Court-packing is always prohibited and to trust that in genuinely extreme circumstances, such as the ones this Article has posited, Court-packing will happen anyway—the emergency itself will be proof of the necessity.

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199. For examples of this insistence, see *supra* note 7 and accompanying text. For discussion of the probable efficacy of contemporary voting restrictions, see *infra* Part V.B.2.

200. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

201. Roe v. Wade, 410 U.S. 113 (1973), *overruled by Dobbs*, 142 S. Ct. 2228.

202. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), *overruled by Dobbs*, 142 S. Ct. 2228.

203. *See, e.g.*, Press Release, Cong. Progressive Caucus, Congressional Progressive Caucus Endorses Judiciary Act To Expand the Supreme Court (Jan. 5, 2022), https://progressives.house.gov/2022/1/congressional-progressive-caucus-endorses-judiciary-act-to-expand-the-supreme-court [https://perma.cc/WL9V-F7SA] (reporting that "Representative Pramila Jayapal (WA-07), chair of the Congressional Progressive Caucus, announced today that the membership of the CPC voted to endorse legislation to expand the United States Supreme Court by four seats," and quoting Representative Jayapal as saying that "[i]n recent years, this [C]ourt has gutted the Voting Rights Act and public sector unions, entrenched unconstitutional abortion bans, and failed to overturn the blatantly discriminatory Muslim Ban"); Elizabeth Warren, Opinion, *Expand the Supreme Court*, BOS. GLOBE (Dec. 16, 2021), https://www.bostonglobe.com/2021/12/15/opinion/expand-supreme-court [https://perma.cc/V5KG-CFVJ] ("This month, a majority of [J]ustices on the United States Supreme Court signaled their willingness to gut one of the court's most important decisions over the past century, threatening to eliminate Roe v. Wade and a person's right to choose.").

This objection may be correct as a strategic, prophylactic matter, but it is not correct in principle, nor does it try to be. When the question is the permissibility of Court-packing as a matter of constitutional policy, "almost never" is a more persuasive answer than "never." This Article has identified extreme situations in which the Court should likely or clearly be packed. It does not serve the interests of truth to suggest otherwise. For example, a Court that simply stopped trying to do law, or threw the country into financial chaos, or rendered a series of decisions that a large majority of the country rejected as extreme and illegitimate, would need to be dealt with by any lawful means available. Moreover, it is likely salutary for the Justices to know this, even though it compromises judicial independence to some extent.[204]

V. PRESENT CIRCUMSTANCES DO NOT JUSTIFY COURT-PACKING

This Part considers current proposals to expand the Court. To the extent that some of them are animated by good-government rationales, this Article does not object to them, although it does insist that these proposals will be subject to the criticisms offered here insofar as they become an exercise in partisan packing. In any event, most current proposals are unapologetically Court-packing plans, and this Part analyzes whether they are justified either as a proportionate response to norm violations by Senate Republicans or by the content and direction of the Court's decisions, especially in the area of voting rights and access to the democratic process. The Part argues that Senate Republicans likely did violate an important norm governing the Supreme Court confirmation process. It further argues that some of the Court's voting rights decisions raise concerns about the Court's role in supporting attempts by the Republican Party to entrench itself in power by antidemocratic means. But it concludes that Court-packing would not be a proportionate response to the Republican norm violation, nor would it be justified at present on grounds of legitimacy restoration or national crisis—although the Court's recent, radical decision in *Dobbs* offers a sobering reminder that the Court's own behavior may change the calculus at a certain point.

204. Feldman, *supra* note 26, at 10–11 (writing that "[t]he Justices can still interpret the Constitution by their own lights," but that "if their interpretations over time go so far away from mainstream constitutional opinion that they cause the court to lose legitimacy, the [J]ustices know that it could lead to substantial loss of independence in the form of court-packing, jurisdiction-stripping, and their consequences").

A. Good-Government Proposals

Some proponents of adding seats to the Court contend that an expanded Court would be able to decide more cases, spend more time on emergency applications, and reflect greater diversity along various dimensions of potentially relevant differences.[205] This Article does not object in principle to these rationales insofar as they are genuine, but it does caution that if a proposal based upon some or all of them were pursued, it would be important for Congress to be disciplined by the stated rationales so that they did not become an excuse for partisan packing. One way to do so would be to permit the political opposition to select half of the nominees. Another way would be to establish a schedule for expansion over the course of, say, eight to twelve years—and so behind a veil of ignorance as to which party would control the presidency or the Senate. Either approach would likely eliminate any temptation to turn good-government goals into a rationalization for seizing ideological control of the Court.[206]

As discussed earlier, one could question the conceptual coherence of the distinction between good-government reasons for expanding the size of the Court and Court-packing.[207] For example, if diversity is understood to mean ideological diversity, and if ideology is highly correlated with partisanship, then the distinction collapses. But diversity need not mean—or need not only mean—ideological diversity. For example, it could also mean professional background, personal experiences, race, ethnicity, religion, geography, socioeconomic status, sexual orientation, and gender identity. Moreover, like other defensible distinctions, this one should not be abandoned just because there are potentially difficult cases on the margins. Among many other unproblematic applications of the distinction, wanting a liberal majority on the Court and wanting the Court to decide more cases are clearly different objectives. It is also not obvious that adding more Justices would be necessary for the Court

205. BIDEN COMM'N REPORT, *supra* note 5, at 78–79.

206. As for the objection that only Democrats care about the good-government goals stated in the text, workload concerns are not partisan, and the Republican Party put the first woman on the Court (Justice Sandra Day O'Connor); replaced Justice Thurgood Marshall with a Black man (Justice Clarence Thomas); and replaced Justice Ruth Bader Ginsburg with a woman (Justice Amy Coney Barrett).

207. *See supra* notes 144–146 and accompanying text (analyzing the destabilization of the distinction in the Biden Commission Report).

to decide more cases—or that it would even be conducive to doing so.[208] In addition, and to reiterate, the distinction can be maintained functionally by asking whether those seeking to expand the Court are willing to let the other party choose half the nominees or to schedule the expansion over time.

B. Court-Packing Proposals

Most current proponents of Court expansion do not argue that there are good-government reasons for expanding the size of the Court at this time. Rather, they advocate Court-packing.[209] Based on the analysis set forth above, packing the Court can potentially be justified only if: (1) it would respond proportionately to previous unjustified Court-packing or another equally serious norm violation by the political opposition; (2) it would restore the Court's legitimacy given the Court's legitimacy-reducing decision-making; or (3) it would meet a crisis to which the Court was contributing. Moreover, even if one of these three compelling interests existed, Court-packing would be justified only if no less-legitimacy-reducing alternative were available. The remainder of this Part considers these criteria. The first Section focuses on Court-packing in response to the Republicans' violation of a constitutional norm, the second turns to whether Court-packing would restore the Court's legitimacy, and the third analyzes whether Court-packing would respond effectively to a national crisis partially of the Court's own making, especially with respect to voting rights and access to the democratic process.

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208. Congress could require the Court to decide more cases by contracting its discretionary certiorari jurisdiction and expanding its mandatory appellate jurisdiction. BIDEN COMM'N REPORT, *supra* note 5, at 78. (If Congress were to do so, it might be prudent to give each Justice additional law clerks and to expand the number of research librarians in the Supreme Court's library.) Moreover, the Court during the 1980s decided roughly twice as many cases as it decides today, even though the number of Justices has remained at nine during this period. *Id.* It is therefore not clear that the primary impediment (if there is one) to the Court's deciding more cases is the number of Justices. Finally, a greater number of Justices can make it more difficult to decide cases because a greater number of minds must agree to dispose of cases. *See, e.g.*, Duke Univ. Sch. of L., *Supreme Court Justice Ruth Bader Ginsburg Discusses the 2015–16 Term* at 44:30, YOUTUBE (Aug. 5, 2016), https://www.youtube.com/watch?v=_ebapaBtXH8 [https://perma.cc/DV2K-62WJ] (quoting Justice Ginsburg on why she opposed a Court with more than nine members).

209. *See, e.g.*, *supra* note 117 and accompanying text (quoting Professor Tushnet's observation that "[t]he difficulty for Democrats is that they can't really come up with decent good-government reasons for adding two justices to the Supreme Court").

1. *Court-Packing in Response to a Norm Violation*. A key rationale for current Court-packing proposals is that they are a proportionate response to norm-violating politicization of the confirmation process by Senate Republicans. These proposals are properly described as recommending Court-packing broadly conceived; they are intended, in significant part, to affect the Court's decision-making going forward.[210] But in contrast to advocacy of Court-packing based on the content of the Court's decisions to date or on a general desire to change the Court's decision-making going forward, the allegation that a political party has abused the confirmation process, insofar as it is accurate and genuine, distinguishes recent proposals from past instances of actual or attempted Court-packing and raises the possibility that Court-packing would now be justified.

This point bears repeating—the allegation of a violation of a constitutional norm, combined with a refusal to be bound by the stated reason for the norm violation, is essential to the case for Court-packing in this political moment. So the allegation warrants careful scrutiny, even at the cost of wading into recent partisan debates. It is unlikely that the Biden Commission would have been formed but for this allegation. During the contemporary era of U.S. constitutional politics, there was no serious talk of Court-packing after the confirmations of Chief Justice John Roberts, Justice Samuel Alito, Justice Sonia Sotomayor, and Justice Elena Kagan, notwithstanding very controversial decisions such as *Citizens United v. Federal Election Commission*,[211] *National Federation of Independent Businesses v. Sebelius*,[212] *Shelby County v. Holder*,[213] *King v. Burwell*,[214] *Obergefell v.*

210. *See supra* note 7 and accompanying text. Advocates of Court expansion who focus on the content of the Court's decisions are plainly advocating Court-packing. Advocates who focus on the behavior of Senate Republicans also tend to emphasize the content of the Court's decisions, but even if they did not, they would still be advocating Court-packing. Their advocacy would presumably subside if the Court started deciding major cases in ways they approve of. They want to add seats to the Court at least partly to change the Court's decision-making.

