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Introduction

"Court expansion" can be defined as increasing by statute the number of seats on Supreme Court of the United States for any of several possible reasons. If those reasons sound genuinely in good governance—for example, judicial efficiency and workload (or, until 1869, maintenance of the link between the size of the Court and the structure of the circuit court system)[1]—then in principle Court expansion is unproblematic as far as constitutional law, conventions, or politics is concerned. If and when there were good governance reasons for altering the size of the Court, one would hope that there would be bipartisan support for making such a change. Current proposals to increase the size of the Court do not appear to be of this sort.

Court expansion can also be accomplished for purposes of "Court-packing." Court-packing can be defined narrowly as increasing by statute the number of seats on the Court due to specific disagreements with the Court's decisions. This is what Democratic President Franklin Delano Roosevelt (FDR) attempted in 1937. Alternatively, Court-packing can be defined more broadly as increasing the Court's size for the purpose of generally influencing the Court's decision making going forward. This, among other objectives, is what motivated certain changes to the Court's size until 1869.[2]

Court-packing, however defined, is not as free from constitutional difficulty as the conventional wisdom holds, but the better view remains that it is constitutionally permissible.

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[1] JOHN V. ORTH, HOW MANY JUDGES DOES IT TAKE TO MAKE A SUPREME COURT? 5 (2006). In 1801, there was a brief interruption of the close 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.

[2] Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEORGETOWN L.J. 255, 258, 269-72 (2017). 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.

Still, there has been a constitutional convention (also called a constitutional norm) against Court-packing for a long time now, which opponents of FDR's plan, including prominent Democrats, invoked (and thereby solidified) in opposing the plan. Whether such a convention continues to exist in light of recent Senate conduct is, however, uncertain.

Regardless, Court-packing remains 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 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 is likely to perform more effectively. Court-packing should therefore be reserved for extreme situations, in which adding seats would respond to a previous instance of Court-packing, restore the Court's legitimacy, or meet a national crisis more important than the Court's legitimacy. And even when an extreme situation exists, Court-packing should be the last resort, not the first.

Current proposals to add seats to the Court are not advisable on good-government grounds. They are instead Court-packing plans. The strongest argument in favor of Court-packing now is that it is justified by the stark politicization of the Supreme Court confirmation process by Senate Republicans that began with their refusal to consider the nomination of then-Chief Judge Garland and that culminated with their confirmation of Justice Barrett. The conduct of Senate Republicans was indeed problematic for many of the same reasons that Court-packing is almost always problematic, but it is not clear why their conduct would potentially justify adding four seats, as opposed to two. Moreover, it is not clear that adding 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 it would likely do to the Court's ability to perform its functions. Nor is the Court squandering its legitimacy. Nor is the country facing a crisis situation that might justify Court-packing. Even assuming for purposes of analysis that such a crisis exists, Congress has not first resorted to less-judicial-legitimacy-reducing means. That is, it has not legislated to advance its compelling interest and awaited the Court's response to the legislation.

The recent conduct of Senate Republicans might justify the refusal of Senate Democrats to consider any Republican Supreme Court nominees in the years ahead. It might justify a decision of Senate Democrats to confirm a Democratic nominee just before a set of elections or even in the lame-duck session after them. Republican "constitutional hardball" also helps to explain current public consideration of Court-packing, including through the work of this Commission.[3] But actually pulling the trigger and packing the Court would risk severe damage not just to the progressive Court that would presumably result, but to the progressive and conservative Courts of the future. It would also damage American politics by injecting threats or promises of Court-packing into each and every election cycle, and by unleashing subsequent rounds of Court-packing whenever the political opportunity arose.

[3] Constitutional hardball refers 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").

The framework of analysis developed in this statement will not appeal to those who approach issues like Court-packing from the vantage point of the substantive rightness of their own political party on controversial questions of law and policy, and on the urgent need they perceive for their side to prevail on these questions. This statement instead aspires to offer a less politically charged framework for determining whether and when Court-packing would be justified, a framework that both political parties could use, even if they would disagree over how it should apply in situations such as the past several years of confirmation politics. This framework is offered in the conviction that the basic stability of American constitutional democracy is of immense social value; that restraints on partisanship, including self-restraints, are essential to maintaining the stability of this regime; and that extraordinary actions that undermine core structural values and institutions of government threaten its stability.