211. Citizens United v. FEC, 558 U.S. 310 (2010) (overruling precedent in holding that, because political spending is protected speech, the government may not prohibit corporations or unions from spending money to support or denounce candidates in elections).

212. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (upholding most of the Patient Protection and Affordable Care Act (ACA)).

213. Shelby Cnty. v. Holder, 570 U.S. 529 (2013) (invalidating the coverage formula in Section 4(b) of the Voting Rights Act).

214. King v. Burwell, 576 U.S. 473 (2015) (rejecting a statutory challenge to the ACA that, if successful, would have severely impaired the law's functioning).

Hodges,[215] *Janus v. American Federation of State, County, and Municipal Employees*,[216] and *Whole Woman's Health v. Hellerstedt*.[217]

Regarding the allegation of abuse of the confirmation process, the president and Congress would need to make a judgment about the recent behavior of Senate Republicans. If they agreed that Senate Republicans practiced the sort of judicial-legitimacy-undermining partisan politics that attempts at Court-packing generally involve, then adding seats would be on the table for discussion. Before this Author offers his own position on the issue, it is important to acknowledge the existence of robust disagreements—primarily along lines of ideology and party affiliation—over the allocation of responsibility for what has become of the Supreme Court confirmation process. It is also important to acknowledge the great difficulty of bridging the divide and persuading anyone who does not already agree with the view being expressed.[218] Even so, there is a difference between neutrality and objectivity, and it is neutral—not objective—to refuse to critically assess the conduct of Senate Republicans in recent years, or to simply insist that both parties are equally to blame as soon as criticisms are offered of one side.

The following position is informed by both this Author's academic work and—full disclosure—his service as special counsel to Democratic senators on the Judiciary Committee during the confirmation hearings of Chief Justice John Roberts and Justices Samuel Alito, Neil Gorsuch, Brett Kavanaugh, Amy Coney Barrett, and Ketanji Brown-Jackson. From this Author's standpoint, the conduct of Senate Republicans beginning after Justice Scalia's death and through their confirmation of Justice Barrett was a norm-violating,

215. Obergefell v. Hodges, 576 U.S. 644 (2015) (holding that the fundamental right to marry includes same-sex marriage).

216. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., 138 S. Ct. 2448 (2018) (overruling precedent in holding that a state's extraction of agency fees from nonconsenting public-sector employees violates the First Amendment).

217. Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016) (holding that provisions of Texas law requiring doctors who perform abortions to have admitting privileges at a nearby hospital and requiring abortion clinics to have facilities comparable to ambulatory surgical centers violates the abortion right), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

218. *See* Mark Tushnet, *The Pirate's Code: Constitutional Conventions in U.S. Constitutional Law*, 45 PEPP. L. REV. 481, 486 (2018) (arguing that "deep partisanship" drives allegations by one party that the other has violated a constitutional convention governing the Supreme Court confirmation process).

significant escalation of prior questionable behavior by both parties regarding judicial nominations, and the conduct of Senate Republicans likely damaged the Court's legitimacy and the appointments process.

As is well-known, Senate Republicans refused to consider any Democratic nominee with nearly a year to go in President Barack Obama's term on the stated ground that it was too close to the 2016 elections and Americans should have a say in who nominates the next Justice.[219] This conduct likely violated a constitutional norm requiring consideration of Supreme Court nominees regardless of the year of the presidency in which the vacancy occurs. The norm is reflected in the felt need of Senate Republicans to offer a justification other than partisanship or ideological opposition; in the outraged reaction of Senate Democrats to the norm violation;[220] in the extraordinarily uncommon nature of the Senate's refusal to hold, or even to schedule, a confirmation hearing for a Supreme Court nominee of a president of the other party based on partisan or ideological objections to the nominee;[221] and in the longstanding historical practice of considering—

219. Letter from Senate Judiciary Committee Republicans to Mitch McConnell, Senate Majority Leader (Feb. 23, 2016) (quoted in News Release, Senate Judiciary Republicans, Judiciary Committee Republicans to McConnell: No Hearings on Supreme Court Nomination (Feb. 23, 2016), https://www.grassley.senate.gov/news/news-releases/judiciary-committee-republicans-mcconnell-no-hearings-supreme-court-nomination [https://perma.cc/6NMG-XTEB]) ("As we mourn the tragic loss of Justice Antonin Scalia, and celebrate his life's work, the American people are presented with an exceedingly rare opportunity to decide, in a very real and concrete way, the direction the Court will take over the next generation. We believe The People should have this opportunity."); *see also* 162 CONG. REC. S5443 (daily ed. Sept. 8, 2016) (statement of Sen. Grassley) ("We have made the decision that the next President will select the next Justice of the Supreme Court.").

220. Whether norms endure depends not upon whether they are violated, but upon how other members of the relevant community respond when they are violated. If a community is following a practice without deviation, there is no opportunity to know whether, in what way, or to what extent it is understood to be obligatory. It is only when there are breaches that this articulation becomes important. *See, e.g.*, Curtis A. Bradley, *Customary International Law Adjudication as Common Law Adjudication*, *in* CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD 57 (Curtis A. Bradley ed., 2016). This is a general point about customary law and norms and their identification; it is also true of conventions, constitutional conventions, historical gloss, customary international law, and customary domestic law.

221. The Congressional Research Service ("CRS") reports that "Supreme Court nominations since 1949 have routinely received public confirmation hearings before either the Senate Judiciary Committee or a Judiciary subcommittee." BARRY J. MCMILLION, CONG. RSCH. SERV., R44236, SUPREME COURT APPOINTMENT PROCESS: CONSIDERATION BY THE SENATE JUDICIARY COMMITTEE 10 (2021). CRS further reports that "[o]verall, from the nomination of Tom Clark in 1949 through the nomination of Amy Coney Barrett in 2020, 36 of 40 Supreme Court nominations (90%) received hearings." *Id.* at 11. The four nominees who did not receive hearings were John Marshall Harlan II in 1954; John Roberts, Jr. in 2005 (because he was

although not necessarily confirming—Supreme Court nominees. Examining this practice beginning early in U.S. history, Professors Robin Bradley Kar and Jason Mazzone conclude that it is most consistent with a norm prohibiting the Senate from deliberately transferring one president's Supreme Court appointment power to a successor except when the president's status as the most recently elected president is in doubt.[222] Part of the modern practice has included Democratic Senates confirming Republican nominees Anthony Kennedy and Clarence Thomas.[223]

The norm is also implied in the constitutional text and structure. The Appointments Clause provides that the president nominates, and the Senate decides whether to approve. The structure assumes that this process will actually function; otherwise, nothing would stop the Senate from going years without voting on a nominee. Moreover, political accountability, which the Seventeenth Amendment seeks to secure, works well only when Americans know what position each Senator is taking on a nominee.[224] This consideration presumably helps explain why Senate Republicans refused to consider then-Chief Judge Merrick Garland at all instead of considering him and then trying to vote him down on the floor. Senators are individuals, and not voting on Garland's nomination presumably gave some of these individuals political cover. It is doubtful that Senate Republicans, whose ranks at the time included the moderates Susan Collins, Mark Kirk, and Lisa Murkowski, would have been unanimous had a floor vote been taken.

Rather than explain why they were changing the pre-existing norm instead of violating it, and rather than offer a weighty reason to justify their behavior, Republicans invoked a democratic "principle" that

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renominated to be Chief Justice and confirmed in 2005); Harriet Miers in 2005 (because she withdrew under pressure from her own party); and Merrick Garland in 2016. *Id.* With respect to the scheduling of hearings, Garland's nomination "is the second nomination to the Court since 1949 for which no hearings were scheduled," and "[t]he Garland nomination is . . . distinct from the nomination of Mr. Harlan in 1954 in that Mr. Harlan's nomination was resubmitted in 1955, hearings were held on that nomination, and Mr. Harlan was subsequently confirmed by the Senate" by a vote of 77–11. *Id.* Since nominees began routinely receiving hearings in 1949, the treatment of Garland stands alone.

222. *See* Robin Bradley Kar & Jason Mazzone*, The Garland Affair: What History and the Constitution Really Say About President Obama's Powers To Appoint a Replacement for Justice Scalia,* 91 N.Y.U. L. REV. ONLINE 53, 72 (2016).

223. Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, 2010 SUP. CT. REV. 381, 407.

224. U.S. CONST. amend. XVII (providing for direct election of U.S. Senators).

cannot be reconciled with the decision of Americans to elect the prior president to serve a constitutionally mandated four-year term. "Because our decision is based on constitutional principle and born of a necessity to protect the will of the American people," Republicans on the Judiciary Committee explained in a letter, "this Committee will not hold hearings on any Supreme Court nominee until after our next President is sworn in on January 20, 2017."[225] If there were any doubt that not even Senate Republicans believed in their own stated principle, such doubt was dispelled when they refused to be bound by it. In 2020, they confirmed a Supreme Court nominee with only days to go before the next elections.[226] The only consideration reconciling such conduct appears to be a level of partisanship that may be unprecedented in modern U.S. confirmation politics. The notion that holding a Senate majority is a license to consider Supreme Court nominees of same-party presidents while refusing to consider nominees of opposite-party presidents produces the result that no nominees will be considered unless the same party controls the White House and the Senate. This may be the situation we are in now, and it threatens to undermine the Court's legitimacy as a legal institution.