I. Court-Packing Is Almost Always a Bad Idea.

The Supreme Court as an institution, and regardless of its membership at a particular time, is charged with performing vital functions in the U.S. constitutional system. It ensures the supremacy of federal law over the states, and it brings uniformity to the interpretation of federal law. It protects a significant level of state regulatory autonomy, and it polices certain aspects of the constitutional relationship between Congress and the Executive. 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. The Justices vindicate constitutional rights to liberty and equality, and they help to preserve democracy by maintaining the structure of democratic politics and protecting process rights such as speech, association, and voting. The Court's exercise of judicial review satisfies the demands of Americans for constitutional change far more frequently than the formal, Article V process permits. Constitutional adjudication is also one crucial way in which American society settles conflicts over fundamental values for the time being without resort 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.[4]

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 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).[5] Legislation can also manage value conflict non-violently. Nor does the Court perform each of the above functions 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 achieving most of the above goals. For instance, the Court is more likely to hold political institutions accountable for violations of the constitutional rights of vulnerable minorities than are the institutions

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

[5] JACK M. BALKIN, LIVING ORIGINALISM at 5–6, 33 (2011).

themselves, and the Court is 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. There are obvious, important counter-examples, including perhaps at present. But typically, critics of the Court focus on its failings without asking themselves whether the political branches or the states are generally likely to do better.

To perform the above functions, the Court requires legitimacy, which 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.[6] The Court requires both forms of legitimacy.[7] (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 oppose. Enforcement and compliance have not always existed in this country, and they may not always exist. They endure only insofar as Presidents, Congresses, state governments, and most Americans accept the authority of the Court—only insofar as they regard the Court as an institution that warrants sufficient respect that they should enforce or comply with decisions with which they may strongly disagree.[8] In making periodic determinations of respect-worthiness, these actors rely in part on the judgments of legal experts, who read, convey, and opine on the contents of the Court's decisions.

Members of the legal community are not inclined to defend the Court's decisions if they view them as political all the way down, let alone partisan. And powerful political actors abide the Court's decisions in significant part because they believe—or because most of the American people believe—that the Court does not just act as another powerful political actor. They believe that the Court is not political in just the way, and to the same extent, that Congress is. 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. (This account, to be clear, is compatible with the view that the Court is also a political actor and that the Court's public legitimacy is also a function of the public's basic agreement with the results of many of its decisions and its ability to sustain social solidarity through the practice of statesmanship.[9]) If the

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[6] *See, e.g.*, Richard H. Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1790-91 (2005) ("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.").

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

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

[9] *See* Friedman, *supra* note 7, at 1387 ("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

Justices fail to satisfy these broadly shared expectations of them, they will reduce and eventually lose the significant amount of diffuse support they retain,[10] even if there is less such support than there used to be.[11] And to satisfy expectations, the Justices cannot rely on fooling people. Legal experts are not easily foolable.

To maintain its broad legal and public legitimacy, the Court requires a very significant measure of independence from the political branches. The Justices will not actually decide cases according to their best understanding of the law if they fear the consequences for their institution or themselves if they deliver unwelcome decisions. And the less frequently the Justices distinguish themselves from politicians, the less reason others will have to accept their decisions as authoritative statements of the law. Fear-driven judging undermines legal legitimacy, and, as will be explained, severely undermining judicial independence could only rarely be justified in the name of restoring public legitimacy.

The final link in this chain of reasoning from constitutional functions, to legal and public legitimacy, to judicial independence is that Court-packing severely undermines judicial independence. As noted, Court-packing is not motivated by genuine good-government reasons, whether sounding in the creation of new circuits or increases in caseload. Rather, the primary point of packing the Court is to create the occasion to alter its substantive decision making all at once through the addition of Justices whom the President and Congress expect to cast votes that are more congenial than the votes being cast by the Court as currently constituted. (The significance of this formulation, which distinguishes Court-packing from ideological uses of the regular appointments process, is explained in the next section.). Court-packing is a strategy that is commonly used in other countries to undermine liberal democracy—see, for example, Venezuela, Hungary, and Turkey—precisely because it erodes barriers to the concentration of power in the hands of the ruling party. Anyone who worries that there are authoritarian tendencies present in contemporary American politics should give serious consideration to this risk of Court-packing.[12]

The foregoing claim is familiar: Court-packing wars with the ability of the Justices to maintain their independence from the very political forces they are supposed to police in the name of the Constitution. Less familiar, perhaps, is the concern that Court-packing risks

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decisions to be socially correct, the work of judges will be seen as illegitimate."); *see generally, e.g.*, Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959 (2008).

[10] *See* 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.").

[11] *See* Maya Sen, Written Testimony, Presidential Commission on the Supreme Court of the United States, at 2 (June 30, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Sen-Written-Testimony.pdf (noting "a steady increase in disapproval of the Court and skepticism about its potential rulings"). On the other hand, a June 2021 Harris Poll found that the Court's favorability rating was up to 57 percent and that its unfavorability rating was down to 26 percent. HARVARD CENTER FOR AMERICAN POLITICAL STUDIES / HARRIS POLL (June 15-17, 2021), at 15, https://drive.google.com/file/d/1OgPzcB75uxXiFmTjUUb-ITIr7BFdFFhw/view.

[12] Two recent books that emphasize the relationship between Court-packing and democratic backsliding are TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY (2019), and STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018).

undermining the *willingness* of the Justices to maintain their independence from these political forces. 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. 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 in everyone's best interests to try to preserve these differences. For example, it is difficult to see how we would be better off as a nation if a Court majority appointed by Presidents of one political party were willing to push back against Presidents of this party in important cases only as often as a Congress of the same party were. As just noted, there are examples, both historically and today, of severely politicized courts in other countries and they are not the envy of the world.

Especially during an era of partisan polarization and mutual distrust, 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. (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.) Critics of the Court may be quick to dismiss this aspiration as naïve, but their criticism of the Court for being partisan implies that it is both possible and desirable for the Justices not to be so. Given the nature and magnitude of the partisan impact on the Court that Court-packing would entail, the Justices on a packed Court—a Court that had been politicized in an extreme way—might be less willing to try to meet this challenge than they would be on a Court that had not been packed. This concern remains real even if one believes that certain Justices will not meet this challenge regardless of whether the Court is packed. Moreover, 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 of most of the Justices cannot become appreciably worse. There is important evidence to the contrary, including the recent conclusion of four Republican appointees that the plaintiffs lacked standing to bring a constitutional challenge to the Affordable Care Act.[13] Moreover, by most accounts, the federal courts—including the Justices—performed well during the controversies surrounding the 2020 presidential elections, regardless of the political affiliations of the judges.

II. Court-Packing Has Been Prohibited by a Constitutional Convention, But It Is Likely Constitutional.

The constitutional text and historical practice recognize the link between judicial efficacy and legitimacy, and between 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. The text also provides salary protection for federal judges and job security in the form of guaranteed service during "good Behavior." This language has been glossed by historical practice to mean life tenure absent impeachment and conviction, which cannot be used merely because of disagreement with a judge's decisions.[14] No Justice has ever

[13] California v. Texas, 141 S. Ct. 2104, 593 U.S. __ (2021).

[14] U.S. CONST. art. III, § 1. For a discussion of the role of historical practice in informing beliefs about the proper bases for removing federal judges, see Bradley & Siegel, *supra* note 2, at 319-20.

been impeached and convicted, and no federal judge has ever been impeached and convicted based upon substantive disagreements with their decisions. In addition, Congress has almost never limited the Court's appellate jurisdiction.[15] And although political considerations (among others) did inform occasional changes in the size of the Court up until 1869, Congress has not since changed the size of the Court, notwithstanding vehement disagreements with many of its decisions. One hundred fifty years of customary political branch practice ought not to be casually dismissed.

Having studied the historical practice regarding issues of judicial independence and power, a number of constitutional law scholars have concluded that there exists a constitutional convention (or constitutional norm) against Court-packing.[16] Constitutional conventions are not legal in status, but they impose obligations of compliance on government officials that can be as great as legal obligations—they guide and constrain how officials "exercise political discretion."[17] Constitutional conventions are not required by the letter of the U.S. Constitution, but they are appropriately denominated "constitutional" because they help to vindicate the spirit—or the purposes—of the Constitution.[18] Violating a constitutional convention without sufficient public-regarding justification is not *un*constitutional, but it "is *anti*constitutional."[19]

In identifying a constitutional 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 plan. Seven of the ten members of this committee were prominent Democrats. Like a number of the witnesses who appeared before them, the Committee tacked back and forth between the language of constitutional conventions and the language of constitutional law, arguing 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." The Committee expanded upon the "constitutional impropriety" of the bill by describing how the American 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

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[15] The exception that proves the rule is *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868). 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. 85 (8 Wall.) (1868).

[16] *See, e.g.*, Bradley & Siegel, *supra* note 2, 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, 74 (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); David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 34, 69 (2014).

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

[18] *Id*. at 1852.

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

> 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.

The Committee concluded that "[c]onstitutionally, the bill can have no sanction. It is in violation of the organic law."[20]

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.[21] This process concern seems difficult to dismiss as merely political. Also hard to disregard as ordinary politics is an elderly woman's complaint that "[i]f nine judges were enough for George Washington, they should be enough for President Roosevelt."[22] To correct her account of history is to miss the deeper point she was conveying.

As noted, since 1937 there has been a lot of displeasure with the Supreme Court for various decisions or lines of decisions. When such displeasure has been expressed in Congress or the Executive Branch, there has often been talk of Court-packing as well as jurisdiction-stripping and, occasionally, impeaching. In many of these instances, the negative precedent of 1937 has been cited in response.[23] This history suggests that Court-packing has not been a matter of ordinary substantive disagreements in American politics, and it has not been just a bad idea under almost every circumstance. Court-packing has also been at least anticonstitutional, a violation of a constitutional convention.