A likely response is that Senate Democrats have behaved just as badly, or even "started it." One can plausibly criticize the treatment of Judge Robert Bork by Senate Democrats. Although the point was disputed by Democrats at the time,[227] the pre-existing norm had arguably been that Supreme Court nominees were to be confirmed if they were professionally competent, had a judicial temperament, and were of good moral character.[228] Judge Bork checked all of these boxes. Senate Democrats were not denying, however, that they were

225. Letter from Senate Judiciary Committee Republicans to Mitch McConnell, Senate Majority Leader, *supra* note 219.

226. *See, e.g.*, Carl Hulse, *How Mitch McConnell Delivered Justice Amy Coney Barrett's Rapid Confirmation*, N.Y. TIMES (Oct. 27, 2020), https://www.nytimes.com/2020/10/27/us/mcconnell-barrett-confirmation.html [https://perma.cc/Q8U7-JW2V].

227. *See, e.g.*, 133 CONG. REC. 20,908–15 (1987) (statement of Sen. Joseph Biden) (arguing "that, in case after case, [the Senate] has scrutinized Supreme Court nominees on the basis of their political and judicial philosophies" and "that, in case after case, it has rejected qualified nominees, because it perceived those views to clash with the interests of the country").

228. For a nuanced empirical analysis, see generally Lee Epstein, René Lindstäd, Jeffrey A. Segal & Chad Westerland, *The Changing Dynamics of Senate Voting on Supreme Court Nominees*, 68 J. POL. 296 (2006), confirming the conventional wisdom that the Bork hearings substantially increased the importance of ideology in the Senate's voting on Supreme Court nominees but also finding that the Senate's emphasis on ideology began in the 1950s.

considering Judge Bork's ideology. Instead, they were defending a different norm: the Senate can consider any factor, including ideology, that the president considered in choosing the nominee. They also insisted that President Reagan had considered Judge Bork's ideology.[229] Perhaps this is a bad norm, but in terms of politicization of the confirmation process, there is a major difference between voting down a nominee on the merits as ideologically extreme in the Senate's view (and then confirming a replacement that was still conservative but was perceived to be less extreme), and refusing to meet with or conduct hearings for any nominee of the other party, no matter how ideologically moderate. To insist that this is a distinction without a relevant difference—that the decision is between a Senate that imposes no ideological constraints on the choice of a president of the other party no matter how extreme the nominee is perceived to be, and a Senate that engages in open ideological warfare against *any* choice of a president of the other party no matter how moderate the nominee is perceived to be—is really to attack the very idea of the Court as a legal institution. It is to reject the idea of the Court as an institution that is appropriately influenced, but not appropriately overwhelmed, by the ideological priorities of the two parties.

It would be inconsistent for the same commentator to justify or excuse the behavior of Senate Republicans as mere norm-free partisan politics as usual, notwithstanding the nature of their behavior and its impact on perceptions of the Court while, at the same time, condemning Court-packing as normatively out of bounds *because* of its nature and impact on perceptions of the Court. The behavior of Senate Republicans resides within the same normative realm as Court-packing absent extraordinary circumstances. In this realm, politics consists only of the indulgence of one's ideological appetites and the exercise of one's will—the antithesis of the conception of democratic politics described and practiced by the likes of Burke, Washington, Madison, and Jefferson.[230] It might therefore be a proportionate response for Senate Democrats to refuse to confirm any Republican Supreme Court nominee in the years ahead or to confirm a Democratic nominee in the

229. *See* 133 CONG. REC. 20,915 (1987) (statement of Sen. Joseph Biden) ("[W]e are once again confronted with a popular President's determined attempt to bend the Supreme Court to his political ends. No one should dispute his right to try. But no one should dispute the Senate's duty to respond.").

230. *See* Siegel, *After the Trump Era*, *supra* note 28, at 127–37 (examining the views of these politicians, some of whom were also theorists).

days before the next set of elections or even during the lame duck session after the elections.

It would not be a proportionate response, however, to add four seats to the Court. If Senate Republicans were entitled either to Justice Gorsuch or to Justice Barrett but not both, then adding two Justices nominated by a Democratic President would "neutralize" the presence of one of these two Justices on the Court. (Regardless of whether one believes the ethical allegations made against Justice Kavanaugh,[231] the Republican Party was going to fill Justice Kennedy's seat anyway, unless one makes the implausible assumption that the defeat of Kavanaugh's nomination would have caused the Democrats to win back the Senate.[232]) Proposals to add four seats, rather than two, appear motivated by a desire to create a Court with a Democratic-appointed majority, not by a desire to respond proportionately to a norm violation.

In addition, it is not clear that adding two seats total to the Court would be a proportionate response to Republican politicization of the confirmation process. Senate Republicans likely violated an important constitutional norm in declining even to consider a Democratic nominee and then added hypocrisy to their prior norm violation. But they did not violate a norm as significant as the one against Court-packing. As discussed above, only Court-packing creates the opportunity to appoint multiple Justices all at once, which helps explain why most ordinary Americans, legal experts, and elected officials view Court-packing as different in nature from, and more threatening to the system than, playing constitutional hardball with open seats on the Court.[233] Disturbing the stability of the Court's composition for the first time in 150 years would risk damaging the Court's standing in a significant way—not only the legitimacy of the Court that would presumably result, but also that of the progressive and conservative Courts of the future. The damage to the Court's

231. Kang, *supra* note 13 (arguing that, "[i]n the past five years, Republicans have used their political power to . . . [d]iscard multiple credible allegations of sexual assault and perjury against Brett Kavanaugh and confirm him without legitimate investigation").

232. There were fifty-one Republicans in the Senate before the 2018 mid-term elections and fifty-three after them. *See Party Division*, U.S. SENATE, https://www.senate.gov/history/partydiv.htm [https://perma.cc/G8UN-AKZA].

233. On public opinion, see *supra* note 117 and accompanying text. On the views of legal experts, see *supra* notes 87, 113, and accompanying text. On the views of elected officials, it suffices to note that Court-packing bills in Congress have not come remotely close to passing notwithstanding unified Democratic government from 2020 to 2022.

legitimacy—and therefore to its efficacy—would likely be greater than the damage that Senate Republicans have caused because packing the Court would likely unleash subsequent rounds of Court-packing whenever one party fully controlled the political branches.

The damage to the Court might be less if two seats were added than if four were added. With only two seats added, the Court would still have a conservative majority, so the packing could more readily (and genuinely) be framed as proportionate, tit-for-tat retaliation for a previous norm violation. Perhaps such messaging would avoid the public perception that the Court had been packed with partisans to achieve particular results, in which case the public might not view a Republican response in kind as justified, and an arms race might be somewhat less inevitable. Although theoretically possible, it seems more likely that Republican politicians would add two seats to the Court as soon as they presided over unified government. They reject any suggestion that they behaved improperly in the recent past,[234] as does the Republican base, and both would almost certainly cry foul in response to the Democrats' two-Justice packing plan.

The fact that divided government has been the norm does not meet the concern about erosion of the Court's legitimacy. Nor does certain political science scholarship suggesting that "[c]ourt expansion would probably not blow up the Supreme Court to unreasonable sizes."[235] Threats or promises to further pack the Court would likely become part of every national election cycle. A norm violation within the existing structure is not likely to affect perceptions of the Court as much as a norm violation that changes the structure itself, with all of the uncertainty and unpredictably that such a change may bring. There will always be future seats on the Court to fill, but the country would

234. *See, e.g.*, Allison Pecorin & Trish Turner, *Senate Republicans Move Barrett Supreme Court Nomination Toward Final Vote*, ABC NEWS (Oct. 22, 2020, 11:53 AM), https://abcn.ws/3dOsf0j [https://perma.cc/96W9-UJC2] ("Republicans have argued that GOP control of both the Senate and the White House makes Barrett's nomination proceedings different from Garland's, giving them an imperative to act quickly.").

235. Sen, *supra* note 47, at 9. Much depends on the definition of "reasonable." A Justice can have difficulty persuading four of their colleagues to join their majority opinion. During an interview in 2016, this Author asked Justice Ginsburg whether she would agree that nine is a good number. She responded that she "certainly wouldn't want any more" than nine Justices because "four people have to agree with me." Duke Univ. Sch. of L., *supra* note 208. In addition, the greater the number of Justices, the lower the likelihood that the Court will be unanimous or near-unanimous in deciding cases, and the greater the likelihood that the Court will produce fragmented decisions in which it may be difficult for the public to understand what the Court has decided.

likely never go back to nine Justices after the first round of Court-packing.

In addition, before the retaliatory packing took place, there might well be serious efforts to nullify Supreme Court decisions. A state government or a successor president might not feel obliged to comply with a 7–6 decision from a packed Court in which the seven Democratic appointees were on the winning side and the six Republican appointees were on the losing side. It does not require great imagination to worry that the next populist Republican president would defy such a decision. One instance of Court-packing, therefore, could expose the vulnerability of the institution of judicial review.