One objection to this analysis and conclusion is that it proves too much. During his long tenure in office, FDR was able to appoint eight Justices to the Court, all committed New Dealers, using the regular appointments process. It may reasonably be asked why this sort of ideological influence on the Court does not violate a conventional convention akin to the one invoked in 1937. This is a deeply interesting question, and there are at least three possible 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 judicial independence to a lesser extent than does Court-

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[20] S. COMM. ON THE JUDICIARY, REORGANIZATION OF THE FEDERAL JUDICIARY, S. REP. NO. 75-711, at 8-9, 23 (1937).

[21] 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 the Judiciary*, 75th Cong. 40, 719–20 (1937) (testimony of Dean of Columbia Law School Young B. Smith) (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); Senate Report, *supra* note 20, at 7, 10 (emphasizing that amendment is "the course defined by the framers of the Constitution" and "the rule laid down by the Constitution itself"); Adrian Vermeule, *Political Constraints on Supreme Court Reform*, 90 MINN. L. REV. 1154, 1070-71 (2006) (noting that FDR's Court-packing plan "was also opposed by some, such as Senator George Norris, who genuinely favored the substance of the proposal but who also genuinely thought that constitutional amendment was the proper path").

[22] *See* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 139 (1995).

[23] For examples, see Bradley & Siegel, *supra* note 2, at 295-312, and Grove, *supra* note 16, at 512-17.

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.[24] 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; she can do so only through a Court-packing plan. In sum, relative to Court-packing, the regular appointments process impacts judicial independence less significantly and better justifies the impact on democratic grounds.

These two explanations, which identify differences in fact between Court-packing and use of the regular appointments process, help to account for the third, ultimate difference between the two. Constitutional conventions that limit and structure political 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 non-lawyers alike—have long believed that Court-packing is different from, and more threatening to judicial independence than, even ideologically aggressive uses of the regular appointments process. As a socio-political 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 among many Americans who want the ideological orientation of the Court to change.[25]

To be sure, one cannot predict with certainty how Americans would respond if Court-packing were actually to occur. 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 impaired as a result, the political party responsible, and its enablers, would not be able to 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 exists a considerable risk that a very conservative Court will render some very conservative decisions, but few people believe that this by itself justifies Court-packing. There is not now a high risk that the Court will imperil its own legitimacy or cause a national crisis, but if this risk were to materialize, Court-packing would be on the table, as discussed below. One need not be a thorough-going Burkean to believe that uncertainty favors the status quo when one is deciding whether to change the structure of the head of an entire branch of government.

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[24] *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").

[25] *See, e.g.*, Sen, Written Testimony, *supra* note 11, at 7 (reporting that "simply expanding the size of the Supreme Court is unpopular among the public").

One could go farther than the above argument by suggesting that Court-packing is not only anticonstitutional, but also unconstitutional. Few commentators would take this claim seriously,[26] but the text of Article III, combined with 150 years of stability in the historical practice, could potentially support a structural inference that Court-packing violates the Constitution. Consider in this regard the emphasis of the Senate Judiciary Committee in 1937 on how the constitutional system is supposed to function—to work.[27] One could also view the historical practice as a "gloss" on the meaning of the word "proper" in the Necessary and Proper Clause, which is the source of Congress's authority to set the size of the Court.[28] On this view, Court-packing is improper and so beyond congressional power. The conventional wisdom notwithstanding, Court-packing is not entirely free from constitutional difficulty, which helps to explain why some past objections to Court-packing have used the language of both law and conventions.

Even so, the sounder conclusion is that Court-packing is constitutionally permissible. The Appointments Clause,[29] the Exceptions Clause,[30] and the clause subjecting "all civil Officers" to removal via impeachment and conviction[31] all indicate that the Constitution also requires judicial accountability, not just judicial independence. The same indication is evident in early historical practice and the fact that FDR's plan was defeated in part for political reasons, which were present alongside claims about constitutional law and conventions.[32] Court-packing is a highly potent method of ensuring judicial accountability—an instrument that contradicts nothing in the constitutional text. As discussed below, moreover, it is questionable as a structural and 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 last nineteenth century.

Whether there remains a constitutional convention against Court-packing is uncertain in light of the increasing politicization of the Supreme Court confirmation process. Conventions require bipartisan support. Given the conduct of Senate Republicans in recent years (discussed below), as well as threats by some Republican Senators to leave seats on the Court open for four years if the Democratic presidential candidate were to win the 2016 election, one cannot say with

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[26] *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 16, 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."). Dorf nonetheless insists that we "have very good reasons to think that Court packing is something that Congress and the President *just cannot do*." *Id*. at 74.

[27] *See* BALKIN, *supra* note 5, at 142 (observing that structural arguments and principles "explain how the Constitution works in practice and how it should work").

[28] U.S. CONST. art. I, § 8, cl. 18.

[29] U.S. CONST. art. II, § 2, cl. 2.

[30] U.S. CONST. art. III, § 2, cl. 2.

[31] U.S. CONST. art. II, § 4.

[32] *See* Bradley & Siegel, *supra* note 2, at 283.

confidence that a Republican President and Congress would feel bound by the previous convention against Court-packing if they were persistently unhappy with the Court's decisions.[33] It is also not clear whether Democrats currently in control of the political branches feel bound by a convention against Court-packing or instead care about its costs and benefits, whether institutional or political. It is not as if the Democrats' hands have been entirely clean on the subject of judicial appointments.

III. Court-Packing Is Justified in Extreme Situations.

"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. First, packing the Court would be a proportionate response to a previous decision of the other political party to pack the Court. Proportionality is a vitally important concept when the majority party in the Senate is considering how to respond after the other party has violated a constitutional norm in order to affect the Court's composition.[34] 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 violation of the underlying norm. Proportionality also enables a political party to deter and punish misconduct by the other party, as well as to safeguard its own democratic authority to affect the Court's composition through the regular appointments process, but proportionality does so while limiting the damage to the Court's legitimacy and efficacy.

Second, there might be extraordinary circumstances in which Court-packing would restore the Court's legitimacy. If the Justices were to issue decisions that the American people 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—Court-packing might well be legitimacy-improving. (These triggers are unavoidably vague but the general ideas they capture are indispensable.) Alternatively, if the Senate were able to confirm a nominee only through bribery of wavering Senators, Court-packing at a later date might be the only way to undo the possibly decades-long impact of the appointment—to "free the taint," so to speak.

Third, there might arise genuine national crises in which it was more important to respond effectively to the crisis by controlling seats on the Court than to mind the Court's legitimacy. Perhaps struggling to create a reconstructed Union that was less savagely racist in the wake of an epic civil war and the assassination of the President would count as such a crisis.

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[33] *See, e.g.*, LEVITSKY & ZIBLATT, *supra* note 12, at 166 ("In the run-up to the 2016 election, when 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.").

[34] Neil S. Siegel, *After the Trump Era: A Constitutional Role Morality for Presidents and Members of Congress*, 107 GEORGETOWN L.J. 109, 169 (2018).

Perhaps the Court should be packed in response to some of the hypotheticals offered above regardless of whether doing so would restore the Court's legitimacy. And perhaps a Court that enabled a President to steal an election—to seriously damage American democracy—should be packed. Some things matter more than the Court's legitimacy and efficacy.

What binds the foregoing examples together insofar as they are good examples—and what might form the basis of a standard or criterion for determining when Court-packing might potentially be justified by a crisis situation—is not only that they involve high stakes for profoundly important constitutional or other human values. In addition, and most critically, there is something about them that persuasively sets them apart from politics as usual—from mainstream partisan disagreements. Animating this proposed criterion is the conviction that the longer-term damage to the Court's legitimacy, and so to the country, of packing the Court is more costly than the benefit of temporarily seizing control of it to better address issues of deep contemporary disagreement. Some people who believe, for example, that climate change poses an existential threat to humanity may weigh the costs and benefits differently. But they have to grapple with the fact that, on the same theory, some other people may conclude, for example, that deterring and punishing abortion justifies packing the Court.

People can reasonably disagree regarding what proportionality entails, when Court-packing would likely restore judicial legitimacy, and when a crisis exists that is more important than sustaining such legitimacy. 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 section. The promise of the foregoing framework 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 framework of analysis 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, proportionality, restoration of judicial legitimacy, or national crisis), the political branches should ask themselves whether Court-packing was necessary to advance one of these interests. For example, members of Congress might disagree about whether one political party was seeking to entrench itself in power by anti-democratic 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 American 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. If Congress and the President lacked the political will to enact such legislation, then they would also lack the will to pack the Court. If the political branches possessed the will to pass such legislation, then they should await the Court's response to it before considering any proposals to pack the Court.

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. Like Alexander Hamilton in *Federalist 78* before him, Chief Justice Marshall in *Marbury v. Madison* suppressed the reality of often reasonable disagreement about the meaning of the Constitution.[35] When such disagreements exist, the Court may prevent democratic majorities, including congressional majorities, from governing as they wish for reasons that are constitutionally questionable. It may take a long time for such majorities to change either the Court's mind through litigation or its composition through the regular appointments process. Alexander Bickel saw through Hamilton and Marshall in coining the phrase "the countermajoritarian difficulty."[36]

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 to occur by structuring how it will 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 plays 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, by rejecting bogus claims of election fraud and by protecting political speech and rights of association and voting.[37] And the Court protects the fundamental rights of outvoted minorities from infringement through the democratic process, which few people would argue the Court should not do. 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 democratic values with which they may trade off. Bickel's purpose was to shore up judicial review, not to degrade it.