Even within the existing structure itself, Senate Republicans made the politics (potentially much) easier for themselves by not considering Garland, but they were not ultimately obliged to vote to confirm him, just as Senate Democrats voted down Judge Bork. And the Republicans would not have been able to fill Justice Scalia's seat themselves had they not then proceeded to win control of both the presidency and the Senate. In other words, unlike Court-packing, the failure of Senate Republicans to consider Garland did not clearly and by itself change the composition of the Court.

Contrary to what some proponents of Court-packing insist,[236] Senate Republicans did not first "unpack" the Court by holding Justice Scalia's seat open for the duration of the Obama presidency and then pack the Court by confirming Trump's chosen nominee (then-Judge Gorsuch) after Trump surprisingly won the 2016 election. It has always been understood that unpacking the Court and packing it are accomplished by passing statutes, which the Republicans did not enact. There are reasons for this understanding. If a political party controls the political branches and is willing to do away with the Senate filibuster as to legislation, a Court-unpacking statute can be passed without waiting for a vacancy on the Court to arise (although the statute cannot force a Justice to resign[237]), and a Court-packing statute can immediately add as many seats to the Court as the party wishes. Senate Republicans, by contrast, had to wait for a vacancy to arise, and

236. *See, e.g.*, Klarman, *Foreword*, *supra* note 7, at 247 ("The strongest argument for Democrats to expand the Court's size when they have the opportunity to do so is that they would simply be 'unpacking' the Court."); *id.* at 249 ("In essence, Senator McConnell managed to shrink the size of the Court to eight for one year, then increase it back to nine after Trump became President.").

237. *See* U.S. CONST. art. III, § 1. For the meaning of judicial service during "good Behavior," see *supra* notes 83–84 and accompanying text.

they were able to fill the vacancy only because they proceeded to maintain control of the Senate and to win the presidency. Even then, they could not add additional seats to the Court. Such enormous differences in the amount and immediacy of political power exercised by a party explain why it is far more difficult to pass statutes than it is to do what the Republicans did. For example, in this case, passing an unpacking statute would have been politically impossible while Obama was still president, and passing a packing statute after the election would have required Senate Republicans to terminate the legislative filibuster, which they did not want to do (and to retain their majority in the House, which they did do).[238]

Moreover, as noted, the formal difference between playing hardball with open seats on the Court and passing (un)packing statutes is also likely to affect public perceptions of the Court. If most Americans believed that the Republicans had already unpacked the Court and then packed it, even though they never passed a statute changing the Court's size, then most Democrats in the political branches would presumably not be so resistant to the idea of adding seats to the Court. Put differently, if Republicans had terminated the Senate filibuster and actually packed the Court, then President Biden would almost certainly not have appointed a commission to analyze debates over reform proposals; he would have instead led the charge for the Democrats to respond in kind.

A refusal by Republican Senators to allow any Supreme Court appointments by the Democrats for years (perhaps for the duration of a Hillary Clinton presidency) might have, at some point, been functionally somewhat similar to Court-unpacking. But pulling this off would have required the Republicans to continuously control the Senate for all of these years. Moreover, the actual packing (that is, the filling of the seat or seats) would have then required them to win the presidency—although even then they would have had no control over the number of seats they could have filled. By contrast, what the Republicans actually did—block a Democratic appointment in the last year of Obama's presidency and then confirm President Trump's appointee—required them to control the Senate for four years and to

238. Then-Senate Majority Leader Mitch McConnell firmly rejected then-President Trump's idea of eliminating the Senate filibuster as to legislation. *See* Aaron Blake, *Trump Asks for More Power. Here's Why the Senate GOP Will Resist.*, WASH. POST (May 30, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/05/02/3-reasons-the-gop-wont-nuke-the-filibuster-and-give-trump-more-power [https://perma.cc/3WBJ-EN96].

win the presidency for one term. It may make political sense rhetorically for proponents of Court-packing to characterize their proposals as merely offering a proportionate response to previous Republican unpacking and then packing of the Court, but that is not what they are. Court-packing requires a party to win the presidency for only one term and to control the Senate and the House for only two years. Then the party can add as many seats as it wills.

2. *Legitimacy Restoration*. There is little doubt that the Court's legitimacy has suffered greatly in the minds of legal progressives over the past several years. This conclusion is evidenced, among other things, by the many progressives discussed or cited in this Article advocating Court-packing and other major, structural reforms.[239] Beyond just progressives, it is also true that the Court's approval rating has been declining significantly, especially since the leak of the Court's draft majority opinion overruling all of its decisions protecting abortion rights.[240] It currently does not appear to be true, however, that the Court is deciding cases in ways that are legitimacy destroying in the minds of a large majority of Americans. No doubt, this assessment could change in the years ahead depending upon how much additional precedent of great significance the Court rejects in a number of highly

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239. For a comprehensive accounting of reform proposals, see generally BIDEN COMM'N REPORT, *supra* note 5.

240. A polling summary based upon several sources finds that Americans' confidence in the Court has recently dropped substantially:

> While public opinion on abortion has remained fairly steady, public opinion on the Supreme Court has not. According to Gallup data, Americans' confidence in the court has been trending mostly downward since peaking in 1988, but it nosedived in the past year. Last June, Americans' confidence in the court sat at 36 percent; however, in June 2022 — ahead of the Dobbs decision but after its draft opinion was leaked — it plummeted to 25 percent. This is the lowest confidence level since Gallup began the surveys almost 50 years ago, and it was driven primarily by a dramatic drop in confidence among Democrats and independents.

Zoha Qamar, *Americans' Views on Abortion Are Pretty Stagnant. Their Views on the Supreme Court Are Not.*, FIVETHIRTYEIGHT (July 1, 2022, 6:00 AM), https://53eig.ht/3nqCWLY [https://perma.cc/FX3J-WFF6]; *see also* Tim Malloy, 66% SAY HISTORY LESSONS FELL SHORT ON ROLE OF AFRICAN AMERICANS, QUINNIPIAC UNIVERSITY NATIONAL POLL FINDS; NEARLY 4 IN 10 HAVE FAMILY OR FRIENDS THEY CONSIDER RACIST, THE SUPREME COURT, QUINNIPIAC UNIV. POLL (Feb. 17, 2022), https://poll.qu.edu/poll-release?releaseid=3836 [https://perma.cc/6NXZ-EFWY] (finding, *inter alia*, that the Supreme Court has a 40 percent approval rating and a 47 percent disapproval rating, with 13 percent not responding); *see also* Jeffrey M. Jones, *Approval of U.S. Supreme Court Down to 40%, a New Low*, GALLUP (Sept. 23, 2021), https://news.gallup.com/poll/354908/approval-supreme-court-down-new-low.aspx [https://perma.cc/GSV9-UF6N] (finding that the Supreme Court has a 40 percent approval rating and a 53 percent disapproval rating).

salient areas of constitutional law, including but not limited to voting rights and access to the democratic process. At present, however, the soundest conclusion is that packing the Court would not be justified to restore the Court's legitimacy in the eyes of the nation as a whole. Court-packing remains unpopular.[241]

Nonetheless, the Supreme Court's June 2022 decision in *Dobbs v. Jackson Women's Health Organization* offers a sobering reminder that there may come a point when the Court will have sufficiently lost its public legitimacy that this Article's calculus regarding Court-packing must change. In *Dobbs*, the Court overruled all of its decisions that had protected a pregnant woman's right to abort a nonviable fetus for the past forty-nine years.[242] The Court issued this maximalist decision even though—as Chief Justice Roberts emphasized in his concurrence in the judgment—it was unnecessary to discard so much case law to decide the case in favor of Mississippi's fifteen-week ban.[243] There was no compelling reason to overturn a half-century of precedent protecting individual rights against majoritarian interference, especially because doing so was contrary to the views of a supermajority of Americans.[244] And there was compelling reason not to be so aggressive, given the enormous reliance interests at stake for the tens of millions of women and transgender men of childbearing age in the United States—reliance interests that the Court dismissed as not sufficiently akin to

241. *See* Giulia Carbonaro, *Expanding Supreme Court Opposed by Americans, Even After Roe Decision: Poll*, NEWSWEEK (June 28, 2022, 8:45 AM), https://www.newsweek.com/expanding-supreme-court-opposed-americans-roe-poll-1719806 [https://perma.cc/94F9-BJSW] (reporting the results of an NPR/PBS NewsHour/Marist Poll conducted on June 24–25, 2022, which found that despite the Court's unpopular ruling in *Dobbs*, respondents oppose expansion of the Supreme Court by a margin of 54 percent to 34 percent); Sen, *supra* note 117 (citing earlier data on the unpopularity of Court-packing).

242. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242–43 (2022).

243. *Id.* at 2316 (Roberts, C.J., concurring in the judgment) ("The Court's decision to overrule *Roe* and *Casey* is a serious jolt to the legal system—regardless of how you view those cases. A narrower decision rejecting the misguided viability line would be markedly less unsettling, and nothing more is needed to decide this case.").

244. *Majority of Public Disapproves of Supreme Court's Decision to Overturn* Roe v. Wade, PEW RSCH. CTR. (July 6, 2022), https://www.pewresearch.org/politics/2022/07/06/majority-of-public-disapproves-of-supreme-courts-decision-to-overturn-roe-v-wade [https://perma.cc/GN9R-QPDC] ("Public support for legal abortion remains largely unchanged since before the decision [to overrule *Roe*], with 62% saying it should be legal in all or most cases.").

the reliance interests present in contract and property disputes, which has never been the relevant metric.[245]

In addition, the Court's articulated rationale for overturning *Roe v. Wade*, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, and all their doctrinal progeny was so breathtakingly broad—abortion is not protected because it is not deeply rooted in American history and tradition[246]—that the Court repeatedly resorted to *ipse dixit*, not legal reasoning, to reassure the country that it did not really mean what it was saying in the context of any judicially protected liberty right other than abortion.[247] Also not deeply rooted in history and tradition are protection from involuntary sterilization; contraception; various forms of intimacy between consenting adults, including same-sex intimacy; and the right to marry someone of the same sex.[248] Only time will tell whether the Court issues more decisions like *Dobbs* and whether

245. *Compare Dobbs*, 142 S. Ct. at 2276 ("[T]his Court is ill-equipped to assess generalized assertions about the national psyche. *Casey*'s notion of reliance thus finds little support in our cases, which instead emphasize very concrete reliance interests, like those that develop in cases involving property and contract rights." (internal quotation marks and citations omitted)), *with id.* at 2346 (Breyer, Sotomayor & Kagan, JJ., dissenting) (internal quotation marks, citations, and footnote omitted):

> While many of this Court's cases addressing reliance have been in the commercial context, none holds that interests must be analogous to commercial ones to warrant *stare decisis* protection. This unprecedented assertion is, at bottom, a radical claim to power. By disclaiming any need to consider broad swaths of individuals' interests, the Court arrogates to itself the authority to overrule established legal principles without even acknowledging the costs of its decisions for the individuals who live under the law, costs that this Court's *stare decisis* doctrine instructs us to privilege when deciding whether to change course.

246. *Id.* at 2253 (majority opinion) ("The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions.").

247. *Id.* at 2277–78 ("Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion."). The problem with this reassurance is that whether a right is deeply rooted in history and tradition has nothing to do with whether a constitutional claim involves a fetus.

248. For a discussion of the sweeping nature of the so-called *Glucksberg* test, see Dahlia Lithwick & Neil S. Siegel, *The Lawlessness of the* Dobbs *Decision*, SLATE (June 27, 2022, 2:58 PM), https://slate.com/news-and-politics/2022/06/dobbs-decision-glucksberg-test-lawlessness.html [https://perma.cc/PE2U-RKLG]. The Court seems unlikely to overrule the holding in *Loving v. Virginia*, 388 U.S. 1 (1967), that bans on interracial marriage violate equal protection, although it is not clear what the originalist or traditionalist warrant is for this holding. *See Dobbs*, 142 S. Ct. at 2277–78. Given the invocation of the *Glucksberg* test in *Dobbs*, the Court now appears committed to the position that the fundamental right to marry protected under substantive due process does not include the right of a nonwhite person to marry a white person because bans on such marriages went as far back as the days of slavery. *See id.* at 2243. The Court's apparent rejection of the second, fundamental-rights holding in *Loving* is deeply sobering.

enough Americans become sufficiently upset that the political branches respond.

For at least three reasons, however, *Dobbs* itself does not ultimately change the current calculus regarding the advisability of Court-packing. First, most Americans and Democratic politicians in the White House and Congress do not appear nearly as outraged by the decision as they would have to be to support the radical response of Court-packing. The Court is substantially less popular than it was before the leak of the draft *Dobbs* majority opinion, but it does not appear to have yet provoked a legitimacy crisis outside progressive circles.[249]

Second, the issue of abortion is arguably unique in the extent to which it has divided the two political parties and impacted confirmation politics for decades. Rather than being an issue that stands apart from mainstream partisan disagreements, it is the quintessential mainstream partisan disagreement. If such disagreements justify Court-packing, then Court-packing is routinely justified and any legitimacy-enhancing effect of Court-packing would be limited to one side of the aisle and have the opposite effect on the other side. For these reasons, the Republican Party would not have been justified in packing the Court to overrule *Roe* and *Casey* at any time since 1973. It is therefore not clear why the Democratic Party would be justified in packing the Court now to overrule *Dobbs*.

Third, for Americans (like this Author[250]) who believe that access to abortion is a fundamental right protected under the Fifth Amendment and Section One of the Fourteenth Amendment, *Dobbs*

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249. *See, e.g.*, Carbonaro, *supra* note 241 (reporting that "[m]any progressive Democrats, including Representatives Alexandria Ocasio-Cortez, Pramila Jayapal, Mondaire Jones, Ayanna Pressley, and Ilhan Omar, Senators Ed Markey and Elizabeth Warren, and New York City Mayor Eric Adams have called for an expansion of the Supreme Court," but that "[o]n June 25, White House Press Secretary Karine Jean-Pierre told reporters that [President] Biden said he 'does not agree with' expanding the number of seats in the court").

250. *See generally* Neil S. Siegel, *The Pregnant Captain, the Notorious REG, and the Vision of RBG: The Story of* Struck v. Secretary of Defense, *in* REPRODUCTIVE RIGHTS AND JUSTICE STORIES (Melissa Murray, Katherine Shaw & Reva B. Siegel eds., 2019) (discussing the connections between pregnancy discrimination and sex discrimination and between sex discrimination and restrictions on access to contraception and abortion); Neil S. Siegel & Reva B. Siegel, *Equality Arguments for Abortion Rights*, 60 UCLA L. REV. DISCOURSE 160 (2013) (articulating and defending equal-protection arguments for abortion rights, which complement liberty arguments); Neil S. Siegel, *"Equal Citizenship Stature": Justice Ginsburg's Constitutional Vision*, 43 NEW ENG. L. REV. 799 (2009) (discussing reproductive rights as a necessity for social, economic, and political equality).

is a serious blow. It is a much greater blow to the economically vulnerable women and transgender men who will die or otherwise be physically or emotionally harmed as a result of the decision. But these tragic facts do not change the substantial risk that Court-packing would severely damage the institution of judicial review in the United States—an institution whose legitimacy made *Roe* and *Casey* possible in the first place, and an institution whose legitimacy will be required in the future to again protect abortion rights under the Fifth and Fourteenth Amendments. We are not at the end of history with respect to the judicial protection of abortion rights in America.

Although legitimacy restoration is ultimately a matter of what Americans living today believe about the Court, another way to try to get some traction on this question is to compare the current Court's decision-making with that of past Courts. As noted earlier,[251] the Court in 1937 was issuing decisions that were substantially more sweeping than anything the current Court has done to date, with the possible exception of *Dobbs*. Yet Court-packing was deemed inappropriate in 1937. Similarly, the Court's decision in *Bush v. Gore*[252] effectively decided a presidential election and caused many academic commentators to question the Court's legitimacy.[253] Yet there was no serious talk of packing the Court in response to the decision.

3. *National Crisis*. Some proponents of Court-packing do not cite just the recent behavior of Senate Republicans with respect to Supreme Court nominations as potentially distinguishing current Court-packing proposals from past ones. They also cite actions of the Republican Party that they claim undermine U.S. democracy, and they cite decisions of the Court that uphold or enable some of these actions.[254] These actions or decisions include the purging of professional Republican election officials from their oversight roles and their replacement by Trump loyalists who erroneously assert that the 2020 presidential election was stolen;[255] the voting regulations being

251. *See supra* note 102 and accompanying text (quoting Pildes, *supra* note 36, at 129–30).

252. Bush v. Gore, 531 U.S. 98 (2000).

253. *See generally, e.g.*, BUSH V. GORE: THE QUESTION OF LEGITIMACY (Bruce Ackerman ed., 2002) (collecting generally harsh scholarly reaction to *Bush v. Gore*).

254. For examples of such criticism, see *supra* note 7.

255. *See, e.g.*, Charles Homans, *In Bid for Control of Elections, Trump Loyalists Face Few Obstacles*, N.Y. TIMES (Dec. 11, 2021), https://www.nytimes.com/2021/12/11/us/politics/trust-in-elections-trump-democracy.html [https://perma.cc/C9FY-Q8XX] (noting that "[a]ccording to a

passed by state legislatures with Republican majorities that are condemned by voting rights activists as disfavoring Americans likely to vote Democratic;[256] and decisions by the Court that critics describe as antidemocratic—cases that fracture the Justices according to the party affiliation of the Presidents who appointed them.[257] These developments are occurring notwithstanding the absence of credible evidence of significant in-person voter fraud.[258] The greater the extent to which the Republican Party is likely to succeed in entrenching itself in power by antidemocratic means, and the greater the role of the Court in producing that result, the stronger the argument for packing the Court now, while there is still time. If we are truly witnessing the death of U.S. democracy, and if the Court is complicit in its demise, then Democrats will not be able to do what the Democratic Party did after 1937 and what the Republican Party did after President Reagan's

May Reuters/Ipsos poll, more than 60 percent of Republicans now believe the 2020 election was stolen"; "[t]his belief has informed a wave of mobilization at both grass-roots and elite levels in the party with an eye to future elections"; and "[i]n races for state and county-level offices with direct oversight of elections, Republican candidates coming out of the Stop the Steal movement are running competitive campaigns, in which they enjoy a first-mover advantage in electoral contests that few partisans from either party thought much about before last November").

256. *See, e.g.*, Nick Corasaniti, *Voting Rights and the Battle over Elections: What To Know*, N.Y. TIMES (Dec. 29, 2021) [hereinafter Corasaniti, *Voting Rights*], https://www.nytimes.com/article/voting-rights-tracker.html [https://perma.cc/9GCY-EDRW]; *see generally, e.g.*, CAROL ANDERSON, ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY 13 (2018) (arguing that recent Republican-enacted state and local voting laws "systematically blocked African Americans, Hispanics, and Asian Americans from the polls" in the 2016 election); Michael Wines, *The Student Vote Is Surging. So Are Efforts To Suppress It.*, N.Y. TIMES (Oct. 24, 2019), https://www.nytimes.com/2019/10/24/us/voting-college-suppression.html [https://perma.cc/V23U-K8Z4] (arguing that aspects of Republican-enacted voter laws aim to restrict the ability of college students to vote).