IV. Present Circumstances Do Not Justify Court-Packing.

There are no good-government reasons for expanding the size of the Court at this time. Rather, the strongest defense of current proposals to enlarge the Court 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. But the allegation that a political party has abused the confirmation process, insofar as it is accurate and genuine, distinguishes the 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 convention is essential to the case for Court-packing in this political moment and so warrants careful scrutiny, even at the cost of

[35] 5 U.S. (1 Cranch) 137 (1803).

[36] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (2d ed. 1986) (1962).

[37] The classic process theory of judicial review that is built on this insight is JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

wading into current partisan debates. It is unlikely that this Commission would have been formed but for this allegation. During the contemporary era of American constitutional politics, there was no serious talk of Court-packing after the confirmations of Chief Justice Roberts, Justice Alito, Justice Sotomayor, and Justice Kagan.

Based on the analysis set forth above, packing the Court can potentially be justified only if: (1) the allegation of abuse of the confirmation process is persuasive and packing the Court would respond proportionately to the abuse; (2) Court-packing would restore the Court's legitimacy; or (3) Court-packing would meet a crisis more important than the Court's legitimacy. Even if one of these three compelling interests existed, moreover, Court-packing would be justified only if no less-legitimacy-reducing alternative were available.

As for the allegation, the President and Congress would need to make a judgment regarding 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. My own view, which is informed by both my scholarly work and (full disclosure) my work for a Democratic Senator on the Judiciary Committee during the confirmation hearings of Justices Gorsuch, Kavanaugh, and Barrett, is that Senate Republicans damaged the Court's legitimacy and the appointments process.

As is well-known, Senate Republicans refused to consider a Democratic nominee with nearly a year to go in the President's term on the stated ground that it was too close to the 2016 elections and the American people should have a say in who nominates the next Justice.[38] This conduct violated a constitutional convention requiring good-faith consideration of Supreme Court nominees. The norm is reflected in the felt need of Senate Republicans to offer a justification other than partisanship, and in the longstanding historical practice from which Senate Republicans deviated.[39] 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 (among other provisions and principles) seeks to secure, works well only when Americans know what position each Senator is taking on a nominee. This consideration presumably helps to explain why Senate Republicans refused to

[38] Chuck Grassley, *Judiciary Committee Republicans to McConnell: No Hearings on Supreme Court Nomination*, News Release (Mar. 23, 2016), https://www.grassley.senate.gov/news/news-releases/judiciary-committee-republicans-mcconnell-no-hearings-supreme-court-nomination ("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).

[39] 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 (2016).

consider Garland at all instead of considering him and then trying to vote him down on the floor.[40]

Rather than offer a weighty reason to justify their behavior, Senate Republicans invoked a democratic "principle" that cannot be reconciled with the decision of the American people to elect the prior President to serve a 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."[41] If there was 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.[42] The only consideration reconciling such conduct is a level of partisanship that has not been seen in American confirmation politics since Reconstruction, the last time Congress changed the size of the Court for political reasons.[43]

It is difficult to justify or excuse the behavior of Senate Republicans as mere norm-free partisan politics as usual notwithstanding its nature and impact on perceptions of the Court while 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.[44] 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 days before the next set of elections or even during a 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 agrees with the ethical allegations made against Justice Kavanaugh, 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.) Proposals to add an additional two seats (for a total of four) appear motivated by a desire to create a Court

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[40] Senators are individuals, and not voting on Garland's nomination presumably gave some of these individuals political cover. It is doubtful that Senate Republicans would have been unanimous had a floor vote been taken.

[41] Grassley, *supra* note 38.

[42] *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.

[43] Neil S. Siegel, *The Harm in the GOP's Pseudo-Principled Supreme Court Stance*, THE HILL (Apr. 15, 2016), https://thehill.com/blogs/pundits-blog/the-judiciary/276462-the-harms-in-being-pseudo-principled-about-the-supreme-court.

[44] Siegel, *supra* note 34, at 127-37.

with a Democratic-appointed majority, not by a desire to respond proportionately to a norm violation.

In addition, it is far from clear that adding two seats total to the Court would be a proportionate response to Republican politicization of the confirmation process. Senate Republicans violated an important constitutional convention in declining to consider a Democratic nominee and then added hypocrisy to their prior norm violation. But they did not violate a convention as significant as the convention against Court-packing. As discussed above, only Court-packing creates the opportunity to appoint multiple Justices all at once, which helps to explain why most elected officials, legal experts, and ordinary Americans view Court-packing as different in nature from, and more threatening to the system than, playing constitutional hardball with open seats on the Court. 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 progressive Court that would presumably result, but also that of the progressive and conservative Courts of the future. The damage to the Court's legitimacy—and therefore efficacy—would likely be greater than the damage that Senate Republicans have caused, including because packing the Court would likely unleash subsequent rounds of Court-packing whenever one party fully controlled the political branches.