257. *See* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2342 (2021) (narrowly construing § 2 of the Voting Rights Act ("VRA") in upholding Arizona's exclusion of ballots cast at the wrong precinct and its ban on ballot harvesting); Rucho v. Common Cause, 139 S. Ct. 2484, 2508 (2019) (holding that challenges to partisan gerrymanders present nonjusticiable political questions); Shelby Cnty. v. Holder, 570 U.S. 529, 556–57 (2013) (invalidating the coverage formula in § 4(b) of the VRA, thereby rendering inoperative the preclearance requirement in § 5); Citizens United v. FEC, 558 U.S. 310, 370–71 (2010) (holding that because political spending is protected speech, government may not prohibit corporations or unions from spending money to support or denounce candidates in elections). Justice John Paul Stevens, a Republican appointed by President Gerald Ford in the 1970s, joined the Democratic appointees in *Citizens United* and had become reliably liberal by then.

258. *See generally, e.g.*, LORRAINE C. MINNITE, THE MYTH OF VOTER FRAUD 5 (2010) (arguing that fraudulent voting is quite rare and is instead a politically motivated myth designed to reduce voter turnout).

election in 1980—namely, continue to win elections and to nominate and confirm Justices of their own choosing.[259]

Democrats—and all Americans who believe in democracy—are right to worry about current Republican efforts to win elections through antidemocratic means. It is alarming that, as a result of a campaign of lying led by former President Donald Trump, only 21 percent of Republicans believe that President Biden's election was legitimate.[260] These concerns justify investing great energy in political mobilization and voting; in pressuring Congress to pass legislation that would address urgent voting rights problems (which, to reiterate, would be easier to accomplish politically than Court-packing),[261] including by overriding the Court's overly narrow interpretation (in this Author's view) of section 2 of the Voting Rights Act[262]; in condemning some of the Court's decisions; and in encouraging left-leaning Americans who have not thought much about judges to care about them. At the same time, Court-packing is a radical solution, and the burden is on those who would pack the Court to make the case that this radical solution is now justified.

The Court's failure to police partisan gerrymandering in *Rucho v. Common Cause*[263] does not justify Court-packing. The Court has never invalidated a redistricting plan as an unconstitutional partisan gerrymander, so the Court's critics want it to act affirmatively in ways that it has not done before, even though its past failure to act affirmatively in this way was never thought to justify Court-packing.

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259. For advocacy of Court-packing along these lines, see Gertner & Tribe, *supra* note 13.

260. Lane Cuthbert & Alexander Theodoridis, *Do Republicans Really Believe Trump Won the 2020 Election? Our Research Suggests They Do.*, WASH. POST (Jan. 7, 2022), https://www.washingtonpost.com/politics/2022/01/07/republicans-big-lie-trump [https://perma.cc/9RQY-J7XK].

261. *See, e.g.*, Freedom To Vote Act, S. 2747, 117th Cong. (2021); John R. Lewis Voting Rights Advancement Act of 2021, H.R. 4, 117th Cong.

262. Voting Rights Act of 1965 ch. 2, 79 Stat. 437 (codified as amended at 52 U.S.C. § 10301). The provisions at issue in *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021), may well have been lawful under § 2 of the VRA; the Biden administration concluded that they were. Brief for the United States as Amicus Curiae in Support of Petitioners at 14, Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021) (Nos. 19-1257, 19-1258), 2020 WL 7231896. Justice Alito's majority opinion is nonetheless concerning because it significantly watered down § 2's disparate-impact standard and wholly endorsed Republican concerns about voter fraud. For analysis, see Michael C. Dorf, *The Troubling Implications of the SCOTUS Arizona Voting Rights Case*, VERDICT (July 7, 2021), https://verdict.justia.com/2021/07/07/the-troubling-implications-of-the-scotus-arizona-voting-rights-case [https://perma.cc/B374-UT5W].

263. Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

As for *Citizens United v. Federal Election Commission*,[264] the Democrats fundraise just as effectively as the Republicans, and the Democrats appear to have benefited more from "dark money" recently than have the Republicans.[265] It is therefore not the case that *Citizens United* is responsible for the entrenchment of Republican rule.

The greatest risk to democracy at present is that lies about voter fraud or other asserted "legal irregularities" will enable the Republican presidential candidate in 2024 to lose the election but steal it through politicized state-election officials who manipulate vote counting, or through Republican-led state legislatures that reject the popular vote in their states and submit alternative slates of presidential electors to the Electoral College.[266] What seems most likely to prevent such attacks on U.S. democracy from succeeding is a broad-based coalition of people—including progressives, moderate liberals, independents, and democracy-defending Republicans—who are all prepared to put profound policy differences aside by voting for, and otherwise supporting, the Democratic presidential candidate should the alternative be former President Trump or another candidate who is antidemocratic.[267] As political scientist Daniel Ziblatt has observed, this approach worked in the past in some European democracies when parties that were not willing to play by democratic rules sought to gain power and undermine democracy.[268]

A key question then is whether Court-packing would make it more or less likely for such a coalition to form. One cannot know the

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264. Citizens United v. FEC, 558 U.S. 310 (2010).

265. Kenneth P. Vogel & Shane Goldmacher, *Democrats Decried Dark Money. Then They Won with It in 2020.*, N.Y. TIMES (Jan. 29, 2022), https://www.nytimes.com/2022/01/29/us/politics/democrats-dark-money-donors.html [https://perma.cc/C2FZ-GPG5].

266. *See, e.g.*, Richard L. Hasen, *No One Is Coming To Save Us from the 'Dagger at the Throat of America,'* N.Y. TIMES (Jan. 7, 2022), https://www.nytimes.com/2022/01/07/opinion/trump-democracy-voting-jan-6.html [https://perma.cc/T25H-2P59] (detailing this risk); David Leonhardt, *Republicans for Democracy*, N.Y. TIMES (Jan. 6, 2022), https://www.nytimes.com/2022/01/06/briefing/republicans-democracy-capitol-attack.html [https://perma.cc/Q4FA-G64L] (same); *see* William Baude, *The Real Enemies of Democracy*, 109 CALIF. L. REV. 2407, 2408 (2021) ("The real enemies [of democracy] are those who resist the peaceful transfer of power, those who subvert the hardwired law of succession in office.").

267. *See* Hasen, *supra* note 266 (arguing that "Democrats should not try to go it alone in preserving free and fair elections" (italics removed)); Leonhardt, *supra* note 266 (writing that "[t]he experience of other countries does offer some lessons about how to defeat antidemocratic movements," and "[t]he most successful approach involves building coalitions of people who disagree, often vehemently, on many issues but who all believe in democracy").

268. Leonhardt, *supra* note 266 (quoting Professor Ziblatt).

answer with certainty, but it would likely turn primarily on the reactions of democracy-defending Republicans to Court-packing, because they are the ones who are most likely to be alienated by it. There is a real risk that they would regard Court-packing as so extreme that they would be unwilling to enable such a coalition. This is especially so because democracy-attacking Republicans would likely argue that if the Democrats could take the radical step of packing the Court, then Republican-led legislatures could take the unusual step of rejecting the popular vote in their states and choosing their own slate of electors. "Neither move is *illegal*," they might well insist.[269]

Some advocates of Court-packing may respond that such a coalition would be impossible to form anyway, given how few Republican politicians are willing to publicly reject former President Trump's lies about the 2020 election. But that counsel of despair leads nowhere worth going. As Professor Richard Hasen reminds us, "it took Republican election officials, elected officials, and judges to stand up against an attempted coup in 2020."[270] "A coalition with the minority of Republicans willing to stand up for the rule of law is the best way to try to erect barriers to a stolen election in 2024," he continues, "even if those Republicans do not stand with Democrats on voting rights or other issues."[271]

It is also questionable to say that the Democrats need to pack the Court now so that the Court can protect against possible fraud or other antidemocratic maneuvers in the next presidential election. It seems perilous to rely on a 7–6 packed, liberal Court on the back end of an election to save U.S. democracy. Such a Court may not be in a position to solve the problem, and such a Court may be defied even if it is. It might well be riskier for a Trumpian to defy the current 6–3 conservative Court.

Beyond this nightmare scenario, it is speculative to believe that the Republicans will render the Democrats uncompetitive in elections. From an individual perspective, the denial of the practical ability of any eligible American to vote is deeply troubling. But from a systemic perspective, the situation appears far less troubling. Democratic candidates fundraise and run on the issue of voting rights and voter

269. *See* U.S. CONST. art. II, § 1, cl. 2 (providing that "[e]ach State shall appoint, *in such Manner as the Legislature thereof may direct*, a Number of Electors" (emphasis added)).