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 "Court expansion would probably not blow up the Supreme Court to unreasonable sizes."[45] Threats or promises to further pack the Court would likely become a 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 likely never go back to nine Justices after the first round of Court-packing.

Even within the existing structure itself, Senate Republicans made the politics 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 in committee and on the floor. 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.

Proportionality aside, Court-packing is not otherwise appropriate at this time. The Court is not currently deciding cases in a way that is legitimacy-reducing in the minds of Americans as a whole. Nor has there been criminality. Nor is there a national crisis on par with rebellion against the Union or theft of a presidential election. If, say, disagreements over climate change,

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[45] Sen, Written Testimony, *supra* note 11, at 9. Much depends upon what one means by "reasonable." A Justice can have great difficulty persuading even only four of her colleagues to join her majority opinion. Justice Ginsburg once remarked during a public interview (in response to my question asking whether she would agree that nine is a good number) that she "certainly wouldn't want any more" than nine Justices because "four people have to agree with me." Duke University School of Law, *Supreme Court Justice Ruth Bader Ginsburg Discusses the 2015-2016 Term*, YouTube (Aug. 5, 2016), https://www.youtube.com/watch?v=_ebapaBtXH8 (see timeline at 44:30).

border security, abortion, or firearms counted as a crisis justifying Court-packing, then a narrow set of exceptions would swallow the rule. Each political party would routinely be able to invoke a perceived crisis to justify further Court-packing, no matter what the longer-term costs to the Court's legitimacy. And in any event, before entertaining proposals to pack the Court, Congress should first legislate to address matters such as these. All of this helps to explain why Court-packing does not appear to be politically viable at present.

V. Two Other Reform Proposals Warrant Serious Consideration.

There are a variety of reform proposals that would alter the composition of the Court, and they cannot all be discussed here. As noted in passing above, proposals that would designate particular seats to each political party should be avoided. They would likely cause the public to view the Court—and might cause the Justices to view themselves—as more partisan than they currently do. Such proposals would also be questionable on democratic grounds if one party were to eventually become ascendant. Moreover, ingenious proposals that have a Rube Goldberg quality should not be recommended, especially if they are of dubious constitutionality. The American public would struggle to understand them; they could have serious negative consequences that no one can currently anticipate; and they would run a substantial risk of being invalidated by the Court when a justiciable case was brought.[46]

One proposal that would likely increase both the Court's legitimacy and its democratic accountability is term limits for the Justices. Relative to Justices who served early in American history, modern Supreme Court Justices possess substantially more power and generally serve for longer periods of time. It is difficult to explain why a single act of democratic authorization should give an individual great power for decades. It is harder to understand why a "median" Justice should possess even greater power for so long a time. Other modern constitutional democracies around the world do not think that such an approach is sensible, nor does any U.S. state but one (Rhode Island). Nor, in all likelihood, would the Framers of the U.S. Constitution have thought so had they been able to foresee what the institution of judicial review (and human life expectancy) would become.

Another democratic virtue of this proposal is that it would regularize and evenly distribute the occasions for political influence on the Court. This could be accomplished by setting the terms at eighteen years and permitting each President to make two appointments per term, as opposed to zero or as many as three. Such an arrangement would also enhance judicial legitimacy by dramatically reducing the significance of the health status of each Justice; by

[46] *See, e.g.*, Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148 (2019) (recommending what the authors describe as "radical" solutions to salvage the Court's legitimacy, including: (1) the "Supreme Court Lottery," according to which every federal appeals court judge would also serve as a Justice and nine of them would be chosen at random—with a maximum of five having been nominated by a President of a single political party—to serve on the Court for two weeks at a time and operate under a 6-3 supermajority voting rule to invalidate federal (and possibly state) laws; and (2) the "Balanced Bench," according to which five Republican-affiliated Justices and five Democratic-affiliated Justices would need to agree on and then select the remaining five Justices from among the federal appellate bench (or possibly district court judges) to serve on the Court for a one-year, nonrenewable term).

eliminating the ability of certain Justices to plan their retirements strategically (assuming each one intended to serve a full term); and by disincentivizing the appointment of younger, less experienced jurists to the Court.

There are risks associated with this proposal, especially doctrinal instability and potential (or perceived) judicial bias as Justices nearing the end of their terms looked to their next professional opportunities. But the Justices would understand the potential for greater instability and so might accord *stare decisis* greater weight in such a system. Moreover, the proposal could provide that service on the Court would come with a lifetime ban on post-service employment or consulting, whether in the private sector or the public sector, including the holding of elected or appointed office. Because retired Justices would continue to receive their full salaries, few (if any) people who are worthy of a Supreme Court appointment would turn it down for financial reasons. And any reasonable concerns in this regard could be met by having Congress raise the salaries of the Justices across the board.