270. Hasen, *supra* note 266.

271. *Id.*

suppression.[272] Some of the more extreme measures to date are in states (like Arkansas) that are not competitive.[273] Some of the most competitive states (like Michigan) have become more democratic through the use of independent redistricting commissions.[274] Some red and blue states (like Kentucky and New Jersey) have also become more democratic by adding more days of early voting and offering the opportunity to register online.[275] Some Republican measures may backfire because many Republicans in rural areas have traditionally preferred to vote by mail, and they may end up more burdened by restrictions on voting by mail than Democratic voters in cities and suburbs.[276] In states that are the main focus of controversy, voting remains accessible; for example, Georgia provides up to nineteen days of early voting and no-excuse absentee voting.[277] There is little or no evidence that a number of controversial Republican measures, including voter identification laws, have much effect, because they impact individuals who have a low propensity to vote anyway.[278] Although both Republicans and Democrats have long been convinced that higher turnout will hurt Republicans and help Democrats, "there

272. *See, e.g.*, DEMOCRATIC NAT'L COMM., 2020 DEMOCRATIC PARTY PLATFORM 6 (2020), https://democrats.org/where-we-stand/party-platform [https://perma.cc/N9J3-CQJJ] ("We must steel and strengthen our democracy, not distort and debase it. Democrats believe there is nothing to fear from the voices and votes of the American people. We will restore the full power of the Voting Rights Act and stamp out voter suppression in all its forms."). As one observer has recognized:

> The laws have met an impassioned response from voting rights groups, which are working to inform voters about the new restrictions while also hiring lawyers to challenge them.
>
> Democrats hope that their voters will be impassioned enough in response to the new restrictions that they turn out in large numbers to defeat Republicans in November.

Corasaniti, *Voting Rights*, *supra* note 256.

273. Corasaniti, *Voting Rights*, *supra* note 256.

274. Nick Corasaniti, *Ungerrymandered: Michigan's Maps, Independently Drawn, Set Up Fair Fight*, N.Y. TIMES (Dec. 29, 2021), https://www.nytimes.com/2021/12/29/us/politics/michigan-congressional-maps.html [https://perma.cc/H7XM-NX8G].

275. Corasaniti, *Voting Rights*, *supra* note 256.

276. *Id.*

277. GA. CODE ANN. § 21-2-385(d) (2021) (early voting); *id.* § 21-2-380(b) (no-excuse absentee voting).

278. For discussion of the impact of voter identification laws, see generally Emily Rong Zhang, *Questioning Questions in the Law of Democracy: What the Debate over Voter ID Laws' Effects Teaches About Asking the Right Questions*, 69 UCLA L. REV. (forthcoming 2022).

is no evidence that turnout is correlated with partisan vote choice."[279] Surveying studies published over the past decade, blogger and journalist Matthew Yglesias concludes that "[t]he key perversity of the voting rights debate is that it's based on a delusion shared by Democrats and Republicans that making it inconvenient to vote benefits Republicans."[280]

Political scientist Alan Abramowitz has examined data on voter turnout and vote margins in the 2020 presidential election. He finds that voter turnout and voting decisions "were driven by the strong preferences held by the large majority of voters between the major party candidates."[281] Moreover, this "is very likely to be the case again in the 2022 midterm elections and especially in the 2024 presidential election."[282] He therefore concludes that efforts by Republican-controlled state legislatures to suppress Democratic turnout "by imposing restrictions on absentee voting, early in-person voting, and use of drop boxes or by requiring that voters present photo identification in order to vote are unlikely to bear fruit."[283]

It is also speculative to think that the current Court will only ever abet the degradation of U.S. democracy. As noted, the Court performed well in 2020.[284] The Court also stood up to Trump and, by lopsided majorities, rejected some of his aggressive assertions of executive power.[285] Moreover, even a very conservative Court does not

279. Daron R. Shaw & John R. Petrocik, *Does High Voter Turnout Help One Party?*, 49 NAT'L AFFAIRS 3, 3 (2021), https://www.nationalaffairs.com/publications/detail/does-high-voter-turnout-help-one-party [https://perma.cc/YL6P-L6ZM].

280. Matthew Yglesias, *The False "Trap" of Bipartisanship*, SLOW BORING (Jan. 19, 2022), https://www.slowboring.com/p/electoral-count-act [https://perma.cc/45BD-YAK8].

281. Alan I. Abramowitz, *Why Voter Suppression Probably Won't Work*, SABATO'S CRYSTAL BALL (Feb. 3, 2022), https://centerforpolitics.org/crystalball/articles/why-voter-suppression-probably-wont-work [https://perma.cc/N4CF-N54K].

282. *Id.*

283. *Id.*

284. *See supra* note 68.

285. *See* Trump v. Vance, 140 S. Ct. 2412, 2431 (2020) (holding 7–2 that Article II and the Supremacy Clause do not categorically preclude, or require a heightened standard for, the issuance of a state criminal subpoena to a sitting president); Trump v. Mazars USA, 140 S. Ct. 2019, 2036 (2020) (holding 7–2 that although congressional subpoenas for the president's information may be enforceable, the court below did not take adequate account of the significant separation of powers concerns implicated by subpoenas from the House of Representatives seeking President Trump's financial records).

benefit from the erosion of democracy. Authoritarians usually come for the courts.[286]

Some historical perspective may also be helpful. U.S. election procedures have always been flawed. Political parties have sometimes sought to win elections partly through antidemocratic means. There have been past instances of democratic backsliding. The country has never lived up to its democratic ideals.[287] None of this has been thought to justify Court-packing.

Accordingly, Court-packing does not appear appropriate at this time. There is not currently a national crisis to which the Court is contributing that is on par with rebellion against the Union, entrenchment of a political party through antidemocratic means, or theft of a presidential election. These considerations help explain why Court-packing does not seem politically viable at present.

C. What about the Costs of Defeat and the Risk of Nonreciprocity?

The existence of significant methodological or ideological differences between the two political parties raises concerns about the costs of defeat incurred by the party that has appointed a minority of Justices until the Court's composition becomes more favorable. These differences between the parties also raise concerns about whether decisions not to pack the Court will generate reciprocity from the other party. This Section considers these objections.

One could insist that this Article has not grappled sufficiently with just how divided the two political parties are in the contemporary era of U.S. politics. On one view, they are divided over what the Constitution means and how to carry it into effect—that is, how to do law. According to this position, relative to decades past, there is substantially less overlap between the methodologies used by the Republican appointees (that is, originalism and textualism) and those used by the Democratic appointees (that is, evolutionary theories of constitutional interpretation and purposivism), and these differences

286. *See* Kosa & Šipulová, *supra* note 58 (noting that "court-packing has flourished all over the world" in authoritarian regimes).

287. For a history of periodic expansions and contractions of voting rights, see generally ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES (2000).

are substantially more entrenched.[288] Alternatively, if one believes that the methodological differences are more apparent than real,[289] or that interpretive methodologies are often significantly under-determinate,[290] then this objection can be reframed in terms of ideological attitudes. On this view, this Article does not sufficiently register how far apart the two parties are ideologically and thus how much they disagree about the attractiveness of the outcomes of particular Supreme Court decisions.[291] A third view is that the parties are divided both methodologically and ideologically.[292] One possible variant of this position might be that the methodological divide matters more to legal elites and that ideological disagreements matter more to activists and voters, even if ideological differences also matter to legal elites.

Whether the objection that this Article underappreciates current partisan divisions is cashed out in terms of methodology, ideology, or some combination of the two, it is potentially persuasive for at least two reasons. First, the greater the distance between the two parties, the

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288. On theories of constitutional interpretation, see FARBER & SIEGEL, *supra* note 146, at 60–76. On textualism, see generally ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012). On purposivism, see generally STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW (2010) and ROBERT A. KATZMANN, JUDGING STATUTES (2014).

289. For example, Justice Kagan has textualist commitments. *See, e.g.*, Yates v. United States, 574 U.S. 528, 553 (2015) (Kagan, J., dissenting) ("[C]onventional tools of statutory construction all lead to a more conventional result: A 'tangible object' is an object that's tangible."). Likewise, Chief Justice Roberts can be a purposivist, such as when he underscored the basic purpose of the Affordable Care Act in rejecting a major statutory challenge to the availability of federal subsidies for eligible Americans seeking to purchase health insurance in the many exchanges created by the federal government:

> Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter. Section 36B can fairly be read consistent with what we see as Congress's plan, and that is the reading we adopt.

King v. Burwell, 135 S. Ct. 2480, 2496 (2015).

290. *See, e.g.*, Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849, 869 (2013) (reviewing SCALIA & GARNER, *supra* note 288) ("In most cases, methodology is too indeterminate—and the differences between the competing theories too subtle—to drive outcomes.").

291. *See, e.g.*, *supra* note 30 and accompanying text (describing the attitudinalist model of judicial decision-making).

292. *See* Gary Lawson, *What Is "United" About the United States*, 101 B.U. L. REV. 1793, 1793, 1797–98 (2021) (asking whether deep disagreements on such basic questions as the nature and purpose of law and the meaning of the public good imply that "the very idea of the 'United States' as a political entity [is] a profound mistake that is not worth preserving").

higher the stakes with respect to which party "controls" the Court. Given increased partisan and affective polarization, increased ideological sorting of conservatives and liberals into the Republican and Democratic Parties (respectively), and heightened focus on appointing "reliable" Justices, each party may have good reason to fear that it will often lose big on the issues about which it cares most—unlike during most of the twentieth century, when the country did not have ideological parties.[293] Second, the greater the distance between the two parties, the lower the likelihood that a party will trust that if it declines to pack the Court when it has appointed a minority of Justices and has the opportunity, the other party will show similar restraint when the tables have turned. A common argument of current advocates of Court-packing is that there is no point in holding back because the Republicans will pack the Court as soon as they feel the need and have the authority.[294]

The "costs of defeat" counterargument has, however, already been addressed. In the current, hyper-polarized era of U.S. politics, this counterargument will always justify Court-packing, and once the first Court-packing statute is passed, the Court's legitimacy and efficacy will suffer greatly. The potential benefit to one side of temporarily seizing control of the Court is likely lower than the potential cost of not having a Court worth packing.

The same considerations are relevant in considering concerns about a lack of reciprocity. There is a risk that the Republicans will try

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293. *See generally* ERIC SCHICKLER, RACIAL REALIGNMENT: THE TRANSFORMATION OF AMERICAN LIBERALISM, 1932–1965 (2016) (documenting the gradual transformation over the course of the twentieth century from a two-party system in which each party had conservative and liberal wings to a two-party system in which the parties were divided ideologically over civil rights and economic policy). "Polarization" refers to the increasing adoption over time of more extreme policy positions and ideological orientations by groups. NOLAN MCCARTY, POLARIZATION: WHAT EVERYONE NEEDS TO KNOW 8–11 (2019). "Partisan polarization" exists when such views are increasingly adopted by members of the Republican and Democratic Parties. *Id.* at 10–11. If there is increasing policy or ideological polarization between liberals (who are characteristically Democrats) and conservatives (who are characteristically Republicans), then the phenomenon is polarization. But if liberal and conservative voters increasingly sort themselves into the parties without an increase in policy or ideological polarization, then the phenomenon is partisan sorting. *Id.* at 11–12, 15. Finally, "affective polarization" refers to the tendency of voters in one party to dislike voters in the other. *See id.* at 61–63.

294. *See, e.g.*, Klarman, *Court Expansion*, *supra* note 7, at 16 ("It cannot be a persuasive argument against Democrats' expanding the Court that Republicans will simply retaliate in kind one day. Republicans have amply demonstrated that they will break the norm against Court expansion when it suits them to do so, regardless of how Democrats behave.").

to pack the Court at some point. Moreover, if there is a good chance that the other party will destroy the Court, it might make sense to be the party to get there first. At the same time, it is very difficult to know how high this risk is. It is not clear why packing the Court—and thereby risking its continued legitimacy and efficacy—is in either party's self-interest when the victory might prove short-lived as nullification efforts began and the other party ran against an extraordinarily aggressive political act that is unpopular with most Americans. Fighting too hard to win the game may end up making the game no longer worth playing for both sides. This characteristic of the strategic interaction between the parties may help explain why unified Republican government during the Bush II and Trump presidencies did not produce serious talk of packing the Court, notwithstanding numerous decisions of the Rehnquist and Roberts Courts since 1990 that many (albeit not all) Republicans have condemned,[295] including in the areas of abortion,[296]

295. Because political parties are not monoliths, the list in the text oversimplifies matters. Many Republicans may approve of, or be indifferent to, some decisions on this list, and only legal elites within the party may be aware of others. Nonetheless, it is sound to observe that the Republican Party, however reasonably defined, has also condemned numerous Supreme Court decisions over the past several decades. The list roughly illustrates this point. For the sake of completeness, it includes a few decisions rendered after the end of unified Republican government in 2019. This Article will not attempt to document Republican criticism of all of the decisions in these areas, but the ideological disagreements between the two parties with respect to most of the areas have long been well publicized. *See, e.g.*, REPUBLICAN NAT'L CONVENTION, REPUBLICAN PLATFORM 2016, at 9–12, 13–15, 40 (2016), https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL%5B1%5D-ben_1468872234.pdf [https://perma.cc/3R8P-V3SF] (condemning, *inter alia*, "unfair preferences, quotas, and set-asides as forms of discrimination," "the long line of activist decisions – including *Roe*, *Obergefell*, and the Obamacare cases," "[t]he Supreme Court's *Kelo* decision," and "the Supreme Court's erosion of the right of the people to enact capital punishment in their states," while championing, *inter alia*, religious liberty and "the appointment of judges who respect traditional family values and the sanctity of innocent human life"). This Article references the 2016 platform, not the 2020 platform, because the Republican Party in 2020 elected not to amend the 2016 platform. REPUBLICAN NAT'L COMM., RESOLUTION REGARDING THE REPUBLICAN PARTY PLATFORM (2020), https://prod-cdn-static.gop.com/docs/Resolution_Platform_2020.pdf [https://perma.cc/4Q3G-GDQ4].

296. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 833–34 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); Stenberg v. Carhart, 530 U.S. 914, 914 (2000), *abrogated by Dobbs*, 142 S. Ct. 2228; Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2292–93 (2016), *abrogated by Dobbs*, 142 S. Ct. 2228; June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2104 (2020), *abrogated by Dobbs*, 142 S. Ct. 2228.

gay rights and transgender rights,[297] the Free Exercise Clause,[298] the Establishment Clause,[299] capital punishment,[300] criminal sentences of life without the possibility of parole,[301] affirmative action,[302] the Takings Clause,[303] terrorism,[304] and the Affordable Care Act.[305]

Indeed, higher partisan stakes for appointments does not just increase the costs of defeat and heighten fears about a lack of reciprocity. It also increases the temptation to pack the Court if a party has appointed a minority of Justices and has the opportunity with unified government to add enough Justices to secure a majority. This is a good reason to expect an arms race once Court-packing is put on the table. In other words, some of the same reasons that are invoked to justify Court-packing in the current political environment suggest that packing the Court would not long succeed.

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297. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 620–21 (1996); Lawrence v. Texas, 539 U.S. 558, 558 (2003); United States v. Windsor, 570 U.S. 744, 745–47 (2013); Obergefell v. Hodges, 135 S. Ct. 2584, 2585 (2015); Bostock v. Clayton County, 140 S. Ct. 1731, 1731 (2020). As noted earlier, *Bostock v. Clayton County*, 140 S. Ct. 1731, is a tricky example because it inspired both opposition and support within the Republican Party. *See supra* notes 65–67 and accompanying text.

298. *See, e.g.*, Emp. Div. v. Smith, 494 U.S. 872, 872–73 (1990); City of Boerne v. Flores, 521 U.S. 507, 507–09 (1997); Locke v. Davey, 540 U.S. 712, 712–13 (2004). The hostile reaction to *Smith* was broad and bipartisan, leading to enactment of the Religious Freedom Restoration Act of 1993 ("RFRA"), 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4), whose proper interpretation today is deeply disputed. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2780–83 (2014) (holding 5–4 that federal regulations requiring employers to provide their female employees with no-cost access to contraception violated RFRA in an as-applied challenge by closely held corporations).

299. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 577 (1992); Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 687 (1994); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 290 (2000); McCreary County v. ACLU of Ky., 545 U.S. 844, 845–47 (2005).

300. *See e.g.*, Atkins v. Virginia, 536 U.S. 304, 304 (2002); Roper v. Simmons, 543 U.S. 551, 551 (2005); Kennedy v. Louisiana, 554 U.S. 407, 407 (2008).

301. *See, e.g.*, Miller v. Alabama, 567 U.S. 460, 460 (2012); Montgomery v. Louisiana, 136 S. Ct. 718, 719 (2016).

302. *See e.g.*, Grutter v. Bollinger, 539 U.S. 306, 307 (2003); Fisher v. Univ. of Tex. at Austin (*Fisher II*), 136 S. Ct. 2198, 2198–99 (2016).

303. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 469 (2005); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency 535 U.S. 302, 302 (2002); Murr v. Wisconsin, 137 S. Ct. 1933, 1933 (2017).

304. *See e.g.*, Rasul v. Bush, 542 U.S. 466, 466–67 (2004); Hamdi v. Rumsfeld, 542 U.S. 507, 507–508 (2004); Hamdan v. Rumsfeld, 548 U.S. 557, 557–58 (2006); Boumediene v. Bush, 553 U.S. 723, 723 (2008).

305. *See e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 521–22 (2012); King v. Burwell, 135 S. Ct. 2480, 2480 (2015); California v. Texas, 141 S. Ct. 2104, 2105 (2021).

CONCLUSION

Those who advocate Court-packing are upset about how the current Court came to be. They have reason to be upset. They are also worried about what the current Court has done and will do. In this Author's view, a number of these concerns are warranted, including with respect to voting rights, access to the democratic process, and reproductive rights and justice.

The Court's general performance is intensely controversial, however, and it will remain so, given how polarized the country is. And to repeat, if Democrats in the White House and Congress conclude that such concerns justify Court-packing now, then efforts to nullify Supreme Court decisions may follow, and Republicans in the political branches will surely conclude that other concerns justify Court-packing when they have the power to act. Repeated Court-packing, or repeated threats of it, would make it increasingly difficult for the Court to perform functions that no other governmental institution is likely to perform better. Until the Court exacerbates a national crisis or alienates a large majority of Americans through extreme decisions across different areas of jurisprudence that tear at the fabric of modern constitutional law, the soundest course is to shore up what remains of the convention against Court-packing, not to dismantle it.[306] The soundest course is to try to maintain three independent branches of government, not to effectively reduce them to two. Americans who vigorously oppose the direction in which the Republican Party and the current Court appear to be headed have less radical means at their disposal to work toward realization of their own understanding of what it means to respect the Constitution and those who live under it.

306. *See* Charles Fried, Opinion, *I Was Reagan's Solicitor General. Here's What Biden Should Do with the Court.*, N.Y. TIMES (Oct. 19, 2020), https://www.nytimes.com/2020/10/19/opinion/biden-supreme-court.html [https://perma.cc/UBC4-RCD4] ("Let's see whether the current Supreme Court majority overplays its hand. If it does, then Mr. Biden's nuclear option [of enlarging the Court] might not only be necessary but it will be seen to be necessary.").