Another possible concern is that, because Supreme Court nominations would be certain to occur every two years, the composition of the Court would become an issue in every presidential and senatorial campaign. This might lead the public to view the Court as more partisan than at present and so cause the Court's legitimacy to suffer.[47] The Court already is a major issue in such campaigns, however, a reality that helps to explain, among many other things, the formation of this Commission. In addition, the shorter terms of the Justices, and the knowledge that the next nomination was only two years away, would substantially lower the stakes of each confirmation hearing. These aspects might actually help to make the confirmation process less partisan, dysfunctional, and so corrosive of the Court's legitimacy and of relations between the parties.[48]

Unfortunately, term limits would almost certainly require a constitutional amendment. The "good Behavior" limitation on removal of a federal judge (discussed above) cannot persuasively be avoided by having term-limited Justices remain Justices essentially in name only. Imagine telling tenured law professors that they still have tenure but can no longer vote on faculty appointments, teach their usual classes, or receive research leaves just because they have held their positions for a certain period of time.[49] The need for an amendment may make the proposal impractical at this time. But with the right sort of sustained public advocacy, a constitutional amendment might become possible precisely because it would be both sensible and non-partisan, especially if the current Justices retained life tenure. In contrast to Court-packing, term limits enjoy broad cross-ideological support among legal scholars and the

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[47] *See id*. at 174 (flagging this concern).

[48] The reasoning in the text assumes that the terms would be eighteen years in length because this is the most common form of the basic proposal. But whether eighteen years is too long and, say, twelve years would be preferable is not a subject upon which I am sufficiently informed to opine. I also leave to others the specific mechanics of how the proposal would work, including how to combat the possibility that the Senate would refuse to confirm nominees. There has been much good thinking on this subject.

[49] William W. Van Alstyne, *The Constitutional Futility of Proposing Statutory Term Limits for Supreme Court Justices*, *in* REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 385, 388-91 (Roger C. Cramton & Paul D. Carrington eds., Carolina Acad. Press 2006).

American public.[50] If this Commission could give serious consideration to only one recommendation, it should be this one.

Finally, although outside the scope of this meeting, it would be advisable to consider expanding the federal courts of appeals to diversify their ranks to a greater extent than can be accomplished by filling vacancies. The public legitimacy of the federal courts is ultimately a function of public trust, which is the trust of the whole public.[51] Trust in a country that is as divided as our own, both historically and today, requires a judiciary that is diverse along several dimensions, including race, gender, and professional background. (Those who are skeptical of this suggestion should try to imagine federal courts with no white men on them who previously served as prosecutors or corporate lawyers.) Although the Supreme Court sits atop the federal judicial hierarchy and so receives the most attention, the courts of appeals are also highly consequential institutions. The overwhelming majority of litigated federal cases end in them, and disagreements between these courts and the Justices can be a way of informing the American public about how far and fast the Court is pushing the law in a particular direction.

This proposal has the additional virtue of being broadly consistent with historical practice. Over the course of American history, Congress has exercised greater political control over the lower federal courts than over the Supreme Court, including by changing their composition and restricting their jurisdiction.[52] If this proposal were pursued, however, it would be important for Congress to be disciplined by its diversity rationale. Using this rationale as an excuse for flooding the courts of appeals with Democratic-appointed judges would likely undermine the legitimacy of these courts and possibly violate a constitutional convention against "packing" the lower courts.[53] One way to prevent this proposal from becoming an exercise in partisan packing 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.

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[50] Sen, Written Testimony, *supra* note 11, at 3.

[51] *See, e.g.*, TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 204, 204–08 (2002) (underscoring the importance to effective legal regulation of "the public's trust in the motives of legal authorities"); Carla Hesse & Robert Post, *Introduction* to HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA 13, 20 (Carla Hesse & Robert Post eds., 1999) ("[T]he relationship between the governed and the governors necessary to sustain the rule of law . . . consists of specific practices that reflect trust and tacit social understandings.").

[52] *See* Bradley & Siegel, *supra* note 2, at 320.

[53] *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/ (concluding that a past 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").

Conclusion

Those who advocate Court-packing are worried about what the current Court has done and is going to do. Some of these concerns are warranted, especially with respect to voting rights, the vindication of which is essential to preventing a political party from trying to entrench itself in power by anti-democratic means. Great energy should continue to be invested in condemning some of the Court's decisions; encouraging Americans to care about judges and vote; and pressuring Congress to pass legislation that would address urgent problems, including by overriding the Court's misinterpretations of federal statutes. But the Court's general performance is controversial and 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 Republicans in the political branches will surely conclude that other concerns justify Court-packing as soon as they have the power to act. Repeated Court-packing, or repeated threats of it, would make it increasingly difficult for the Supreme Court to perform functions that no other governmental institution is likely to perform better. It is preferable to consider term limits for the Justices and diversification of the federal courts of appeals. These reform proposals would enhance both the legitimacy and the accountability of the federal court system as a whole.